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

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.)
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 contractor is, in most circumstances, a pitfall to avoid

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
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.?

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?
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

COMPENSATION
**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

**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
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 renegotiation 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

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.
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”

FRINGE BENEFITS
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

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
“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?

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
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

PAID / UNPAID TIME OFF (2/2)

- Even if it is 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 medical leave laws which may provide for additional paid or unpaid leave
**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.

**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.
RESTRICTIVE COVENANTS

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
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!

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
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

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
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.)

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
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

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
QUESTIONS?

Thank you.