

Physicians' Guide to Reviewing and Understanding Employment Agreements

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The Purpose of an Employment Agreement: Employer's View

We need to establish our preferred rules governing:

- Our employees' day-to-day practice;**
- Our financial obligations to a physician;**
- How we can deal with a problem physician (including termination of employment); and**
- What happens after a physician is no longer employed.**

The Purpose of an Employment Agreement: Physician's View

How much do I make?

Thinking like an Employer: Before You Sign

- **Read and understand your contract**
 - Every part of your contract is in it for a reason
 - Hire an attorney to assist your review
 - Ask questions and get answers
- **Visualize your practice as described in your contract**
- **Focus on what happens when things go wrong**
 - Both employers and physicians tend to ignore their agreements when things are going well.
- **Read your contract as if you are unhappy and want to leave. Will you be able to manage departure?**
- **Get and keep a copy of your contract.**

Thinking like an Employer: After You Sign

- Promptly review any written communication that you receive from:
 - Your employer;
 - CMS or commercial payors;
 - Board of Medicine or other governmental entities
- Provide proper notice when making a change
- Understand the post-termination provisions of your agreement before making a change

The Basics: Compensation

Compensation:

- a. **Salary, with or without bonus potential**
 - Bonus can be production-based or fixed

- b. **“Pure” production models**
 - You are paid based on your productivity (adjusted charges or collected revenues less allocated expenses)
 - Your production will be negative for the first several months of practice
 - Avoid pure production models during first 2-3 years of practice

- c. **Compensation based in whole or in part on third party payor incentives**

Compensation (cont.)

Watch for and understand the following:

- 1. Can your employer change your compensation or your compensation model without your consent?**
 - a) Negotiate for “herd immunity.”**

- 2. How do third party payor incentive programs affect your compensation?**
 - a) Government programs like MIPS and advance payment models will increasingly affect physician compensation**
 - b) Commercial payors are following suit with coordinated care programs, “value based” care initiatives, and similar P4P incentive programs**

Professional Liability Insurance

- **Your employer should pay for coverage**
- **Usually written with “Per Incident” and “Annual Aggregate” limits**
 - **Know the professional liability cap in your state (if applicable)**
 - **Ensure that you are ensured (i) to the cap, if applicable, and (ii) at the same amount as other physicians in your practice**
- **Know and follow your employer’s reporting procedures, if any**

Liability Insurance (cont.)

Two Types of Professional Liability Coverage:

(1) Occurrence-based Coverage

- Covers a specified period of time, regardless of when a claim is made
- Expensive; Uncommon outside of health systems

(2) Claims-Made Policies

- Coverage is contingent upon a claim being made within the policy period
- Know your “retroactive date” and make sure your coverage is appropriate
- We will discuss “tail” coverage later

Termination

- **Employment agreements generally end in one of two ways:**
 - **Termination with Cause**
 - **Termination without Cause**
- **Understand what constitutes “Cause” and negotiate for the right to cure any breach that can be cured**

Other Cautions

1. **Avoid or limit indemnities whenever possible**

- a) An indemnity is an agreement that you will pay any costs or expenses that result from your acts or failures to act
- b) Your employer should insure against such losses and not look to you personally

2. Understand other payment/repayment obligations

3. Buy-in Provisions (for non-institutional practices)

- a) Ask for specifics and include anything that is critical to you in your agreement

4. Restrictive Covenants (non-competes)

- a) We'll discuss how these work later – be sure you understand and can live with the terms
- b) Remember that restrictive covenants are active during employment, as well

Due Diligence: Kicking the Tires

Ask questions about practice organization:

- How is the practice organized? Is it owned by a health system, health plan-affiliated, or private?
- How old are the partners / shareholders?
- Who last made partner? On what terms?
- How is call shared? How is holiday coverage apportioned?
- How (and how much) are partners compensated? What are regional averages in your specialty?
- Are the younger physicians happy? How many have left? When? Why?
- Do the practice physicians own other businesses or property used by the practice?

Due Diligence (cont.)

Ask questions about your employer's planning:

- **Does the practice have a long-range plan? What is it?**
- **Is the local health system purchasing physician practices? Does the practice compete with local system-affiliated practices?**
- **Is the practice happy with its electronic medical record (EMR)? If not, why not?**
- **Where is the practice in MACRA transition?**
- **Does the practice participate in government/commercial insurers' coordinated care/P4P initiatives? What has its experience been?**

Other Thoughts about Being a Successful Employee

- 1. Know the rules, ask questions, confirm in writing**
- 2. Don't ignore bad news**
 - a) Ask for help if you need it**
- 3. Be careful with email**
- 4. Be careful with text messaging**
- 5. Be careful with social media**

Terminating your Agreement

- **Review your contract before you do anything.**
 - Walk through the post-termination effects of your contract
- **Don't rely on verbal agreements to waive contract terms.**
 - If someone tells you “don't worry about that,” you should worry about that.
- **Hire a lawyer to help you.**

Post Employment

- **Watch for three things (maybe four):**
 - **Restrictive Covenants**
 - **Repayment Obligations**
 - **Tail Coverage**
 - **(and any other obligations that continue after your relationship is over)**

Restrictive Covenants

The Employer's Purpose: To prevent you from building a patient base, then leaving and taking your patients with you to a second employer or to your own practice.

General Prohibition: the physician may not practice medicine

- in competition with his/her employer
- within a defined area
- during or after employment
- (if after) for a set period of time

Restrictive Covenants

Physician non-competition agreements are enforceable in most states.

How is a covenant not to compete enforced?

1. Injunctive Relief (the court orders you to stop)
2. Money Damages (the court orders you to pay your former employer)
3. “Later of” Clauses
4. Awards of Attorneys Fees and Costs
5. Loss of Tail Coverage and other post-termination benefits*
6. Chilling Effect on Prospective Employers*
7. Expense and Uncertainty*

***Note that these can occur even without litigation**

Non-Competes: What are your options?

Before you sign:

- **Review with counsel and understand the restrictions**
 - **Ask yourself: can I live with this? Can my spouse live with this?**
- **Negotiate limitations**
 - **Mutually exercisable buy-outs are sometimes possible**
 - **Not applicable, or more limited in scope, if employer terminates without cause or physician terminates with cause**
 - **Hospitals may agree to restriction on employment by other health systems / large competitors but not by independent or small group employment**

Non-Compete Options (cont.)

After you sign:

- Review and understand before you take any action to end your relationship
- Consult with counsel before terminating employment
- Plan ahead

- **Once again: KEEP A COPY OF YOUR CONTRACT**

Tail Coverage

Extended Reporting Endorsements

- a.k.a. “tail coverage”
- provides coverage of prior acts following termination of claims-made insurance
- Negotiate for cost-sharing. Your employer enjoys some benefit from tail coverage and cost-sharing is becoming more prevalent
- Negotiate permission to maintain continuing claims-made coverage (generally only possible if you move within the state)

Phase 3: Other Post-termination Items

- **Observe any notice periods**
 - e.g., notice required for termination
- **Watch for other contract provisions with post-termination effects:**
 - **Confidentiality provisions**
 - **Repayment obligations**

Final Thoughts

- **Get and keep a copy of your contract and other practice policies**
- **Walk through the termination of your contract before you sign it and before you end it**
- **Avoid / understand contract language that makes you personally liable for claims or requires to you to repay money**
- **There are no handshake agreements**
- **Hire an attorney to review and advise**

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