American College of Emergency Physicians®

ADVANCING EMERGENCY CARE

Emergency Physician Contractual Relationships

Policy Resource and Education Paper (PREP)

This policy resource and education paper (PREP) is an explication of the policy statement "Emergency Physician Contractual Relationships"

This policy resource and education paper (PREP) explains some of the background and foundation of ACEP's policy statement, "Emergency Physician Contractual Relationships." It follows the format of the policy statement and provides an explanation of many of the 16 principles that are defined in the policy. The exact language of the policy is bolded for easy reference. The policy statement and PREP are organized into four categories: the importance of good contracting, contractual rights, billing rights, and the nature of the contract.

The policy represents the ideal components of contracts involving emergency physicians. Unfortunately, the ideal is not always achievable. Individual emergency physicians and emergency physician contracting vendors must fully understand contracts to which they are a party. It is especially important to be aware of clauses that waive a particular right or recourse of action. Expert legal advice is often required to fully understand and negotiate the optimal contract.

The Importance of Good Contracting:

- **The interests of patients are best served when emergency physicians practice in a stable, fair, equitable, and supportive environment.**

  In order to create a stable environment, any knowledge by the contracting vendor of substantial risk of hospital contract instability, including discussions of contract termination, should be disclosed to physicians, especially during the physician recruiting process. All physicians should be informed of the date of renewal of the current contract.

- **Quality patient care is best promoted within a framework of fair and appropriate contractual relationships among various involved parties.**

  Self-explanatory.

Contractual Rights:

- **ACEP supports the emergency physician receiving early notice of a problem with his or her performance and an opportunity to correct any perceived deficiency before disciplinary action or termination is contemplated.**

- **All entities contracting with or employing emergency physicians to provide clinical services, either indirectly or directly, should ensure an adequate and fair discovery process prior to deciding whether or not to terminate or restrict an emergency physician's contract or employment to provide clinical services.**

Contracts should clearly state the conditions and terms of termination, including the required notice period. Physicians should fully understand how termination will work and its implications. Most employment contracts are “at will.” Terminations “with cause” and “without cause” are generally different. Physicians may want to consider negotiating for consideration, adequate notice, financial payments, or other benefits if they are terminated without cause and/or without notice. Physicians and contracting entity(s) should recognize that permanent "removal from the schedule" is a form of termination.

ACEP supports emergency physicians working in an environment where they receive feedback regarding their performance. As a provider, it is valuable to be given information, both real and perceived, in order to increase awareness regarding measures in which the provider may be held accountable. If a concern has been raised regarding the emergency physician involving issues of quality, utilization, efficiency, or service, the medical director (or designee) of the facility in which the emergency physician works should discuss the concerns with the physician promptly. Early notification of issues, ideally, allows the physician the opportunity to implement changes to correct the supposed fault before disciplinary action or termination is entertained.

ACEP supports the inclusion of an adequate and fair discovery process between contracting entities before termination or restriction of an emergency physician’s privileges to provide clinical services. A contract may require the emergency physician to relinquish his/her right to appeal the loss of medical staff privileges. Therefore, if the contract is terminated, the physician would automatically be terminated from the facility’s medical staff and vice versa. ACEP supports a remediation process in which the provider receives feedback regarding deficiencies followed by the opportunity to answer and address the concerns. Should the provider fail to adequately correct the outlined deficits, termination can then proceed with the physician’s awareness that a process has been followed with his/her involvement.

- **Emergency physicians employed or contracted should be informed of any provisions in the employment contract or the contracting vendor’s contract with the hospital concerning termination of a physician’s ability to practice at that site. This includes any knowledge by the contracting vendor of substantial risk of hospital contract instability.**

- **Emergency physician contracts should explicitly state the conditions and terms under which the physician’s contract can be reassigned to another contracting vendor or hospital with the express consent of the individual contracting physician.**

- **The emergency physician should have the right to see and review the parts of the contracting entities’ contract with the hospital that deals with the term and termination of the emergency physician contract.**

  Emergency physicians may be directly or indirectly contracted to a hospital. An example of a direct contract is when an emergency physician is employed directly by a hospital. In this case, there is only a single legal agreement linking the emergency physician to the practice site. Emergency physicians may be indirectly contracted to the hospital through a contracting vendor. The contracting vendor may be an individual, a group of individuals, or an organization. In this case, the emergency physician is contracted to the contracting vendor, which then contracts with the hospital (“contracting vendor’s contract with the hospital”). Under this model, the emergency physician is linked to the practice site through two contracts.

  - Emergency physicians have routine access to their employment contract but typically do not have access to the group’s contract with the hospital.

- The group's contract may include provisions that could be used to limit a physician's ability to practice at a particular site. For example:
  - Medical staff privileges can be revoked. In the context of a contract between a contracting vendor and a hospital, sometimes the vendor's contract explicitly states that any or all physicians lose their privileges and waive their rights to hearings or due process under certain circumstances. As this potentially has considerable impact on the emergency physician's career, ACEP encourages physicians to be aware of these arrangements and the possible consequences as they apply to their work relationship.
  - Work hours, shift assignment, or scheduling may be limited or altered.
  - The contracting vendor may agree not to schedule a physician upon request of the hospital.

The core issue behind language in emergency medicine contracts having to do with termination of the physician's ability to practice is that of *due process*. Due process refers to the right to have a fair hearing, including input from the affected physician, prior to any decision being made about termination of the ability to practice (specifically the loss of hospital medical staff privileges). The concept of due process is felt to support the independence of a physician in advocating for patients without undue influence from extrinsic forces and preserves the sanctity of the physician-patient relationship. These forces may include non-medical concerns, such as financial, marketing or political interests. In ACEPs policy statement, "Emergency Physician Rights and Responsibilities," ACEP endorses the right of emergency physicians to enjoy due process:

"7. Emergency physicians shall be accorded due process before any adverse final action with respect to employment or contract status, the effect of which would be the loss or limitation of medical staff privileges. Emergency physicians' medical and/or clinical staff privileges should not be reduced, terminated, or otherwise restricted except for grounds related to their competency, health status, limits placed by professional practice boards or state law.

8. Emergency physicians who practice pursuant to an exclusive contract arrangement should not be required to waive their individual medical staff due process rights as a condition of practice opportunity or privileges."

However, frequently emergency physicians have been forced to waive due process rights. The policy, "Emergency Physician Contractual Relationships," supports an emergency physician's right to know whether his or her rights to due process may be abridged by a particular contract. Emergency physicians should be informed and understand whether or not the contracting vendor's contract with the hospital and/or the contracting vendor's contract with the physician waives due process rights afforded other members of the medical staff. Physicians should be aware that, under usual contract law and in many court decisions, especially for independent contractor arrangements, the rights available to the physician are those delineated in the contract. Therefore, lack of language addressing "due process" under the contract, or under medical staff bylaws, will usually deny those to the physician.

NPDB (National Practitioner Data Bank) reporting is only required when loss of privileges is due to "professional competence or professional conduct issues." If privileges are lost solely due to contract loss, reporting to NPDB is not required.

Billing Rights:

- **The emergency physician should have the right to review what is billed and collected for his or her service regardless of whether or not billing and collection is assigned to another entity within the limits of state and federal law.**

Although patients are generally billed on behalf of the specific emergency physician who cared for them, the way business is structured in emergency medicine, funds paid by a patient or by a third-party payer on behalf of a patient do not generally go directly to the emergency physician. In most instances, the emergency physician has *assigned* his or her payments to another entity, generally the entity contracted with the emergency physician.

The physician, however, is responsible for the accuracy of the charting and also the accuracy of the coding and billing based upon the physician's charting. The bottom of the Health Insurance Claim Form 1500 (required by many government payers) reads:

"SIGNATURE OF PHYSICIAN (OR SUPPLIER): I certify that the services listed above were medically indicated and necessary to the health of this patient and were personally furnished by me or my employee under my personal direction.
NOTICE: This is to certify that the foregoing information is true, accurate and complete. I understand that payment and satisfaction of this claim will be from Federal and State funds, and that any false claims, statements, or documents, or concealment of a material fact, may be prosecuted under applicable Federal or State laws."

Therefore, ACEP supports the right of an emergency physician to review what is billed and collected in the physician's name.

- **Hospitals should disclose to physicians and/or the contracting vendor which networks, plans, etc. the hospital is contracting with—ie, which networks consider the hospital to be "in-network."**

  The emergency physician and the contracting entity have a right to know with which networks the hospital is contracting. This is important to allow the EP or contracting vendor to better understand the implications of contracting with a potential payer and to better advise patients who are part of a particular network.

- **It is the right of an emergency physician contracting entity to make an independent decision regarding all contractual arrangements that involve insurers and to be represented by legal counsel.**

  This principle states that emergency physicians and/or the contracting vendor should not be subject to pressure from a hospital to accept unfair contractual terms with a payer (coercive contracting). This is the practice whereby the hospital forces emergency physicians to accept certain terms with a payer in order to keep the contract at the hospital.

  Emergency physicians and/or the contracting vendor should have the right to negotiate agreements with managed care organizations with rates predicated on the market value of their services. The failure of physicians to reach an agreement with managed care organizations should not constitute a breach of the physician's agreement with the hospital, nor serve as grounds for termination. Emergency physicians should be able to refuse to contract with, to modify contracts with, and/or to terminate contracts with managed care plans that are showing financial instability; receive advance notice of the hospital's intent to enter into any package or global pricing arrangements involving their specialties; and have access to alternative dispute resolution mechanisms to resolve disputes with the hospital concerning managed care contracting.

- **Health care facilities should provide confidential complete transparency to the emergency physician of all facility charges that are billed as part of an emergency visit.**

Since the emergency physician is responsible for ordering tests and procedures while interfacing with the patient, he or she must know how much the patients will be charged for various services. Only with this information can the emergency physician properly advise patients regarding the risks (which include the cost) and benefits of particular services.

The Nature of the Contract:

- **Business relationships that include emergency physicians are best defined within a written contract.**

  Commonly, the physician's group or employer provides a direct financial benefit to the emergency physician, typically an hourly wage, and subsequently bills for the physician's services. The amount of money involved in this relationship is significant and may amount to millions of dollars in direct payments over the course of the relationship.

  In addition, other indirect benefits, including profit sharing, bonuses, moving allowances, health insurance, CME allowance, and paid time off, may be promised to the emergency physician at the time he or she is hired. Other nonfinancial benefits may be involved in this transaction as well, including scheduling preferences, guaranteed numbers of shifts, and promises of assignments at specific hospitals in a multihospital group.

  In some practice locations, emergency physicians may be asked to work without a contract. Working without a contract makes it hard to enforce promises and agreements that may be unfulfilled. The value of these promises can be significant. This statement supports the concept that it is within an emergency physician's rights and best interest to request a contract for physician services.

- **The contracting parties should be ethically bound to honor the terms of any contractual agreement to which it is a party and to relate to one another in an ethical manner.**

  It is crucial for the provider to acknowledge and understand the indemnification clause, or hold harmless clause. Here, one or both parties are protected from the loss associated with the other party's actions that cause a third party to claim damages. If an indemnification or hold harmless clause is included at all, ideally it should provide mutual assurance and protection.

- **Physician disciplinary, quality of care, or credentialing issues pertaining to medical care must be reviewed and affirmed by a licensed emergency physician.**

  Emergency physicians are the most qualified to determine quality of care issues regarding emergency medicine. Therefore, ACEP believes that quality of care questions regarding an emergency physician's care should be affirmed by a licensed emergency physician as part of a standardized, confidential peer-review process.

- **The emergency physician is individually responsible for the ethical provision of medical care within the physician-patient relationship, regardless of financial or contractual relationships.**

  Self-explanatory.

- **Quality medical care is provided by emergency physicians organized under a wide variety of group configurations and with varying methods of compensation. ACEP does not endorse any**

single type of contractual arrangement between emergency physicians and the contracting vendor.

There are many different models of emergency physician employment and compensation currently practiced. Usually, they include employment, partnership, or independent contractor status or a combination of these models. Examples of various types of contracting relationships are:

- Employment directly by a hospital (no contract group)
- Government service (employment by government entities such as county government, the military, or the Veterans Administration)
- Sole proprietorship (employment by an individual or individuals, who in turn hold the contract with the hospital)
- Contract management group (employment by an organization whose business is to staff and administer emergency departments that in turn holds a contract with the hospital)
- Democratic or other partnership (participation in a group of physicians that together hold the contract with the hospital)

There are also many different methods in which emergency physicians may be paid for their services, including:

- Salaried position (a set amount of pay for an agreed-upon amount of work, generally a certain number of hours of patient care and/or other services provided)
- Hourly compensation (a preset dollar amount paid per hour of work in the emergency department or for other services of a value such as administrative services; may vary by the shift or by the day of the week)
- Fee-for-service (reimbursement based on the actual amount of revenue generated by the physician or, in some cases, the amount billed by the physician, regardless of the patients' ability to pay)
- Profit-sharing (income usually layered on top of another model and determined by an agreed-upon calculation involving several variables, but usually including some measure of productivity or seniority or position within a group)

Revised by the Emergency Medicine Practice Committee – June 2018
Reviewed by the Board of Directors – July 2018