

NC MEDICAL BOARD PROPOSES POSITION STATEMENT ON LICENSEE EMPLOYMENT WITH HOSPITALS, GROUP PRACTICES AND OTHER HEALTH SYSTEMS



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The North Carolina Medical Board recently proposed a Position Statement on physician employment with hospitals and other large groups. A Position Statement is not a law or regulation, but rather the Medical Board's interpretation of existing laws or regulations that govern the practice of physicians, physician assistants, and nurse practitioners. Position Statements give practitioners a road map for compliant and ethical practice. One would disregard a Position Statement at his or her peril.

What's the Problem?

While the Board is clear to state that the existence of a Position Statement should not be taken as an indication of the Board's enforcement policies, it only stands to reason that the Board would have, or anticipates having, some concerns about the "shift from licensees practicing in personally owned practices toward licensees practicing while subject to employment and other contractual relationships with hospitals, group practices and other health systems." (Proposed Position Statement 9.1.3., *Licensee Employment*, p.1).

Know The Structure

The Board expects licensees to know the organizational structure of the employer. I don't think this means a physician must memorize the org chart of a multi-billion dollar system. I believe this advice is more elementary. Physicians are sometimes employed by start-ups or practices that have relationships with management service organizations (MSOs), and they often conflate the MSO with the managed practice. With few exceptions, physicians cannot be employed by a lay corporation to deliver professional services on behalf of that lay corporation. Physicians may, however, be employed by licensed hospitals and HMOs. With the increase of MSOs, it is important for physicians to know that the MSOs cannot employ physicians to render professional services. The licensee's employment agreement should be with the medical practice, and the remuneration should be paid by the medical practice. The physician should know the difference between the practice and the MSO, and keep the line between the two clear and in focus.

Employment Agreements Are Real

The employment agreement should be consistent with the employment relationship. The Board provides in the proposed Position Statement, "Employment Agreements are legal documents. Licensees should seek their own legal counsel before signing them." The Position Statement also provides that employment agreements should be negotiat-

ed in "good faith" and that both parties should engage legal counsel "experienced in physician employment matters." It is obvious that I would mention this, analogous to the barber extolling the virtues of a haircut; but I think it is telling us more. The takeaway to licensees is "do not tell us you did not know what was in your employment agreement, or that you did not understand it." Physicians are forewarned.

Know What is Expected of You

Physicians are required to know the policies and protocols of their employers. The Board will have little tolerance for a physician's attempt to defend his or her actions because an employer steered the physician away from doing the right thing. Further, ancillary to this point is the Board expects physicians to associate with ethical employers. A physician cannot

hide behind an employer when taken to task. In fact, the Position Statement goes so far to say that you need to "Recognize that your obligation to provide care that conforms to the standards of acceptable and prevailing medical practice, or the ethics of the medical profession, may require you to leave a situation that does not allow you to provide such care." This is the "Johnny Paycheck" option.¹ In short, if your employer is making you do something you believe to be short of acceptable and prevailing standards of medical care, the Board expects you to resign.

A Supervisory Role Doesn't Insulate You

The Position Statement is specific: if your position removes you from direct patient care "such as a medical director or vice president of medical affairs . . . (such a role) does not remove you from professional ethical obligations." The Board provides that "patient welfare must take

priority in any situation where the interests of licensees and employers conflict."

Guidance to Employers Is Plentiful

The proposed Position Statement cites the American Medical Association's "Principles for Physician Employment" AMA H-22.950 which indicates that employed physicians "should be free to exercise their personal and professional judgment in voting, speaking and advocating on any manner regarding patient care interests, the profession, health care in the community and the independent exercise of medical judgment. Employed physicians should not be deemed in breach of their employment agreements, nor be retaliated against by their employers, for asserting these interests."

Further, the Position Statement indicates that while physicians typically assign billings to employers, "employed physicians or their chosen representatives should be prospectively involved if the employer negotiates agreements for them for professional fees, capitation or global billing, or shared savings. Additionally, employed physicians should be informed about the actual payment amount allocated to the professional fee component of the total payment received by the contractual arrangement." Position Statement, p. 5.

Conclusion - Patient Welfare is the Guidepost

The Position Statement is replete with references to patient welfare trumping the relationship between the employed physician and his or her employer. For example, patients should be notified when a physician departs from the practice, and informed of the physician's new contact information. Further, the Position Statement cites the AMA "A physician's paramount responsibility is to his or her patients." The AMA recognizes the inherent conflict of interest with the physician's duty to his or her patients and the duty of loyalty owed to the physician's employer. "This divided loyalty can create conflicts of interest, such as financial incentives to over- or under-treat patients, which employed physicians should strive to recognize and address." It is clear, however, that the "employer-made-me-do-it" will not be an acceptable defense.

¹Johnny Paycheck was a popular country music singer in the 70's whose biggest hit was "Take This Job and Shove It," a working man's anthem at the time written by David Allen Coe. ❏

