Check the Vitals: Workforce Considerations for Physician Practice Groups in Addressing the Impact of COVID-19

Pay Reductions: Strategies and Implications

In light of the COVID-19 outbreak, some practices have instituted pay reductions.
Practices considering this option may want to encourage physicians to voluntarily agree to a pay reduction as a member of the leadership of the organization. It is important to obtain buy-in from physicians as they are one of the main revenue generators. Some practices have reduced time commitments or other requirements to account for reductions in pay. Keep in mind, however, that various states have laws that require a certain salary threshold for physicians in order to maintain their exempt status.

If implementing reductions in physicians’ pay, it is critical to remember that many physicians may have employment agreements. Practices may be able to amend physicians’ salaries subject to an employment agreement through an amendment to the agreement. Thus, it may be helpful for practices to review any applicable employment agreement to ensure how to properly reduce salaries. In addition, several states have wage theft laws, which require employers to provide, among other things, written notice of changes to employees’ salaries and other benefits. Thus, depending on the jurisdiction in which the practice is located, it may be helpful to address wage theft or similar laws in connection with any salary or benefits reduction.

Practices may also consider allowing physicians to moonlight to make up for any lost income. To the extent a practice is open to such an option, it may want to address the impact of such an arrangement on any applicable agreements with a physician and to consider issues such as insurance and credentialing. Moonlighting could also include serving as an expert witness, performing tests for drug companies, or other similar opportunities. Practices may want to consider being flexible in this respect and be open to additional opportunities presented by physicians.

On a related note, some practices have initiated “compensation stability programs.” Under this type of program, physicians are given a guaranteed percentage of his or her previous year’s salary. In return, physicians agree to participate in cross-training and redeployment in critical areas as necessary. A practice group that decides to implement a compensation stability program may want to clearly define any temporary role that the redeployed provider may assume. This can be accomplished through an addendum to a physician’s employment agreement or other agreement that is consistent with the parties’ employment relationship. Practices may find it useful to address the impact of such a program on any applicable agreements with a physician and to consider issues such as insurance and credentialing.

**Terminating the Relationship: Strategies and Implications**

The first step to take when considering whether to terminate a physician’s employment is to analyze any applicable employment agreement to determine if it includes a provision that eliminates or reduces an employer’s obligation to maintain the employment relationship. Unless an agreement provides an avenue to eliminate an ongoing employment relationship, failure to comply with the terms of any applicable agreement relating to termination of employment could result in a potential claim. In addition, physician employment agreements often contain notice provisions, which require employers to provide certain notices prior to termination.
In addition to an employment agreement, a physician may also be a party to other agreements such as a shareholder agreement, deferred compensation agreement, and other written arrangements. Practices may want to review any other agreements prior to terminating a relationship with a physician to ensure compliance with all agreements.

There also may be various contractual issues that could arise out of terminating a physician’s relationship with a practice. For example, a non-compete agreement may be triggered and may be impacted in the case of an involuntary termination of a physician’s employment. In addition, rights and remedies under a shareholder agreement and the payment of deferred compensation may become issues if a practice does decide to discharge a physician.

Finally, while discharging a physician may appear to “fix” a short-term financial problem, such a decision could have other unintended consequences. By way of example, the physician may have a particular niche expertise or skillset that would be lost. Patients may leave because they want to be seen only by the physician whose relationship with the practice ended. In addition, discharging a physician could result in other health professionals leaving if they are not happy with the practice’s business decision.

**Other Issues and Implications**

When considering all of the potential options, it is critical to remember overall compliance obligations under the Stark Law, the federal Anti-Kickback Statute, and other state and federal laws. In addition, when making workforce decisions, practices may want to take into consideration past and current treatment of other physicians to ensure consistency. Failure to do so may result in potential arguments of inconsistent treatment based on a protected class or status.

**Return to Work and Future Employment Agreement Drafting Considerations**

Many states are allowing (or are close to allowing) practices to once again perform elective surgeries and procedures. While office visits may increase, practices may want to remain nimble to adjust to all but certain additional safety, security, and procedural measures included in guidance that federal, state, and local governments and health authorities may issue. These measures may result in fewer surgeries and procedures in the near term, so practices may want to be in a position to adjust to changing needs and requirements.

After the COVID-19 crisis resolves, practices may want to consider how to best structure physician employment agreements going forward. A potential option is to include a natural reduction provision, which essentially provides that if a physician’s work volume goes down, so does the physician’s compensation. Practices may also want to include a “force majeure” provision, which excuses one or both parties’ performance obligations when circumstances arise that are beyond the parties’ control and make performance of an agreement impractical or impossible.
