AAHKS
AMERICAN ASSOCIATION OF HIP AND KNEE SURGEONS

AAHKS Physician Unionization Primer

Orthopaedic surgeons are facing unprecedented negative pressure on multiple fronts: compensation, consolidation and autonomy. Currently, orthopaedic surgeons are prohibited from collective bargaining with CMS/Medicare or private insurers due to Federal anti-trust laws. However, as healthcare services are increasingly consolidated into corporate systems, physicians with a common employer are unionizing to negotiate with employers including hospitals, ASCs and large private groups. Physicians have pursued unionization to address loss of autonomy, deterioration of working conditions, compensation and benefits. Despite the potential benefits, there are several concerns regarding the limitations imposed by unionization and the possibly deleterious unintended consequences. This serves as an informational primer for the membership as they may weigh their options in a challenging health care environment.

A union is an organization that exists to represent bargaining unit employees in dealing with their employer concerning their terms and conditions of employment, including compensation, benefits and working conditions. The National Labor Relations Act (NLRA), as administered by the National Labor Relations Board (NLRB) governs union representation and collective bargaining for physicians employed by Health Care Employers (HCE).

Unionized physicians are empowered to collectively negotiate the "terms and conditions of employment" with HCEs. This is broadly defined by the NLRA to include wages, hours, benefits, work rules and disciplinary matters. Unionized physicians are typically limited to negotiations with only HCEs and do not have the legal right to negotiate with private insurers or Centers for Medicare and Medicaid Services (CMS). Although physician members may be involved with the union's bargaining committee or hold union professional staff appointments, the union ultimately decides who participates in collective bargaining.

In order to obtain recognition as the bargaining representative for a unit of physician employees, employees constituting an "appropriate unit for bargaining" petition the NLRB via an existing union (i.e., American Federation of State, County and Municipal Employees (AFSCME) and Service Employees International Union (SEIU)) for an election to vote for representation. Currently, in the acute care hospital setting, rules limit certification to representation of "all physicians", thus a bargaining unit composed of only orthopaedic surgeons would likely not be recognized. However, there have been recent instances of single-specialty practices successfully gaining recognition and unionizing to negotiate with HCEs.

Representation by a union is limited to physicians employed by private (non-governmental) entities: hospitals, ASCs and independent practices including faculty practices, or other health care organizations. Faculty and private employees may organize to negotiate with the employing entity. However, physicians who are independent contractors or consultants paid on a 1099 basis, supervisors and/or members of HCE management, and those having only staff privileges are not eligible for representation. Supervision of PAs and other staff is not considered exclusionary as management for purposes of unionization.

Within the union, members have the right to vote on union leadership and are typically able to vote on collective bargaining agreements. The union has a duty of fair representation to members and can

establish their own rules concerning dues and fees. Unionized physicians gain the collective ability to negotiate the terms and conditions of employment with HCEs and the opportunity for representation in connection with disciplinary matters. However, concerns and hesitancy to join a union may arise due to the potential loss of the ability to directly negotiate with HCEs over terms and conditions of employment. Additionally, most collective bargaining agreements (except in “right to work” states) require union dues/fees as a condition of employment and are required to comply with the union’s rules for members (including compliance with instructions to strike).

There are several contemporary examples of successful physician unionization. The Doctors Council, an affiliate of SEIU, represents a group of physicians employed by the Departments of Health and Welfare of the City of New York as well as physicians employed by academic medical centers and staffing organizations. The Doctors Council has expanded from New York to Illinois, New Jersey and Pennsylvania, where it represents physicians employed by academic medical schools, hospitals, professional corporations and national corporations.

The Union of American Physicians and Dentists, affiliated with AFSCME, is perhaps the largest physician union representing practicing physicians working for the State of California, California counties, non-profit health care clinics and for private practices. Recently, a group of hospitalists in Washington state was able to align with the UAPD to become the first physician union to obtain joint-employer status. This has cascaded into more physicians in the region filing for unionization.

Orthopaedic surgeons are again placed in the difficult position of advocating for not only themselves and their careers, but for the care of their patients. Efforts to engage with CMS and HCEs on the individual and association levels have been overall met with significant resistance. Physician unionization is increasingly prevalent and offers the potential to improve compensation, maintain autonomy and resist consolidation, however concerns persist regarding unforeseen consequences that may further hinder practice.