

Employment Contracts: Guidance for Physicians

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Employment Relationships: 3 Critical Areas

Think of your employment relationship in 3 phases and review your contract with these in mind:

- 1. Understanding the rules going into the relationship, both within and outside of your employment agreement;**
- 2. Living with the rules during your employment; and**
- 3. Ending your relationship successfully.**

Opening Thoughts

- Focus on what happens when things go wrong.
- Both employers and physicians tend to ignore their employment agreements when things are going well.
- Don't be afraid to ask questions.
- Consider hiring a lawyer to review your agreement.
- 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.**

Phase 1: Entering an Employment Agreement

Read and understand a few basics:

- **Term**: How long does your contract last?
- **Description of your obligations**: How much discretion does your employer have to change your duties?
- **Record-keeping / billing / coding requirements**: Avoid promises that make you personally liable for errors.
- **Representations and Warranties**: Make sure these are accurate. Correct any inaccuracies before signing.

Phase 1 (cont.): 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**

Phase 1 (cont.): Professional Liability Insurance

The Basics:

- 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)
- Review other state-specific requirements or programs (plaintiffs’ lawyer blogs are a good source of basic information)
- **Get and keep a copy of the policy or Acord 25 form (sometimes referred to as a “face sheet”)**
- 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

Phase I: 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 should not look to you personally

2. Understand other 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 in a Medicare ACO, Advance Practice Model, or Clinically Integrated Networks? Is it participating in other coordinated care initiatives?**
- **Does the practice have an electronic medical record (EMR)? If not, where is it in the transition to EMR?**
- **Where is the practice in MACRA transition?**
- **Does the practice participate in commercial insurers' coordinated care/P4P initiatives? What has its experience been?**
- **How has the practice been affected by health reform?**

Hospital Employment of Physicians

- 1. Watch for changes in compensation structure in later years of contract**
- 2. Include description of services and limits on hours**
- 3. Recruitment Assistance and Salary Guarantees**
 - a) Watch provisions that trigger repayment obligations. Should be an employer obligation unless you breach.**
 - b) The practice should not restrict your ability to remain in the hospital service area following termination**
 - c) Understand how debt forgiveness works**

Phase 2: During Employment

- 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**

Phase 3: It's Not Me, It's You (Ending the Employment Relationship)

Employment agreements terminate in 3 ways:

- 1. Expiration (this is rare);**
- 2. Termination with cause (more common but still rare – 5-10%);**
- 3. Termination without cause (most common).**

Phase 3 (cont.): Termination

Termination with “Cause”:

- (1) Material breach / failure to comply with policies of Employer;**
- (2) Failure to maintain license / privileges / Right to Participate with Medicare and/or Medicaid;
- (3) Felony or “moral turpitude;”
- (4) Loss of insurance (vs. insurability);
- (5) Disability / Substance Abuse;
- (6) Inaccuracy of warranties / representations;
- (7) **Failure to meet clinical performance measures.****

****Contract should give you the right to cure, and you should have copies of applicable policies and performance measures.**

Phase 3 (cont.): Termination

Termination Without Cause: *This Agreement may be terminated by either party without Cause upon ninety (90) days' prior written notice to the other party.*

- **Standard contract provisions - not cause for alarm.**
- **Ask for reciprocal notice periods.**
- **Focus on other contract provisions that are triggered by termination.**

Phase 3: Terminating your Agreement

- **Review your contract before you do anything.**
- **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.**

Phase 3: It's Over, but It's Not 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**

Non-Competes (cont.)

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**
 - **“Springing” noncompetes**
 - **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
- **Once again: KEEP A COPY OF YOUR CONTRACT**

Phase 3 (cont.): 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**
- **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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