



The Basic Anatomy and Negotiation of Employment Contracts for Physicians

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BACKGROUND

- Similar to other employment contracts for other highly-compensated professionals
- But . . .
 - Licensing and standards of care
 - Significant malpractice liability exposure
 - Additional federal and state healthcare-specific laws apply
 - e.g., HIPPA, Stark, federal anti-kickback, etc.
 - More common for an employer to be a non-profit
 - Potential for partnership / buying into the practice

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BASIC ANATOMY OF PHYSICIAN EMPLOYMENT CONTRACTS

- Identification of the parties, recitals, definitions
- Term, termination, renewal
- Duties and responsibilities
- Compensation, fringe benefits, expenses
- Malpractice insurance
- Restrictive covenants & confidentiality
- Indemnification, dispute resolution, remedies, etc.
- Miscellaneous provisions (e.g., governing law, forum selection, notice, zipper clause, etc.)
- Signature page, exhibits, schedules, addenda





COMMON CONTRACT PITFALLS (1/2)



- Vague, missing, undefined, inconsistent, inaccurate, one-sided material terms
- Independent contractor classification (vs. employee)
- Only incentive-based compensation (vs. guaranteed)
- No outside compensation permitted
- Bonuses & advances structured as forgivable loans
- Limited or poor fringe benefits
- Limited or no expense reimbursement
- Overbroad restrictive covenants
- Physician pays for malpractice insurance
- Physician pays tail coverage for malpractice insurance

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COMMON CONTRACT PITFALLS (2/2)



- Overbroad indemnification by physician
- Shifting excessive risk / liability to the physician
- No physician termination / broad employer termination
- Giving away intellectual property rights to employer
- Binding arbitration and waiver of jury trial
- Out-of-state governing law / forum selection
- Allowing employer to freely assign contract
- Contract provisions that survive termination
- Documents referenced in agreement are not provided or attached (e.g., employee handbook, code of conduct, standards of care, etc.)

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COMMON PHYSICIAN MISTAKES



- Relying on prior oral terms or agreements
- Failing to read all or portions of the employment contract
- Agreeing to terms they do not understand
- Taking on excessive risk or liability
- Not negotiating and/or ineffective negotiation of the terms of the employment contract
- Not hiring an attorney to review (and negotiate) the employment contract
- Relying on recruiters to assist with negotiation of the employment contract

BASIC CONTRACT PROVISIONS



EMPLOYEE VS. INDEPENDENT CONTRACTOR

- Contract must provide whether the physician will be employed by the practice as either an **employee** or an **independent contractor**
 - Note: label placed on relationship in the contract is not always conclusive
- Significant practical differences in being classified as an employee versus an independent contractor
- For physicians in their first years of practice, classification as an **independent contract** is, in most circumstances, a pitfall to **avoid**

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SCHEDULE

- The contract should specify whether the employee will be employed full time or part time
 - How many hours is full time? Part time?
- The contract should clearly define and delineate the specific days and hours the physician will be required to work
 - When and how many days is the physician required to be “on-call”?
- **Expectations must be specific**

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DUTIES AND RESPONSIBILITIES

- The contract should specifically identify what the physician's responsibilities will be. For example:
 - What specialty? What procedures?
 - What clinic(s) and location(s)?
 - Is the physician required to see a set number of patients per hour/day/week?
 - Who does the physician report to?
 - Record-keeping and billing requirements?
 - Are there specific standards of care or protocols?
 - Does the physician hire/control support staff?
 - Can the physician provide services to other clinics, organizations, etc.?

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TERM, TERMINATION, AND RENEWAL (1/2)

- Term: When does the contract start and end?
- Termination: under what circumstances can the contract be terminated?
 - For-cause termination (e.g., license revocation)
 - At-will: termination for any (legal) or no reason
 - Termination upon notice or mutual agreement
 - Pay at termination
- Renewal: what happens to the contract when it ends?
 - Automatic renewal?
 - Renegotiation of terms?

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TERM, TERMINATION, AND RENEWAL (2/2)

Pitfalls to Avoid

- Term: a longer term is not always better, especially where termination is difficult or has bad consequences
- Termination:
 - Contract gives the employer unilateral or broad power to terminate
 - Employee is unable to terminate or can only terminate with significant notice (e.g., 90 days)
- Renewal:
 - Contract does not provide for renewal
 - Contract does not provide for re-negotiation of terms, automatic increase of compensation, etc. upon renewal

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COMPENSATION



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SALARY VS. INCENTIVE PAY (1/3)

Possible Pay Structures

1. Guaranteed salary
2. Incentive-based pay (RVUs, charges, net/gross collections)
3. Combination of guaranteed salary and incentive-based pay
 - #1 is more common in a physician's first year(s) of practice
 - #3 is the usually the most common pay structure

Relative Value Units (RVUs)

- Common measurement for incentive-based pay
- Represents the amount of work a physician must do to treat a patient (based on skill, expertise, effort, etc.)
- For example, different RVUs for a surgical procedure versus a well-patient checkup

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SALARY VS. INCENTIVE PAY (2/3)

Best Practices

- Contract accurately describes the compensation structure
- Ensure guaranteed pay is sufficient to cover expenses
- Use objective criteria to negotiate pay (i.e., what do other physicians in similar practices, in similar locals make?)
 - Important to do your homework!

Pitfalls to Avoid

- For physicians in their first years of practice, agreeing to a strictly incentive-based pay is not recommended
- No automatic increase or renegotiation of compensation in multi-year contract (e.g., 3+ years)
- Agreeing to complex compensation formulas the physicians does not understand

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SALARY VS. INCENTIVE PAY (3/3)

Lessons from COVID-19

- Incentive-based compensation = more risk of salary fluctuation
 - COVID-19 caused physicians to have their pay cut in many practice areas
- Best Practices:
 - Employment Agreement should provide for flexibility for re-negotiation of compensation (e.g., on an annual basis)
 - Avoid provisions (e.g., force majeure provisions) that may allow the employer to unilaterally change pay due to unforeseen circumstances

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SIGNING BONUSES / RECRUITMENT LOANS

- Significant signing bonuses are very common in physician employment contracts
- Usually structured as a forgivable loan over “x” time period
 - Usually forgivable on a set basis – e.g., monthly, annually, etc.
 - Encourages physicians to stay at a practice
 - Will usually require the physician to sign a promissory note in favor of the employer
- **CAUTION:** leaving prior to complete forgiveness will usually result in the physician having to repay all or a portion of the signing bonus to the employer



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OUTSIDE ACTIVITIES & COMPENSATION

- Common for employment agreements to provide that the physician must devote their “full time and best efforts” to the employer’s practice
 - May also prohibit income from other sources
- Best Practice: If the physician practices elsewhere, or derives income from other sources (or plans to in the future), the contract should expressly provide such activity is permitted
 - For example: outside research, teaching, consulting, expert witness, work for another practice, etc.
 - Alternative: permitted “upon mutual written agreement”

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FRINGE BENEFITS



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LIABILITY AND MALPRACTICE INSURANCE

- Physician must ensure a provision(s) addressing professional liability and malpractice insurance is included in the employment agreement.
 - Who pays for the policy premiums?
 - What are the policy premiums?
 - When will coverage be effective?
 - What are the limits of coverage?
- Claims-made Policy vs. Occurrence Policy
 - Claims-made = cover losses reported within the active policy period
 - Occurrence = covers losses that take place within a specific coverage period, no matter the reporting date

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GAP/TAIL INSURANCE COVERAGE

- Applies for claims-made policies
- Contract should provide details of professional liability insurance coverage for claims made after the physician leaves the practice – *i.e.*, gap/tail coverage
 - Pitfall to Avoid: Common that the employment contract will require employee to pay for all of this cost, which can be expensive
 - Commonly negotiated provision
 - It is in the physician's best interest to get employer to agree to pay as much of the tail coverage as feasible

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“TANGIBLE” BENEFITS

- Physician should ensure contract clearly outlines what the employer will and will not provide to the physician. For example:
 - What support staff will be provided?
 - e.g., Scribe, physician’s assistant, etc.
 - Will the physician have an office or other workspace?
 - What medical equipment and supplies will be made available for the physician’s use?

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EXPENSE REIMBURSEMENT

- Employment contracts commonly provide for the reimbursement of expenses the physician will incur
- Expenses that employers commonly reimburse include:
 - Relocation and travel expenses
 - Automobile expenses
 - Cell phone, pagers, etc.
 - Licensing and board recertification fees
 - Continuing Medical Education (CME) fees
- Pitfall to Avoid: Employment contract provides for limited or no expense reimbursement

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PAID / UNPAID TIME OFF (1/2)

- The employment contract should also clearly outline what types of time off from work a physician will be provided, and whether such leave is paid or unpaid:
 - Vacation / Paid Time Off
 - Holidays
 - Time for CME and/or professional development
 - Sick leave
 - Parental leave
 - Partial disability



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PAID / UNPAID TIME OFF (2/2)

- Even if it not provided in the employment contract, the Family and Medical Leave Act (“FMLA”) provides for 12 weeks of unpaid family and medical leave for qualifying reasons
 - But, only applies to employers with 50 or more employees working within a 75 mile radius
- There are also state and local family and medial leave laws which may provide for additional paid or unpaid leave

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STUDENT LOAN ASSISTANCE

- Physician employment contracts may also provide the physician with assistance for repayment of student loans
- Similar to signing/retention bonuses, there are usually conditions imposed on receiving such assistance from the employer. For example:
 - Completing residency, continued licensure, working for the practice for “x” number of years, etc.
- Pitfall to Avoid: If physician fails to satisfy the requirements for the student loan assistance, it is possible that the physician will be required to repay any amount advanced to the employer

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OTHER BENEFITS

Other fringe benefits that physicians should ensure the employment contract provides for and outlines their eligibility for include:

- Retirement plan – 401K / pension / 403(b)
- Health insurance
- Disability insurance – short-term & long-term
- Life insurance
- Dental and vision coverage

Best Practice: Obtain copies of and read all policies from the employer to ensure the fringe benefits being provided are satisfactory

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RESTRICTIVE COVENANTS



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RESTRICTIVE COVENANTS GENERALLY

The three most common types of restrictive covenants that will almost always be found in a physician employment agreement include:

- (1) **Confidentiality** – must keep certain defined information confidential both during and after employment
- (2) **Non-Compete** – cannot work for certain competitors of the employer for “x” time after employment ends and within “x” geographic area
- (3) **Non-Solicitation** – cannot attempt to solicit or hire away other employees of the employer for “x” time after employment ends

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NON-COMPETITION (1/3)

- Usually, to be enforceable, non-competes must be reasonable both in (i) duration, and (ii) geographic scope
 - Some non-competes, however, will provide for a restriction for working for certain competitors or customers, rather than providing a geographic scope
- Whether a non-compete is enforceable will be determined by state law
 - Some states do not allow non-competition agreements altogether
- When in doubt – talk to an attorney!

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NON-COMPETITION (2/3)

Duration

- Two Standards:
 1. Length of time necessary so that employer's customers no longer identify former employee as working for employer; or
 2. Length of time necessary for employer to hire and train replacement employee
- Two Years is typically reasonable in Minnesota

Geographic Scope

- Usually limited by "x" distance from employer's location(s)
- Fact specific depending on business and customers
- Best Practice: try to have geographic scope limited to a narrow area where physician actually worked

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NON-COMPETITION (3/3)

➤ Pitfalls to Avoid

➤ Duration

- Agreeing to an amount of time greater than that which is reasonable and necessary
- Non-compete that fails to provide for a duration

➤ Geographic Scope

- Agreeing to a geographic scope greater than that which is reasonable and necessary
- For example, in a metropolitan area a “20 mile” radius will likely prohibit a physician from working for a significant number of employers
- But, a “100 mile” radius in a more rural area could be reasonable

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NON-SOLICITATION

- More common for more senior physicians – *i.e.*, physicians that would leave and open their own practice
- May apply to employer’s employees, customers, vendors, etc.
- No geographic limitation
- Similar to non-compete, whether duration is reasonable depends on the specific situation
 - Length of time necessary so that employer’s customers no longer identify former employee as working for employer

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EMPLOYMENT CONTRACT BEST PRACTICES

- Everything in the contract is negotiable
- Terms must be in writing and set forth in the contract
- Terms must be specific and accurate
- Get copies of every document referenced in the employment agreement
- Read everything!
- Avoid taking on unnecessary costs, liability, and risk
- Watch out for provisions that provide the employer with the “sole discretion” to make a decision
- Hire an attorney to review the contract
- Do not start working until both you and the employer have signed the contract

NEGOTIATING THE EMPLOYMENT AGREEMENT

NEGOTIATING TIPS

Before beginning negotiations....

- Read the contract and all attachments
 - Identify problem spots, missing terms, etc.
- Do your homework and research
- Determine your goals
- Determine your leverage
- Determine where and how the negotiations will take place (via phone, e-mail, in person, etc.)

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NEGOTIATING TIPS

When negotiating

- Do not start at your desired outcome
 - For example, if you want to end up with a salary of \$200,000, you need to start higher
- Start with small concessions, moving to larger concession when appropriate
- Provide reasons for each position you take, supported by objective criteria if possible
- Determine what areas are important to the other party – *i.e.*, the areas that will be hotly negotiated – and vice versa
- Do not make the negotiation personal

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NEGOTIATING TIPS

After negotiations have ended

- Coordinate who will make the changes to the agreement
 - Professional assistance recommended
 - Redlines are important!
- Make sure the final contract accurately reflects the agreements reached during negotiations
 - Do not sign anything until you are confident everything is correct

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OTHER NEGOTIATING BEST PRACTICES

- Use comparative information whenever possible – *i.e.*, objective criteria
 - For example, what are other physicians in similar practice areas and in similar locales earning?
- Determine what aspects are most important to obtain and which aspects you are willing to concede
- Determine at what point you are willing to walk away
- Don't have recruiters negotiate for you – they do not have your long-term interests in mind
- If you want a third-party to negotiate on your behalf, hire an attorney
 - The short-term cost can pay off handsomely in the long run

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QUESTIONS?

Thank you.