

Feeling the Pandemic Squeeze?

How to Deal with “No Cause” Terminations, Compensation Cuts, and More

By Karin Zaner, JD
Zaner Law PC

Whether specifically caused by the COVID-19 public health emergency (“PHE”) declared last year or by other factors that have been exacerbated or just merely delayed by the PHE, some physicians have started to feel the impact of a pandemic “squeeze” now surfacing in the healthcare business environment. These tricky situations can hit independent practices as well as individual physicians particularly hard, leaving them with limited options and minimal leverage. At what point should a physician or a physician group contact an attorney to help them navigate these situations? In some of these situations, significant sums of money are involved (past or future wages, ability to practice, and/or sources of patients). In other situations, non-compete and other restrictive covenants surviving post-employment may impact a physician’s future ability to treat patients or accept employment. And in still other situations, a physician’s professional record may be impacted or even harmed. Given the fact that these situations usually involve complex and sophisticated legal issues, physicians facing any of these scenarios should reach out to an attorney experienced in representing physicians to assist with strategy moving forward.

Responding to No Cause Termination

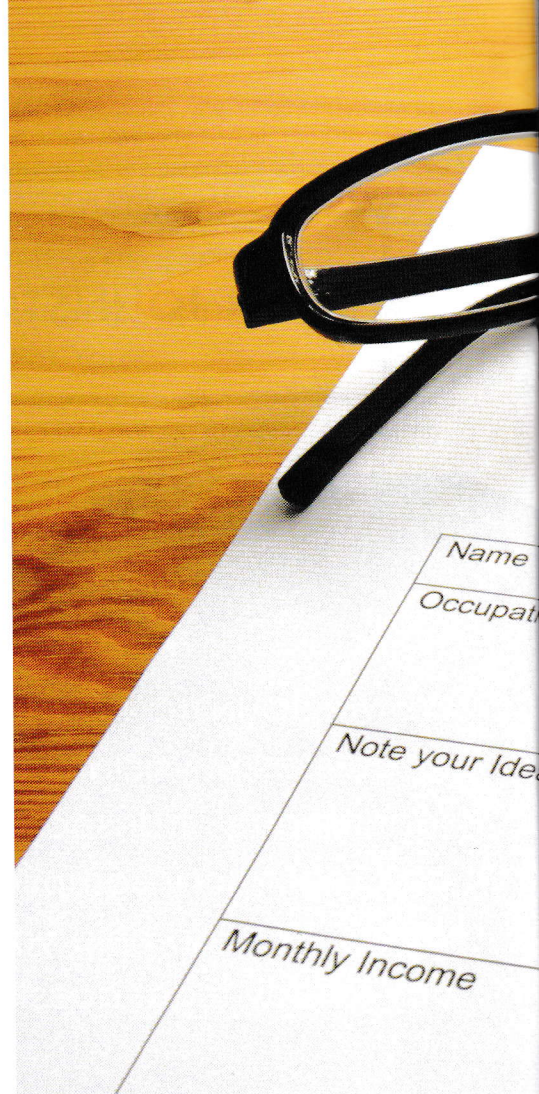
A physician may provide professional services through an employment contract or an independent contractor relationship for a certain “initial” term (e.g., two, three, or even more years). So, in the physician’s

mind, he or she has a contract for a certain term of years. Thereafter, the contract may provide automatic renewals each year unless the contract is terminated by either party with notice. These are typically referred to as “evergreen” renewals, which essentially make yearly extended renewal “automatic.” This also creates an impression to a physician that the extended term is guaranteed from year to year. However, such contracts will usually also contain a “no cause” termination provision that allows either party to override any initial or extended term and terminate the contract for “no cause” as long as a certain amount of notice is given (e.g., 90 or 120 days is common). Given that the PHE has affected healthcare entities and groups in various ways that could not have been foreseen, decisions to give notice of “no cause” terminations without much advance warning seem to be occurring with more prevalence.

Most commonly, “no cause” terminations occur in the employment context. How does an affected employed physician respond? While the likelihood of reversing such decision, once made by the healthcare entity or group, is minimal, a physician should address several very important issues before the separation by consulting with experienced physician’s counsel. Importantly, if there is a contractual non-compete (which is usually triggered at termination of the contract and may last a year or more), determining whether such geographic radius restriction is enforceable under the Texas physician non-compete statute (Tex. Bus. & Commerce Code §15.50) is crucial. Unless the non-compete is clearly unenforceable on its face, a physician needs to understand what the non-compete prohibits so that he or she can determine where and how

to practice without being sued. Or the physician may determine he or she wants to exercise the “buyout” option. Even if the non-compete is plainly unenforceable, a physician will need legal guidance as to how to move forward while minimizing any threat of litigation.

Also, experienced physician’s counsel can help a physician understand what other restrictive covenants may exist as these may be just as important as a non-compete. For example, the employment contract may also have non-solicit provisions in addition to a non-compete restriction. If the non-solicit provision only restricts the physician from trying to hire employees, it may be easy for the physician to comply. However, many non-solicits are broader than that, including those that prohibit the physician from soliciting or even just working with referral physicians or vendors. In fact, a non-solicit may even prohibit the physician from soliciting or treating specific patients. In other words, focusing on non-compete obligations while overlooking non-solicit provisions may become truly problematic for a physician after the fact. Instead, all post-employment obligations (including any non-solicits) should be addressed by physician’s counsel in





coordination with the non-compete issues. Various other issues that require legal help include a physician's obligation to notify patients seen in the last two years of the separation (under 22 TAC Part 9, TMB Rule 165.5), determining who pays for malpractice tail coverage if needed or required, as well as the breadth of the release of any claims (usually requested if the physician receives any kind of severance package). Most importantly, physician's counsel can protect the physician's professional record by confirming the nature of the "no cause" termination and ensuring that any related privilege relinquishment does not result in an affirmative report to the National Practitioner's Data Bank ("NPDB"), the Texas Medical Board, or any other third party.

"No cause" terminations can also happen in other contracts as well (e.g., for ER call or surgery coverage), either through notice of direct termination or effectively through exclusive contracts or a facility closing such coverage to independent physicians. Just as it is important for an employed physician to have experienced physician's counsel review the facts and determine legal strategy and available remedies, a physician group whose access to patients and referral physicians may

be cut off by such termination/exclusion should consult with physician's counsel in order to determine whether any remedies are available. This could include analyzing whether any grounds exist for legal action under federal or state healthcare regulatory statutes and/or anticompetition laws. While legal accountability in these types of situations is generally an "uphill battle," having physician's counsel review the complex facts and applicable laws may also help the physician's group gain some traction (e.g., so as to possibly reverse

Since the PHE began, more and more physicians seem to have received notices from their healthcare entities and/or groups that their salary or compensation formula will be unilaterally cut in the future.

such a "no cause" termination/exclusion decision or at least obtain other favorable accommodations).

Dealing with a Unilateral Cut of Salary or Compensation

Since the PHE began, more and more physicians seem to have received notices from their healthcare entities and/or groups that their salary or compensation formula will be unilaterally cut in the future. Such notices may present the physician with an unfair choice: either accept the unilateral cut or likely face contractual termination in the near future. If the physician is the only one to whom this notice is given, consulting with physician's counsel regarding the salient facts is highly recommended. Although factual situations widely differ, if such adverse action occurs as a result of discrimination for impermissible reasons under federal and/or state law (e.g., due to race, color, religion, sex, pregnancy, national or, age, disability, whistleblower status, etc.), the physician may consider bringing legal action and/or filing a complaint with the

appropriate federal or state agency, such as the Equal Employment Opportunity Commission and/or the Texas Workforce Commission ("TWC"). Also, if such adverse action results in the physician being deprived of wages that he or she has already earned, experienced physician's counsel can help the physician determine whether to press his or her rights under the various Texas payday laws through the TWC or otherwise pursue payment for wages earned. However, such reduction request may result instead from precarious economic circumstances flowing from the PHE, and may be pressed upon other similarly situated physicians and/or employees in the group as well. Or perhaps a physician has been highly salaried for his or her first few years of employment, but now the healthcare entity or group has decided to push to wRVU compensation in order to incentivize productivity. In any of these situations, from a practical standpoint, the physician will likely have limited options, especially if the healthcare entity and/or group has the right to contractually terminate for "no cause" as described above. However, there may be opportunities to "horse trade" with the healthcare entity or group for non-monetary items that are important to the physi-

cian (e.g., additional vacation days, less call days each month, a reduced non-compete radius, etc.). Experienced physician's counsel will be able to assist the physician (either directly or behind the scenes) in negotiating as well as legally documenting any such concessions obtained.

If Hints of Peer Review or Quality Review Are Raised

While the above scenarios would certainly be unwelcome to any physician, keep in mind that things could get worse. For example, if the contract does not have a "no cause" termination clause or if the healthcare entity or group determines that it does not want to pay the physician a salary for the applicable termination notice period as set forth in the contract (i.e., if the "no cause" notice period is 120 days, payment for "salary in lieu of notice" would equal 120 days of salary). In these situations, the healthcare entity or group could try to find a professional behavior or clinical care reason to terminate "for cause" under the contract as this would typically allow an immediate termination without paying additional salary. Depending on how closely the healthcare entity

or group is related to a hospital, surgery center, or other healthcare facility at which the physician has clinical privileges, this may result in the physician going down a peer review or quality review path that may permanently harm his or her professional record. If there is any sense that peer review or quality issues will be raised in such a context, a physician should immediately consult with physician's counsel in order to determine the best legal strategy to protect the physician's professional record. Even if this is the very first sign of a peer review or quality issue, a physician should expedite retaining experienced physician's counsel to address any "hint" of peer review or quality issues before they become real issues that may harm the physician's professional record. **DMJ**

This material is provided for informational purposes only and is not intended to be legal advice. Karin Zaner, of Zaner Law PC, focuses on the representation of Texas physicians and physicians in training. She helps physicians maintain their professional records while seeking practical pathways to the resolution of the myriad business, legal, and ethical issues that arise in the challenging practice of medicine today.



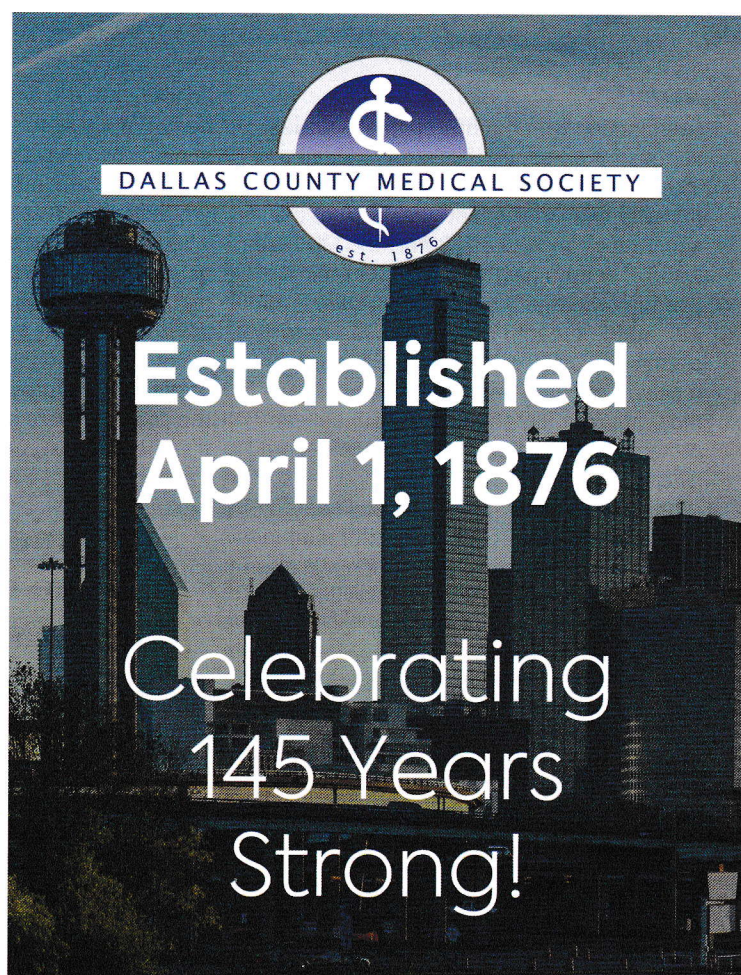
Image matters to our patients, our physicians, and to **US!**

★★★★★ 4.9 Google Rating with over 2,100 patient reviews

- MRI
- CT
- X-ray
- Mammography
- Ultrasound
- DEXA
- OPEN 7 days a week
- Extended Hours Monday - Friday
- Cash pricing and payment plans
- 99% Patient Satisfaction Rating
- X-ray walk-ins welcome
- Celebrating 35 years of excellence

SOUTHWEST DIAGNOSTIC IMAGING CENTER

WWW.SWDIC.COM ■ 214-345-6905



DALLAS COUNTY MEDICAL SOCIETY

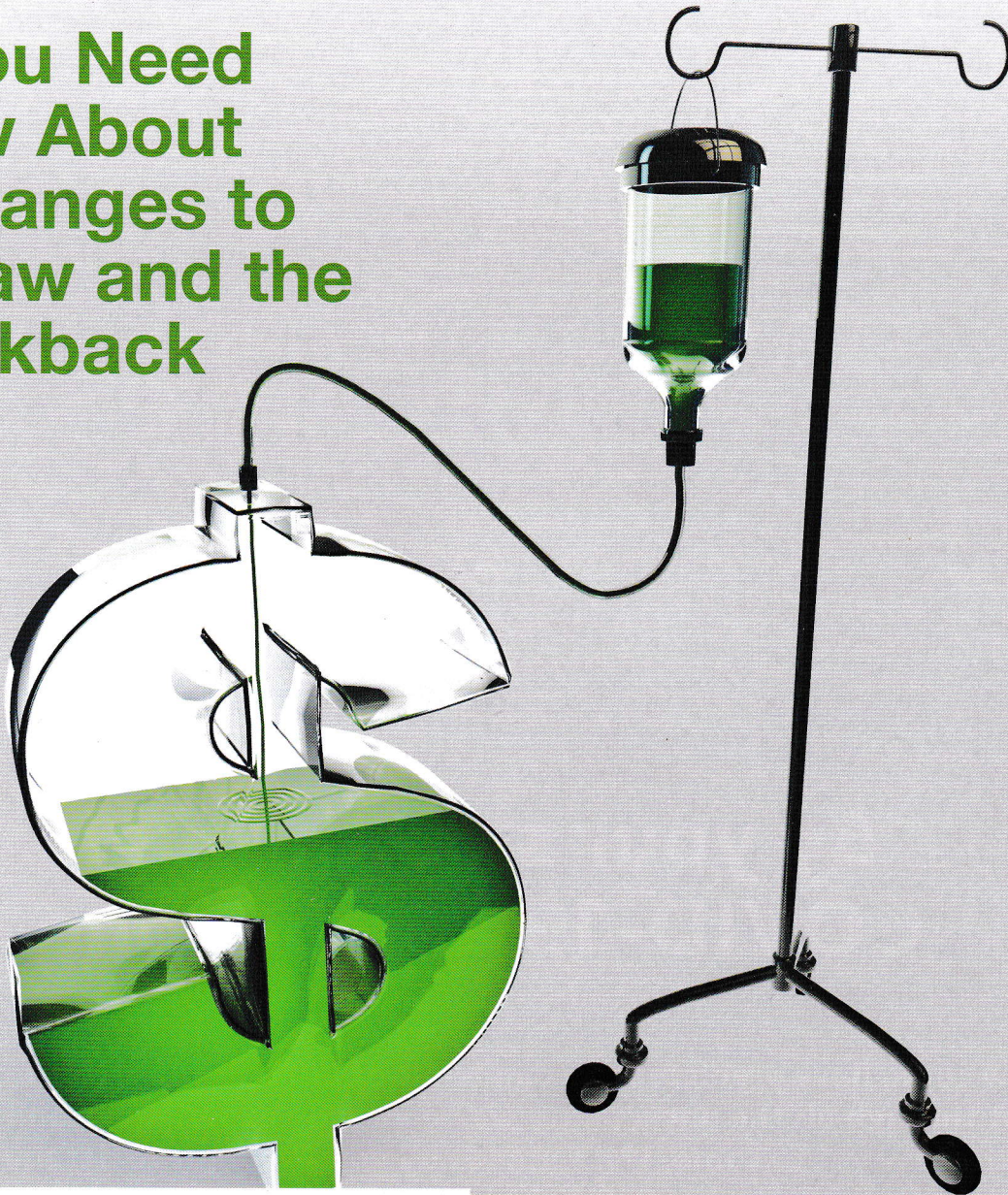
Established April 1, 1876

Celebrating 145 Years Strong!

DALLAS MEDICAL

JOURNAL

**What You Need
to Know About
New Changes to
Stark Law and the
Anti-kickback
Statute**



DCMS Physicians
Participate in Virtual
Dallas Science Fair