Physician Employment Contracts & Medical Malpractice Tail Insurance: *A Necessary Evil… To Address A Complex Issue*

In today's litigious society, physician employment contracts are a necessity. There are scenarios where a physician separation from a practice is amicable; however, more often than not there are other (non-amicable) reasons why a physician leaves a group. Of particular importance is the aspect of how medical malpractice tail insurance will apply. Having tail issues clearly spelled out in an employment contract can protect both parties from headaches and potential coverage gaps at the time of separation.

Ideally, whenever a physician signs an employment contract, they should closely examine the insurance section to determine how the termination provisions are spelled out. Unfortunately, more often than not, this clause is usually only examined upon contract termination, if it is examined at all. The concepts of tail coverage and prior acts coverage can become confusing, and coverage gaps may be discovered.

Regarding tail coverage, there are four basic possibilities in physician employment contract language:

1. The employer will assume the risk and purchase a tail policy.
2. The employee will assume the risk and <u>must</u> purchase a tail policy.
3. The employee will assume the risk and can <u>either</u> purchase a tail, secure prior acts coverage, or choose to go bare.
4. The contract is silent.

If the employer or employee purchases tail coverage, they are assuming all liabilities associated with the employment contract. The tail policy will provide coverage for all acts that occurred during the term of employment, even after the physician is no longer an employee. In my opinion, this is the best scenario for everyone involved. It is a clean contract and if a claims situation arises, there will only be one carrier responding on behalf of the physician and the employer. The employed physician can then go into the marketplace and purchase a new policy with a new retroactive date and enjoy the first-year-in-practice deep discount.

If the employed physician is required to assume the risk and is given the option of purchasing prior acts coverage or tail coverage, risk management philosophies may not always be in sync:

- From an individual risk management standpoint, purchasing a tail policy or purchasing a new policy with prior acts coverage accomplishes the same objective, however, there are cash flow considerations. Tail policies are expensive, typically 200% of expiring premium. The policy can typically be paid over a three-year period, in annual installments, or may be required to be paid upfront. On the other hand, a new policy with prior acts coverage would allow a physician to pay in quarterly installments. Over time, the

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comparative total cash outlay will equate, but given the high lump-sum cost of a tail policy, the initial cash outlay will be much higher. A seven-year timeline illustrating discounted cash flows is a great tool for examining these options.

- From a practice risk management standpoint, the corporate policy would respond to any claims arising from the former employee, however, there may now be different carriers involved – and hence, different interests. This could cause a claim to cost more than it would have, had only one carrier been involved.

The fireworks start when the employment contract is silent, or there is no employment contract. Again, in a mutually-agreed, amicable separation, this may not be an issue, however, the high cost involved with tail could turn a seemingly friendly separation into a contested, litigated mess.

In conclusion, the claims-made policy is a complex insurance contract. When you are entering into any agreement, ensure there is a clause outlining the exit strategy. Avoid the landmines, find an insurance professional you can trust, ask questions and always read the fine print.

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