



Episode 20: “Flipping the Script: What to Know About Physician Contracts, With Dr. Andrew Tisser”

Speakers: Ari Kwiatkowski, Barclay Damon and Dr. Andrew Tisser, Associate Chair of Emergency Medicine at Sisters Hospital and Host of the “Talk 2 Me Doc” Podcast

[Ari Kwiatkowski]: Hi, everyone, this is a Barclay Damon live broadcast where we discuss all things L&E, labor and employment. I’m Ari. Let’s dig in.

[Ari]: Hey guys, welcome to “Flipping the Script: What to Know About Physician Contracts with Dr. Andrew Tisser.” I am thrilled to announce for our 20th episode we have our first external guest, which is, as I just mentioned, Dr. Andrew Tisser. Andrew is the associate chair of emergency medicine at Sisters Hospital, and he is also a career strategist for early career physicians. Andrew, thank you so much for joining us.

[Andrew Tisser]: Thanks, Ari. So happy to be here.

[Ari]: Glad you’re here. And I did want to let our listeners know just a little interesting tidbit about Andrew is that he and I are neighbors. He lives just a couple of houses down from me, so he cannot escape me in all of his personal and professional life.

[Andrew]: That is true.

[Ari]: Andrew. Before we dig in, do you want to tell us a little bit about what you do at Sisters of Charity Hospital here in Buffalo and just a little bit about your career strategy work?

[Andrew]: Yeah, sure. Thanks. So I’m the associate chair of emergency medicine, so I’m responsible for the Emergency Department at Sisters of Charity—I’m a medical director there. I have six physicians that work with me and multiple physician assistants. And really everything that goes into that part of my job. And for the career strategist work, I work with early career physicians—so less than ten years out of training who are dissatisfied with their current careers—and we work together to figure out a career that works for them. Additionally, I have a podcast called “Talk to Me Doc.”

[Ari]: Yes. I wanted to ask you about the podcast. Please tell us.

[Andrew]: Yeah. So that is a podcast that focuses on the unique issues that relate to the early career physician.

[Ari]: Awesome. Well, I think all of your experience, Andrew, makes you the perfect guest for today, and I’m really excited for us to just get into it.

[Andrew]: Yeah, me too. Thanks so much.

[Ari]: I wanted to let our listeners know that Andrew and I were talking about him coming on and we decided to kind of flip the script and switch it up a little. So Andrew actually asked his Twitter audience and his social media audience, you know, what do you want to hear from a labor and employment attorney? So just so our listeners know, that’s where the questions are coming from. And Andrew, I am going to turn it over to you.

[Andrew]: Thanks, Ari, Yeah, I am excited for this opportunity. So this is kind of a funny question to ask an attorney, but do you think do you think contracts are important, especially as they relate to health care–related and physician-related contracts?

[Ari]: Yeah, that's a good question. You know, obviously I'm a little biased, but I would definitely say yes. Especially in this space. I think, you know, being a labor and employment attorney, we see employment relationships or we review contracts in all different fields. And I think that health care in particular and specifically physician agreements are probably the most common for this space. So I definitely think that, you know, if you're an early career physician or if you're a physician making a move or joining another group, the contract is definitely important because—as you know better than me, Andrew—I think the relationships between physician groups and their employees, hospital systems and their employees are a little bit more complex than just your average employee.

[Andrew]: Yeah, that's fair. So we don't want to just like scribble something down on a napkin and shake our hands on this or what.

[Ari]: I'm not supposed to give legal advice on this podcast, but in that hypothetical, I would say absolutely do not do that, to anyone who's listening.

[Andrew]: I will make a note of that. So, yes, to contracts. So well, let's talk about contracts. And so what should we be looking for when it comes to a contract? And, you know, I think people are listening in either that are just coming out of their training and they're having their first contract. And then there'll be some people that maybe are looking towards their second or third job. But I think it applies to everyone. So what are some of the important things that you want to know about when it comes to contracts?

[Ari]: Yeah, that's a really good question. I'm assuming this question may have come from one of the Twitter audience members.

[Andrew]: Yeah, people were pretty fired up about this stuff.

[Ari]: I keep saying Twitter audience, I should just say followers. Like, yeah, clearly everyone who's listening can tell that I don't have a Twitter. So I think that's a great question. I think you're 100% right. And, you know, there are definitely certain things that both physicians and you know, physician groups or hospitals, the drafter of the contract, the employer and the physician should both look for. You know, I think I'll just hit a few of them, Andrew, and then maybe we can talk in depth about a couple more. And this is like the student becoming the master kind of thing. So if I'm rambling on too much—I'm usually the one asking the questions, so please feel free to interrupt me. You know, just a few things right off the bat. Normally, one of the first things in the contract is the contract term or the period of time that the contract applies to. You know, if you're signing a document that's legally binding and it's an employment agreement, that's one of the things you want to look out for because you're going to want to know for what specific term the agreement covers. You know, just generally there's usually something in the physician agreement that delineates the responsibilities or the duties of the physician and then the responsibilities and the duties of the physician's group. With respect to duties of the physicians. One of the things that we look out for and it sounds kind of silly, but is the practice locations. So obviously if you're a young physician or maybe you know, you're laterally moving, you're going to a big system or a big group, you know, you may not want to drive the 45 minutes or an hour and a half to a different practice location. So if that's something that's important to you, I would say definitely make sure that that's in the agreement because sometimes, you know, I've seen physician agreements that have like a blanket provision in there that say practice, all of our practices or, you know, don't specify locations. So I don't know if, if it were me, I wouldn't if, if I'm joining a group that has a Rochester location, our listeners

know I'm in Buffalo and obviously you're in Buffalo, too. You know, I wouldn't want to be contractually obligated to drive to Rochester, you know, two or three times a month unless... if I were okay with that, that's different. But that's definitely something I've seen kind of in there that maybe isn't paid attention to as much.

[Andrew]: Yeah, I think especially in my field, emergency medicine a lot of these big systems have multiple locations. And yeah, a lot of them will say like, you know, maybe you get a little extra money if you're willing to move around. But if you can really lock down where you're going to be, I think that's important because, yeah, some of these are really hour and a half, two hours away from each other and you don't want to be stuck there a hundred percent of the time.

[Ari]: Right. Exactly. You know, and obviously there's a there's plenty of things that can be listed with respect to the duties of physicians and physician groups for you know, for responsibilities of the practice. You know, something that I always look for in a contract are call hours. I feel like that's like something that, you know, both the physician and the practice is usually interested in making sure that those responsibilities are clear, you know, because there are certain provisions I've seen that divide it equally among members of the practice. I've seen provisions that basically say once a partner or a physician reaches a certain age, you know, they're kind of phased out of their call responsibilities so just something to keep in mind. And I think that's something that's really important to both the group and doctors.

[Andrew]: Yeah, I think I've seen before some of them listed as just equitable. And I think that can be kind of nebulous as to what equitable really means.

[Ari]: I agree.

[Andrew]: So I would I think that's something to watch out for it.

[Ari]: Yeah, definitely. I'm glad you agree. As the boots on the ground.

[Andrew]: I agree.

[Ari]: So, you know, just really briefly, vacation benefits. You know, those are things you're probably going to want to review in detail. Any type of maternity, paternity leave, family leave. You know, obviously, a lot of our listeners know that those are statutorily granted the types of leave that are available. But, you know, if you're a young career physician and you're thinking about having a family in the next few years, like you definitely want to take a look at whatever the contract may or may not say about that. You know, one other thing I always look for is malpractice insurance. I think obviously if you're a physician and you're joining a group or if you're a group or a practice and you're having a physician come on. Obviously, malpractice insurance is something that is important and is usually always included in every contract. You know, you may or may not know this about me, Andrew, but when I first started practicing law way back when I did do some med mal defense, so I'm always hyper—medical malpractice defense work. So I'm always, you know, hyper-vigilant when it comes to looking at insurance. You know, sometimes a contract will have a cap on an insurance or the amount of malpractice insurance that's available. I've seen some where the contract will say that if the physician has privileges at a hospital, that the physician should make sure that they have insurance that covers them above and beyond the cap and the policy with the practice. So just there are some little, there are some wonky things with insurance. So I would definitely say, of course, if you're a physician, you've worked super, super hard. You've gone to school for a really long time. In the unlikely, unfortunate event something happens or maybe it doesn't, and you're just named in a lawsuit and you know nothing. You know, this happens doing med mal defense, I saw this a lot. You just want to make sure you are covered that's really all my spiel boils down to.

[Andrew]: Fair enough.

[Ari]: Yeah. And then just I think we can talk about in a little more detail, termination issues, you know, what the contract says about whether you can be terminated and when and why. And then, of course, a topic which I think is probably the most important, which is what we in the legal business call “restrictive covenants,” which basically are non-competition clauses and I know just from having friends, family who are in the medical field that that’s something that comes up a lot.

[Andrew]: Yes, that’s the moneymaker right there. That’s what the people want to know.

[Ari]: Well that’s what we’re here for, right!

[Andrew]: So let’s dig into that a bit more. So as far as termination, I know like when I look at contracts, I see for cause, without cause, you know, and I know people are always worried like, well, can they just fire me for no reason? You know, especially nowadays with the pandemic the last few years and staffing cuts and stuff. So, like, what is all that? What does that mean and how do we navigate that?

[Ari]: Yeah, that’s a really good question. And I’m really glad that you said “Let’s dig in,” Andrew, because that’s kind of what I say. That’s like my catch phrase in the beginning of every episode.

[Andrew]: We didn’t plan that, we didn’t plan that!

[Ari]: ...I didn’t tell you as the host that you had to say it, so I’m glad you said it. I did not pass my hosting duties on properly. No, I’m kidding. So I think that’s a really good question. You know, a lot of physician agreements are employment agreements generally have these, you know, termination without cause, termination with cause provisions. And, you know, it really depends on what the contract says, Andrew. You know, I’ve seen contracts that have a termination without cause provision that say, you know, there’s usually a notice provision. So like within 100 days’ notice this contract can be terminated without cause by either side. So either the physician can terminate the agreement or the practice or the employer can terminate the agreement without cause, meaning no particular reason. Kind of like consistent with an at-will employment type of relationship. But there is usually, you know, a notice requirement with that. So normally that’s you know, there’s a specific number of days you have to give notice. So if you have, it’s usually called like a termination without clause in your contract. Definitely something you want to look for and be aware of what it says. Because if you want to, you know, end your employment relationship with the practice or the practice is, you know, planning on ending their employment relationship with you, there has to be compliance with that notice provision. So I think that’s important to point out because, I don’t know, for me when, you know, and even in my personal life, if I get a contract and it’s 30 pages long, it’s kind of like when you get to page 28, you’re kind of just like, all right, let me keep, you know, let me keep reading... So I don’t know, I think that that’s something that’s important that your listeners probably would want to know about.

[Andrew]: Yeah, absolutely. I think it’s one of those things, you know, you never take a job thinking about when you’re going to leave the job, but it’s, yeah, most people don’t stay at their first job. So it’s just something that you always got to know about how, how this is going to end, whether it’s, no longer mutually beneficial or if something’s going on, I think you got to know about how the contracts are going to end.

[Ari]: Right. I agree.

[Andrew]: All right. So how about “for cause”? So is that is that because like a doctor did something wrong or how does that work out?

[Ari]: It can be, Andrew, and that’s another good question. This is a very lawyerly answer, so I apologize in advance. But the answer is it depends. So yeah, Andrew, I’ve seen, you know, different types of

examples of what would qualify as termination for cause. You know, the easiest one that comes to mind is, you know, unfortunately, like the death of the physician, if the physician has to go out on an extended leave, for an unknown period of time, you know, if the physician's license, heaven forbid, is revoked, canceled, or suspended...things like that. So I think that probably gives you a good flavor of the reasons that I've seen that are listed for cause. But, you know, one thing I would just say if you're either the employer or the physician group or the physician, is, I would definitely take a very careful look at that because there are... sometimes there are clauses in there that say at the option of the employer or at the option of the group, which is good, sometimes it will say, you know, automatically terminates the employment relationship. And, you know, sometimes there will be opportunities to cure... what we call in the legal world "cure" or fix the alleged grounds for termination. So I think it's really important to take a look at that because it will give you specific reasons. And I think that's important because if there's a reason that's not there, that may be that your employer is saying is a reason that should be grounds for termination. You could have an argument that it's not because it's not specifically in the contract. So.

[Andrew]: Got it. Well, yeah, well, I'm glad you're here breaking this down for us because it certainly can get a little complex.

[Ari]: Yes. And you know, us lawyers just love to wordsmith.

[Andrew]: That's that that is your profession. So like, let's get into the thing that I want to talk the most about. And I think my listeners and my social media following wants to hear about are those non-compete clauses because there's a lot of information thrown around, you know, on the one side, like you should never accept a non-compete clause. And on the other side of things like, oh, don't worry about it because they're not enforceable. So can we talk about those? Because I think there's so much confusion as it relates to the restrictive covenants.

[Ari]: Yes, absolutely. And I'm not surprised that your listeners want to hear about this because I think this is kind of an amorphous area in the law. And just so you know, Andrew, obviously we see this with physician agreements, but this kind of permeates many different fields and professions. So the answer to the question of whether you should never sign a restrictive covenant, what we call a restrictive covenant or a non-compete clause...I don't like to ever speak in absolutes as a lawyer, but I don't think that that's true. I think that there can be non-compete clauses that are beneficial to both sides. And, you know, at the end of the day, and we'll talk about this in a minute, non-compete clauses can certainly be enforceable. So for people who are listening, you know, whether you're on the employer side and you're just... stick whatever in the contract because that's what somebody's told you to do or you're a young career physician, you know, I think you definitely have to read it and you have to take it seriously because it could be enforceable. So I think what you said, Andrew, the two sides of the token, neither of them are right.

[Andrew]: Fair enough.

[Ari]: And as most things we'll probably just find some sort of compromise answer in the middle but, you know, I would like to talk a little bit about just what the enforceability piece of it, if you'll allow me, because I think this is probably what's most interesting to your listeners. So in New York, the general rule is if a non-compete clause is reasonable under the law, it's enforceable. And obviously being a physician, that's a very highly specialized field. So there are some extra considerations when you're looking at a physician agreement as opposed to, you know, a different type of employment agreement. So in New York, you know, there's no particular statute or law that governs this area. It's really all what the courts have said. So that kind of tends to lead to why it's a little bit amorphous. But, you know, we'll dig in. But I just want to briefly tell you the test. It's, you know, basically a non-compete and a physician's agreement has to be reasonable in time, geography, and scope. So we'll talk about what "reasonable" means. That is a word for us legal beagles that's thrown around a lot. It has to be necessary to protect the employer's interests, not harmful to the public, and not unduly burdensome. So

that's the legal test for the enforceability of a non-compete clause.

[Andrew]: Oh, just those things.

[Ari]: Right. So, again, a little bit of amorphous. I think people are probably wondering well, what the heck, Ari? What the heck does that mean?

[Andrew]: I am wondering that.

[Ari]: So, "reasonable in time and scope." Great. So just as an overarching background piece of information, as I just mentioned a couple of minutes ago, you know, physician agreements, the physician field is highly specialized. So this is I think, an area where enforceability is a little bit more likely than other areas... provided what we're about to talk about is satisfied. So I just want to kind of put that out there. So the whole notion of "I don't... I'm just going to sign this agreement even though it has a non-compete clause because it's not going to be enforceable" I think. Let's set the record straight on that. I think that's a very cavalier attitude to have. And if you're hearing, Andrew, anyone say that definitely step in.

[Andrew]: That is a scary mindset, it seems.

[Ari]: Yes, exactly. So let's talk about "time," what's reasonable in time. So you know, again, it depends. Not an answer people want to hear a ton. But if you have a non-competition agreement that has five years in it, that's probably not reasonable in time. If you have a year period of time, that's probably going to be held to be reasonable. If you have six months as a piece in the period of time identified in your non-competition agreement, it's likely going to be enforceable. So, you know, I think five years from what we've seen in what the courts in New York have said is too long, if you're in the year-ish range, like it's probably reasonable...

[Andrew]: Fair enough. I mean, and then anything beyond that becomes somewhere in that middle ground, right?

[Ari]: Yeah. Yeah. I think if you're in the realm of a couple of years, you're in that middle ground. If you're talking more than five years, it's probably not reasonable. It's probably too long. So hopefully that gives a bit of a range as to what would be reasonable.

[Andrew]: Yeah, I've seen a lot of them that are like somewhere...they're usually like one or two years. I don't think people try to be like, oh, you can't work here for 10 years. Yeah, go find somewhere else to live.

[Ari]: You'd be surprised, Because I have seen some with like five, which I think is, is way too long. So geography and this one is a little bit different because if you're talking like 15 to 20 mile radius of where you were working before, that's probably okay if you're talking 100 miles, it's probably not okay. But with the caveat. Well, let me back up. If your non-compete if the non-compete has no geographic limitation, probably not ok. Because it's probably what we in the legal field call ambiguous or not specific enough. And not having any geographic limitation is way too broad. That's how the courts have interpreted it, which I think makes sense. But if you're talking 100 miles, probably way too, too far of a reach from a geographical perspective. With the caveat, though, if you are in a remote area and you know, a large geographic area, it could be okay. So if you're in an area where there's not many physician groups or you're in a hyper super specialized area and there aren't many practices in your area that practice that particular specialty, you're getting a little bit more in the gray area when there are non-competes that cover like a whole city, for example. I mean...

[Andrew]: That comes, I think here in Buffalo, you know, if you get a 30 mile non-compete, that's the entire

city. I mean, there's nowhere else you can work.

[Ari]: Correct! Correct It's very true. That's true. So, you know, whether or not that's reasonable really depends on what specialty you're practicing and also the time limitation, because there are instances in New York where courts have said that non-compete that have a broad geographic reach are okay because the duration was so short. So it's kind of a balancing test. I know that's not a bright line answer, but if you have a very large geographic limitation, but a super, super short period of time, like six months, for example, it could be okay, just depending on what the space, what the geographic region looks like and what the competition is in that area.

[Andrew]: Got it.

[Ari]: So I know that's kind of a little bit weird.

[Andrew]: No, that's helpful though.

[Ari]: You know, with respect to courts considering the employer's interests, you know, if you're in a situation where a practice or a group or a system brought you to the community like a large expense to the practice or to the system, recruited you, moved you here, paid you a sign-on bonus, paid all your moving expenses you know, put you up in a hotel while your house is being finished. I don't know, whatever crazy stuff you doctors get to do, you know, that probably would weigh in favor of the employer because the employer put so much time and energy into bringing you into that community, the system, etc. So basically, if a number of physicians are leaving a group and you know a practice is trying to enforce a non-compete, if enforcement of the non-compete would lead to a shortage of physicians in that particular area, then it's less likely to be enforced. So hopefully, Andrew, that helps kind of explain what the non-competition agreement is and in what pieces and what may be enforceable.

[Andrew]: Yeah, it does. And it really sheds a light on how complex this is. Right. And why you really need to dig into your individual agreement because, you know, an endocrinologist in a rural area that's you know, there are no other ones versus, you know, a generalist in New York City are going to have very different enforceability provisions as it comes to these non-compete. So it really is very specific to the agreement and the physician at hand, it seems.

[Ari]: Exactly. You're 100% right.

[Andrew]: So last thing about these non-compete. What if going back to what we talked about before, what if you're terminated without cause and you have one of these non-compete clauses then what happens?

[Ari]: Yeah, that's a really good question. And again, the answer is it depends. Your listeners are just going to be like, everything depends. And you know what...That's a great takeaway. Because that's 100% accurate as it relates to the law. But in all seriousness, this is you know, this is a good question because some courts have said, okay, well, you were terminated without cause. So your non-competition agreement shouldn't be enforceable. And it really comes down to why were you terminated. You know, as a physician, or as an employer, why did you terminate the physician? Was it actually without cause or was it for cause? Because if it was for cause, you know, it's more likely that a court would, in fairness, enforce the non-competition agreement. So, again, it's just really, really important to take a look at what is in your specific contract and what it says on that issue, because some contracts are silent on that issue or don't say anything about it. And that's kind of when it really becomes an issue. If you have to unfortunately, get into litigation about whether it's enforceable.

[Andrew]: Got it. That makes a lot of sense. Well, I think, you know, it is definitely a very complicated but for some reason, as a whole, physicians have this general distrust of attorneys, even when they're on

our side, for whatever reason, even the ones that are supporting us, I don't understand where it comes from. Like, you know, you're buying a house in your real estate attorney. I don't know. I want to talk to a lawyer. But this begs the question you know, and a lot of doctors for some reason want to DIY and bootstrap things. But when it comes to contracts, should they be getting a lawyer? I mean, I think I think I know your answer and you may be slightly biased, but yes?

[Ari]: 100% yes. No, I'm just kidding. You know, it's kind of like the same thing. It's like for me, like, you know, if I'm sick, I go to the doctor. If my car needs work, I go to a mechanic. You know, if you're a doctor and you got to look at a contract, just get a lawyer. It's the same thing. It's complicated. And there are so many nuances, as we've talked about in so many facts, specific answers to certain questions. So I would just definitely say, yes, you know, you don't want to be in a spot where you're unfortunately, you want to leave a group or a practice, wants to terminate your relationship. You don't want to be in a spot where you don't know what your contract says and then you're kind of in the lurch.

[Andrew]: Yeah, that makes sense. And even just these non-compete we talked about, like, Ari practices law in the state of New York, if you're listening from outside of New York, that could be totally different. And an attorney would know in more state-specific provisions as well. And you know like she said, you know, if you're water pipe breaks, you're going to call a plumber. So get a lawyer, get someone to look at it for you. It doesn't have to be scary, but I think that's a great takeaway message.

[Ari]: Yes. Well, Andrew, thank you so much for joining us. Thanks for interviewing me. That was a little different, but I liked it, hopefully I didn't drone on too much...

[Andrew]: No, that was great.

[Ari]: Thank you. And hopefully this is you know, this is very helpful to your listeners and to our listeners. Thanks so much for tuning in. Join in for our next segment, where we tell you what to do when the Department of Labor is knocking at your door. You don't want to miss it. Thanks, Andrew.

[Andrew]: Thank you.

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