



Episode 49 Giving Notice and Non-Competes

With guest Jon Appino

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HF: Ouch.

JA: That's it.”

HF: Welcome to The Doctor's Crossing Carpe Diem podcast. Welcome to The Doctor's Crossing Carpe Diem podcast. If you're questioning your career in medicine, you've come to the right place. I'm Heather Fork, a former dermatologist and founder of The Doctor's Crossing. As a master certified coach, I've helped hundreds of physicians find greater happiness in their career, whether in medicine, a nonclinical job, or something else. I started this podcast to help you discover the career path that's best for you and give you some resources and encouragement to make it happen. You don't need to get stuck at the white coat crossroads. So pull up a chair, my friend, and let's carpe that diem.

Hello, hello and welcome back to the Doctor’s Crossing Carpe Diem podcast. You are listening to episode 49. Today I'm thrilled to have my first repeat guest. When my podcast editors heard his voice on our initial podcast, they said, enthusiastically, he's got a great voice for podcasting.

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JA: Oh, my goodness.

HF: I couldn't agree more. You may remember him. His name is Jon Appino and he joined me for episode 28 on contract negotiations. He's the founder of the nationwide company Contract Diagnostics that helps physicians understand and negotiate their employment contracts.

Today we're focusing on two specific aspects related to your contract. The time required for giving notice and restrictive covenants. Jon is going to help us look at what we should be aware of regarding these two aspects when you're signing a contract as well as when it comes time to turn in your resignation and part ways.

He's also going to touch upon the executive order by president Biden regarding restrictive covenants. It's my great pleasure to welcome Jon Appino back to the podcast. Hey Jon, how are you?

JA: Hi, I am doing great. Thank you so much for having me. It's always a pleasure. And it's funny you say that about my voice. I'll listen to one every once in a while, just so I can learn from the podcast. And I think I sound idiotic and ludicrous. I'm glad that you and other folks think that it sounds good. But I'm looking forward to digging into the topics that you brought up that are fantastic and super, super important that people understand, notice how to do it proper ways, how negotiable it might actually be. And then of course, restrictive covenants - non-competes are some of those things that impact physician's lives in a very, very interesting way from time to time. So, we will definitely get into that as well.

HF: Wonderful. And just embrace your voice. It's so rich and so deep, it has so much character. And that laugh, that laugh is to die for. So, I'll be a listener when you start your own podcast.



JA: Oh, gee. I would much rather be a guest than do it on my own. I know how much work goes into making these and producing these for your listeners. And so, I appreciate the ones that I get to listen to how much effort goes into it from their end. And so, thank you for having a great podcast and allowing us to be on it. It's special. For sure.

HF: Oh, you're welcome. It's my pleasure. Well, let's start with, let's say an example of a physician who's about to sign a contract. There is a required notice that they have to give, and then there is a restrictive covenant. Can you talk about those and define them a little bit for us?

JA: Yeah. Term and termination are items that are defined, I would hope anyways, in a physician contract. Sometimes they're connected. They're in the same section, term and termination. The term, like the length of employment. The contract is one year. The contract is two years. The contract is two years and automatically renews. It starts in September or whatever.

Understanding what the definition of the term is, is important because that may play into the termination of the contract as well. Once we have a defined term of the contract, again, it could be one year, it could be two years, it could be just indefinitely. It could say the term starts on September 1st and goes until it's terminated from Section 5. And then you go to Section 5, it says termination.

It's super, super important that we understand these things because this is how the relationship could end. Obviously, the relationship could end. You talked about giving notice, but there are other aspects of that termination clause that can be important that the physicians need to understand.

If there is something in there about an immediate termination, these are very common. Immediate termination usually includes items such as the inability to work. Of course, something like death or disability permanently, losing a license or being convicted of a



felony, being unable to obtain Medicare reimbursement or being on staff at the hospital. If those things happen, of course, the physician and his or her skillset is not able to be utilized as much. Of course, the employee would terminate the physician in that instance.

Of course, a breach of contract is also a terminable cause. There could be, if you violate the contract, it might take 30 days, it might take 60 days for a remedy period to go by. And if the breaching party doesn't cure, then the non-breaching party could terminate or fire if you will, the other.

But when we talk about giving notice, like you mentioned, that would be what I would call the no-cause termination. It's no cause. That's exactly what it is. It's no cause. We see these in about 97% of all physician contracts that we review. Of course, they're very common if there isn't one in there that would almost be a red flag. We see no cause for terminations in independent contractor agreements, 30 days or 60 days. That's the notification period.

So, if a physician wants to leave the employment, they're obligated to give the employer 30 days or 60 days to say "Hey, thank you so much for everything. I'm going to move on to a new opportunity". The employer can usually do the same so the physician can terminate the contracting entity and an independent contractor deal.

For an employed physician, joining a hospital system or a group as an employee, we usually see 60 or 90 or 120 days for the no-cause termination. If we saw 30 days in an employment contract, it would be a red flag. Oftentimes, we do see longer. We might see 180 days. We've seen up to a year in some situations, but usually the no-cause termination is 60 to 120 days. 90 tends to be the gold standard.

We might see longer in the case of a physician in a hard to recruit area, one of those rural areas, or even a highly trained subspecialist. We saw a neurosurgeon that had one

year. It was like a subspecialty trained neurosurgeon. And this individual was required to give a year just to terminate without cause which we of course thought was excessive. I don't know if his next employer will be willing to wait one year to obtain his services.

HF: I know, it makes it really difficult. Even 120 days can be difficult because what I'm seeing in the nonclinical realm is some of these companies would like the physician to come yesterday. They're like, "Can you get out of this? We would like you in less than 30 days". Let's say a physician has 90 or 120 days and they have this job offer. How should they approach this?

JA: Just like you can negotiate into a contract, we feel that you can negotiate out of a contract. Some contracts do contain clauses that say, you need to give us 90 days. And if you give us less than 90 days, you owe us maybe a dollar rate per day, right. \$2,000 per day, less than 90 days. So, if your contract was specific on a damage like that and your next employer is saying, we need you in 30, or we need you in 60, of course, all of its pending credentialing at that employer and being on staff, if of course, it's a clinical role.

And if you wanted to say, "Look, I can get out of this thing in 30 days, but it's 60 times \$2,000 that would need to be paid to my current employer". And that's not the negotiation. That's just complying with the terms. And your future employer could or could not choose to pay that on your behalf.

Now, another way that you could go about it, if you didn't want to follow the terms of the contract is you could negotiate out of it with the employer. Depending on the situation, again, we're assuming it's a no-cause termination. There's no cause at fault by the employer for you leaving, which you could get out earlier because they're violating the contract on how much call they are obligating a physician to take or schedule or something like that.

If you want to negotiate out of a termination notice period, we definitely think that is possible. And sometimes it all depends on the frame. Maybe you are willing to offer to help train the next person. Maybe you're willing to help interview the next person. Maybe you know somebody that you can bring in and you can give them high grades on the employer, if you wanted to shorten it up. Maybe you would be willing to give up a bonus or maybe you would be willing to pay a certain amount to get out and to get it negotiated.

HF: Yeah. So, what you're basically saying is don't just make the assumption that you're stuck or that you have to serve that "time", but you could consider having a conversation and seeing what is important to them and not make assumptions about that.

JA: Correct. Yes. And we've seen lots of success with physicians negotiating their way out of a contract, which again, it could be you negotiating for less of a time. They demand that you give 180 days, but you only want to give 120 or 60, or it could be the reverse. You need to give 90, but you're willing to give them 120 or 180, depending on your next position.

We have many stories here where a physician might be obligated to repay a signing bonus or a relocation amount or a student loan payment that the employer gave on the physician's behalf to start the position. And they're leaving early. The contract was three years and they're leaving after one year. So, they need to pay back some dollars.

We have seen people negotiate out of repaying that by sticking around longer. So, instead of giving them 90 days, they could say "I'm willing to terminate in 120 days or 150 days. And I will keep taking calls and I will keep my patient volume". Of course, you'll keep your benefits and your salary. And then you forgo having to repay those dollars. Or you could ask them to forgive insurance or pick that up.

Just like we could negotiate a shorter timeframe that would be beneficial to the physician, we could negotiate a longer timeframe, which would be beneficial to the employer. And you sometimes have more negotiating capital in that situation. Again, depending on your next employer and when they're looking at expecting you to start working, that might be an option for something that a physician could kind of sweeten the deal, if you will, on the way out with what they're willing to do.

HF: Yeah. Yeah. There is flexibility in these different features. And so, it's always good to have a conversation. I just want to back up for a minute here on the signing end of the contract, say it's 120 days required notice and you just feel like, "Oh, that just feels like so long". How successful have you seen physicians negotiate that amount of time to be less?

JA: I think it varies by employer. If it's a large hospital system that has a standardized contract, maybe less successful. If it's a smaller private practice, I think there might be more flexibility in a situation like that.

HF: So, it's definitely something that you can address if it's a concern to you.

JA: Yes, absolutely. Yeah. And you might have to give something up. Of course, negotiations are about give and take. So, if they're willing to give something to you, you might be willing to give something back in return.

HF: Excellent. Now we're going to come back a little bit more about this leaving and giving notice. But before we do that, I want to talk about the restrictive covenant piece. Some physicians aren't exactly familiar with that term.

JA: The restrictive covenant?

HF: Yes.

JA: Restrictions, restrictive covenant, non-compete, as a lot of people might be more familiar with that term are basically restrictions on what you can or can't do oftentimes during the term or usually during the term, but most commonly after the term as well. So, what can you do or not do after the employment ends as far as providing services that you're doing for the employer?

HF: And often they'll have a restrictive covenant where they cannot see patients in another organization or practice for a certain number of years, it could be two years and a distance from the practice could be 5 miles, it could be 10 miles, sometimes even 30 miles. And this can really impinge upon what you're able to do when you leave.

JA: Yes. Not being able to compete with the employer, of course, says you can't work. So, if a physician has a non-compete, they usually need to be time-bound. For so many months or so many years and geographically bound for so many miles or in such a county or multiple counties, the physician cannot perform professional services. If you have a 10 mile non-compete from your primary office, you cannot work for one year or two years for 10 miles within your hospital. Again, based on a radius as the crow flies, not Google driving, of course, roads aren't straight lines.

If it's from any facility that you work and if you have an outreach clinic, it could be more catastrophic. If it's from any facility the employer has, it could be from 20 locations, even if you've never stepped foot in that office. If you're a surgeon, there's a primary care office 20 miles away.

So, we need to be very careful how these are worded, because if you live in even a big city like Houston and you have a non-compete that's 15 or 20 miles from three different locations, it can mean you've got to relocate out of the Houston Metro area for crying out loud. So, they're super important as far as understanding them, on what you can and can't do, and then how they play into the determination of the contract.



HF: Right. And it is significant. It's fortunately not usually an issue, if a physician is going into a nonclinical position because they don't care if you go and do something like that, they just don't want you competing for patients. However, it can be devastating if that's your primary way to earn money and you have a family and the kids are in school and you don't want to relocate.

JA: Yeah. And we do see them. Again, not just in medicine, you see them in the tech industry. If you work for a tech giant or social media company, you can't go work for the other. We do see them in pharmaceutical industries or in the biotech industries where a physician doing nonclinical medicine or nonclinical work could be subjected to a non-compete. We see them in lots of different areas that could impact a physician who does not just practice clinical medicine. Even in the leadership role with an organization who doesn't see patients, they could still be impacted by a non-compete.

HF: Yeah. That is a great point that you make about, look at your nonclinical contract as well so you're not limited. Do you want to just speak briefly about this executive order by president Biden and whether that could work in favor of physicians?

JA: Yeah. I'd love to. I believe it was early July as president Biden is talking about making the country more competitive when it comes to workers and when it comes to companies. How do we have healthy competition among everybody? And one of those things, of course, that could impact companies growing and people leaving is non-competes.

And so, one of the items that was published was a potential executive order to eliminate non-competes, which of course would impact anybody under a non-compete, whether you work for Apple and you can't go work for Google, or whether you work for hospital A and you can't go work for hospital B or vice versa, if you are in a nonclinical career.

So far nothing has been formally done with it. I don't think that he's going to be able to just do a sweeping policy around non-competes and say they are unenforceable. There are already certain states that don't allow non-competes like California and Massachusetts. And there are other states that have varying policies, but I don't think there'll be anything from a federal level that he'll be able to push through, which means that understanding these things and items in your physician contract is going to be super important.

HF: And just a quick question, that is often asked when a physician wants to leave and has one of these honourous non-competes is how likely am I to get in trouble if I don't honor it?

JA: Great question. Again, it all depends on the individual contract terms, but some contract terms will say that the employer does not even have to go to court to prove that you violated it. You could be agreeing to damages when you sign the contract. It could be called liquidated damages where it says, if you violate the non-compete, the hospital doesn't need to really prove anything. You are agreeing to pay them a defined rate. You're saying, "I have damaged you. I'm agreeing to that by signing this contract. And let's agree that the damages are blank". And those are usually defined in the contract. Heather, they're usually defined at one time your W2 earnings.

HF: Oh, that's a lot of money.

JA: It's a lot of money. You have a physician who makes \$200,000 or \$300,000 a year. And it says, if you breach the non-compete, we will send you a bill for \$300,000.

HF: Ouch.

JA: That's it. We don't need to even go to court. And so, it's important to understand those types of clauses in contracts. Could you negotiate it to \$50,000? Maybe. Could you

negotiate it out and say, “We're going to go to court to figure it out”? Maybe. Does the state that you are going to have a particular provision? Maybe. These are all things that a physician should take into account as they are going through their contracts.

HF: I've had some physicians say, “Well, so and so left early and they didn't do anything to them”. And so, they think, well, that might help me have some confidence. But you just never know. And ideally, you don't want to have to take that risk if you don't have to.

JA: Yeah. I think it's important to know. And when we coach physicians on understanding their agreements, we always want to coach them through asking questions exactly like that. Is the non-compete the same for everybody? Has anybody ever violated it? Have you ever let anybody out of it?

And just by having that precedent, I think it is important if you are going to terminate the contract and there is something that you might want to inform them of as you go to terminate the contract. But it's also on how the contract could end. If the contract ends by the employer's no cause termination, that's not your fault. And maybe it shouldn't be enforced. So, there are others that we could say should or should not be enforced based on how the relationship ends. If it's your fault or not your fault, I think there is a fairness doctrine in there, that you could negotiate upfront as you are signing your contract as well.

HF: Yeah. Well, these are great points and I'm sure some physicians may be going to revisit their contracts. It's good to know upfront. So, let's shift gears a little bit and move to this scenario where a physician is ready to give notice. And a lot of times I hear these questions, “How do I exactly do this? Do I plan a meeting with my manager or my boss and tell them then? Should I send it in an email? What exactly do I need to put in a resignation letter?”

JA: Yeah. Another great question. Oftentimes contracts will be specific. There might be a section called notice. Should you want to give notice of anything in the contract, such as the no-cause termination, here's the formal way to do that. And sometimes it'll say you need to deliver a letter to this particular address with a copy to this particular lawyer and it needs to be signed for, or it needs to be sent through the US mail system or electronic mail or email, of course, is acceptable or it's not acceptable.

Sometimes the contract will say specifically, here's how you have to do it. Of course, it can say, you need to give us 90 days. And the contract says any notice needs to be in writing, delivered by US mail. You can't just send a text message to your boss to say...

HF: Hasta la vista.

JA: Hey, here's my 90-day notice. Right?

HF: Yeah. See you.

JA: So, it's important to understand if there is a specific way per the contract. And of course, if you need to take it into account, what else happens? Is there a non-compete? Do you need to buy your tail insurance? Do you have to repay any provisions of a signing bonus or a relocation amount?

Again, if there is written notification that needs to be given, which is almost always the case, I think a letter that just says to whom it may concern and I think you'd be brief.

HF: Short and sweet. You don't need to give a whole bunch of reasons.

JA: I think you can just say "I've had a wonderful time working here. Thank you so much for the great experience. I am going to be terminating my contract per section 9.2 or

whatever it is. This is effective. My 90-day notice will be final. We'll start today and we'll end on this day. So therefore, my last day will be this day.

I realize I have a non-compete for "blank". I realize I have tail insurance or I have to repay the money. And if you wanted to put on there that you are willing to give longer notice, like we talked about earlier, you could even say, "I'm willing to increase the notice period based on a mutually agreeable date in the future and subject to potential negotiations on the above".

That kind of tells them, "Hey, I'm willing to wait around and terminate in the 120 days instead of 90 days, but I'm not going to give you the \$20,000 back for my bonus.

HF: Yeah. I really like that you bring up that, just be short and sweet. You want to acknowledge and appreciate the opportunity. Write in that date, so it's written, and then you're done. It doesn't even have to include reasons why you're leaving.

JA: No, I think it's better if it doesn't. I think if there's an exit interview, that's a place for those types of things. I think if a physician has grievances, they can request an exit interview. But I don't think that putting those in a termination letter "I feel disrespected. I feel like I'm not being paid fairly". Those things may all be factual and true but having that in the termination letter, I don't think any benefit can come from that.

HF: Absolutely. And if you need to express those things, write them out, just don't put them in that letter, but it could be things to bring up with your manager when you leave. I've had clients who have conversations where they really were able to express these things and knew nothing was going to change at that point, but they felt like it was necessary for them to say some things.

JA: Yes. You can always request an exit interview through human resources, depending on the size of the organization you're working with. If there are items that you feel would

need to be brought to the attention of human resources or of management or somebody else.

HF: You mentioned something that I want to pick up on briefly as one of the last things we talk about, which is potentially agreeing to stay longer. I've had a couple of situations where physicians were only required to give 90 days. However, they like the people they work with. They know they're in a remote area, it's difficult to recruit. They might even know that there's a candidate coming when they finish their residency six months later. So, they'll say, "Well, should I offer to stay six months? I feel guilty." Do you think they should offer and then they're committed? Or how do you deal with that? Because it's possible that in three months they may have a job offer or they may just have changed their mind. They may feel differently, but then they're locked in.

JA: Yeah. I think if they wanted to do something like that, that's fantastic. I think it can be a negotiation. Maybe right now you're not paid for calls, but you decide to get paid for calls because you're helping them out. Depending on your next position and when it starts, you can even ask for permission from your next position to work part-time and continue to help out taking calls at your last facility or to do telehealth in your spare time and get compensated for that, depending on the role.

I think you can definitely offer many ways to continue to be of service to the community and the employer that would be mutually beneficial for both yourself and the employer and community so long as it lines up with your timelines, with your next position. And so long as your next position, if you do have a clause in there prohibiting outside activities that you of course gain approval from them, for outside activities, such as remaining employed or contracting with your current facility.

So, you can contract with them to take calls, to do telehealth. You can contract with them to work two days a week, or on a block fashion if you're a hospitalist, a week here

and a week there in between your other weeks. There are all kinds of options that you could come up with as far as finding a happy medium.

HF: Those are fantastic suggestions because you raise this point of you don't have to just say, "Okay, I'll stay longer". You can see if there might be some perks in it for you. There might be some flexibility in what you're doing when you're staying, it doesn't have to be exactly what you were doing.

JA: Yeah. And like I said, maybe you say, "Look, I'm a hospitalist. And my current rate is say \$1,500 a day. Well, I'm willing to continue to do that through the notice period. And then once I start my next position, I'm willing to help out four days a month or seven days a month, instead of you having to pay locums to do it". Because they know you and maybe they would pay a locum \$2,500. And so maybe if they're gonna pay a locum \$2,500 and your rate is \$1,500, maybe they give you \$2,200. So, it's beneficial to you. They save money. The staff and the patients already know you because you've been there for one year, two years or five years. So, it's a benefit to everybody to come to an agreement like that.

HF: I have to say, Jon, I think you're a negotiating ninja. You really do- your mind naturally goes to these things of "What's in it for them? What's in it for me? How can we be creative and think about this and not be locked into a rigid structure?"

JA: Yeah. Well, we've been doing this for a long time, Heather. So, we've got a lot of stories that we could tell.

HF: You're the man, you're the man, Jon to go to for the negotiation. This has been really fun. I'm so glad we got to dive into these two topics that come up a lot because I talk to a lot of physicians who are giving notice. So, how can folks get in touch with you if they'd like some help with their contracts?



JA: Well, just typing “Contract Diagnostics” into any search bar you'll easily find us. Our website is contractdiagnostics.com. If they want to call me directly, my direct line is 816-288-3312. And my email is jon@contractdiagnostics.com. We have lots of ways they can get in touch with us on the website. We have free consults they can sign up for. They are 15 minutes long. We have free educational evening lectures. We just gave one last Thursday. I think we have another one on October 4th, maybe or so, or 7th. And these are just free. It's online. Bring your questions. We don't market anything to them.

We usually have 20 people on them and they're fantastic. Non-branded, non-salesy stuff. It's not about the company. It's about information. There are all kinds of stuff on our website that they can find. A great blog and everything else. They can find us in lots of different ways and we'd love to connect with anybody and do whatever we can to help them. Find questions, if it's just informally, answering questions on a phone call or whether it's formally doing a traditional contract.

HF: Oh, wonderful. And we'll make sure to have all of your contact information in the show notes so folks can find you and benefit from your services. I think they're very affordable and it could help you save thousands and thousands of dollars and also some agony from signing something you really don't want to.

JA: Yes. Lots of headaches potentially and lots of anxiety on how do you ask this. So, what do I say? Yeah, we'd love to help. It's always a pleasure. Thank you again for having me on, Heather.

HF: It's been so much fun, Jon. I hope I get to meet you in person sometime.

JA: That would be fantastic.



HF: Yeah, it would be. It would be. So, give me a shout-out if you come to Austin, but until then be well, thank you again. And for my listeners, don't forget to carpe that diem and I'll see you in the next episode. Bye for now.

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Podcast details

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