Employment Contracts and Related Issues: Guidance for Physicians

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Outline: What We Will Cover Today

- **Critical Areas of Physician Employment Agreements**
- **Due Diligence Investigation of Medical Practices**
- **Hospital and Health System Employment**

Employment Agreements: 4 Critical Areas

- Think of your employment relationship in 4 component parts and review your contract with these in mind:
  1. How do my employer and I work together?
  2. How does my employer work with other health care providers?
  3. How does our relationship end?
  4. What happens after my employment ends?

Opening Thoughts (cont.)

- **Focus on what happens when things go wrong.**
- **Both employers and physicians tend to ignore their employment agreements when things are going well.**
- **Read your contract as if you are unhappy and want to leave.**

Phase 1: Working Together

- **The basics:**
  - **Term: How long does your contract last?**
  - **Description of your obligations: Read and understand. How much discretion does your employer have to change your duties? This is a critical area in the current health reform environment.**
  - **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

b. Salary plus bonus (production-based or fixed)

c. "Pure" production models

- You are paid based on your productivity (charges or collected revenues less allocated expenses)

- Your production will be <u>negative</u> for the first several months of practice .

- This means you will not be paid under a pure production model

- You are likely to be "net" negative for the first 12- 18 months

- Avoid pure production models during first 2-3 years of practice.

Phase 1 (cont.): Benefits

Understand your benefits:

(1) Salary and Bonus;

- Understand how these work. Ask for models.

(2) Health and disability insurance (employee and dependents);

- Watch for spousal exclusions

(3) Professional dues, licenses and insurance;

(4) CME Allowances;

(5) Recruitment Incentives and any obligation to repay;

- Remember that these are (generally) taxable

(6) Vacation / Sick Leave.

Phase 1 (cont.): Professional Liability Insurance

The Basics:

- **Employer should pay for coverage**
- **Usually written with "Per Incident" and "Annual Aggregate" limits**
- **Know the Cap in your State (if applicable)**
- **Get and Keep a Copy of the Policy or (at least) of the 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**

Working Together (cont.)

Avoid or limit indemnities whenever possible

An indemnity is an agreement that you will pay any costs or expenses that arise as a result of your actions or failures to act

- Acts and omissions that trigger an indemnity obligation are usually specified y but the description may be as general as “physician’s acts or omissions”

Your employer should insure against such losses and should not look to you personally to make the employer whole

Working Together (cont.)

Here is a sample indemnity provision. Avoid the language in yellow (particularly) and negotiate for the underlined text if you can't avoid the indemnity altogether:

If any claim should be asserted against Employer for Physician's activities occurring during the term of Physician's employment and arising out of alleged malpractice, *third party payor (e.g. Medicare, Medicaid, or private insurance) reimbursement or claim submission,* or tax deficiencies relating to disallowed business expenses incurred by Physician, Physician (or Physician's estate) shall bear the financial responsibility therefor *to the extent any such claim would not otherwise be covered by insurance required to be maintained hereunder*.

Working Together: Buy-In Provisions (non-institutional practices only)

What You Should Bargain For:

(1) Decision time-line included in the contract

(2) Price or methodology included in the contract

- Discuss tax-advantaged methods

(3) Other requirements specified in the contract

(4) Right to buy-in to ancillary businesses (and terms)

(5) The right to leave with limited consequences if you are not offered the opportunity to buy in

Phase 2: 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 – under 10%);**
3. **Termination without cause (most common).**

Phase 2 (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 2 (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.**
- **<u>Focus</u> on other contract provisions that are triggered by termination.**

Phase 3: It's Over, but It's Not Over
Restrictive Covenants

<u>The Employer's Purpose</u>: 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?**
  - **Take extra care if you are married to a physician**
- **If possible, negotiate a mutually exercisable buy-out**
  - **One year of compensation is a typical measure**
- **Negotiate other limitations**
  - **e.g., Not applicable if group terminates without cause or fails to offer equity ownership**
  - **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:

- **Don’t leap before you look!**
- **Consult with counsel before terminating employment**
- **Always 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 for 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**
- **Watch for other contract provisions with post-termination effects:**
  - **Confidentiality provisions**
  - **Repayment obligations**

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 the practice'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 or Clinically Integrated Networks? Is it participating in other coordinated care initiatives? Are those being considered? Do they exist in the market?**
- **Does the practice have an electronic medical record (EMR)?**
- **If not, where is it in the transition to EMR? How does the practice plan to pay for EMR? What is the projected effect on physician compensation?**
- **Does the practice prescribe electronically? If not, why not?**
- **Does the practice participate in commercial insurers' coordinated care initiatives? What has its experience been?**
- **How has the practice been affected by health reform?**

Due Diligence: Medicare Electronic Health Record Incentive Program

This program imposes penalties on physicians who do not successfully demonstrate "meaningful use" of an EHR

- **Physicians who provide >90% of their services in hospitals (POS 21 or 23) are exempt – this will include many or most residents**
- **"Newly eligible" practitioners can apply for exemption for up to 2 years, as well – this generally will extend exemption post-residency but application is required**
- **Discuss your eligibility and status with your new employer – you may need to apply for a "hardship exemption" to avoid penalties**

Hospital Employment of Physicians

Critical Issues:

1. **Compensation**
   - **Negotiate to 75th percentile of MGMA compensation (available online and through your attorney)**
   - **Negotiate for signing bonuses / moving allowances**
   - **Watch for changes in compensation structure in later years of contract**
   - **Watch for restrictions that make it difficult for you to leave and stay in the area**
2. **Description of services and limits on hours**
3. **Restrictive covenants and performance measures (understand)**
3. **Recoupment of payments (avoid)**

Hospital Recruitment Assistance and Salary Guarantees

1. **Watch provisions that trigger repayment obligations**
   - **For recruitment assistance, repayment is typically required if you leave the hospital's service area during the subsidy period or the 2-3 year period following the end of the subsidy**
   - **Repayment should be a practice obligation unless you breach**

2. **The practice should not restrict your ability to remain in the hospital service area following termination**

3. **Consider the tax impact of signing a note**

Hospital Recruitment Assistance (cont.)

4. **Understand how debt forgiveness works**
   - **Tax planning is critical to handle discharge of indebtedness (DOI) income**
   - **Negotiate for separate payment of practice expenses and physician compensation to minimize DOI income**
     - **Your collections should go first to pay your compensation, then to practice expenses**

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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