

Negotiating Your Employment Agreement: A Physician's Checklist

By Steven A. Eisenberg(seisenberg@bakerlaw.com) and Emily Williams
(ewilliams@bakerlaw.com)

You found your ideal practice setting – the perfect city, the perfect group of peers, and an oral offer that sounds pretty darn great. Your future employer hands you a written employment agreement and you are ready to sign on the dotted line. The agreement is fine... it is just a formality, right? Maybe. Keeping in mind that a written employment agreement constitutes a binding contract – one that will trump any conflicting oral promises previously made no matter how sincere they seemed at the time – this is one bet you cannot afford to take. To protect yourself and your future practice, there are three basic rules to follow in negotiating your employment agreement: 1) communicate with your potential employer throughout the process; 2) read and understand every term of the agreement; and 3) do not sign until you are comfortable the agreement's terms.

1) Communicate, Communicate, Communicate

While the first of these rules may seem elementary, many employment negotiations have fallen apart due to a simple lack of communication. Take the time to review and become comfortable with the agreement, but do not cut-off communication with your potential employer. Keep the employer updated, be prompt in responding to inquiries, ask all your questions, and keep the mood positive. Open, positive communication throughout the negotiation process conveys your continued interest and facilitates compromise. A practice will want you more, and thereby potentially give you more, if they know you want them.

2) Read It, Understand It, Negotiate It

Second, before you can negotiate any of the terms of your agreement, it is essential that you read and understand all of the terms of your agreement and how they interrelate. The following checklist sets forth common provisions in physician employment agreements. In comparing your agreement to the list below, do not simply look for what is included in your agreement, but also for what is absent. These provisions are designed to protect you as well as the practice.

- Term and Termination

The contract will be valid for specified term, usually one to three years. At the end of the initial term, the agreement will either terminate, requiring a new agreement to continue your employment, or automatically renew for a specified period of time. If your agreement contains an automatic renewal, pay attention to the notice deadline for rejecting the renewal. If you want to leave the practice, you will need to provide notice to your employer of your intent not to renew the contract by the specified deadline. The term of your contract will also be subject to certain termination provisions, which define the circumstances under which you or the practice may terminate the contract early. In most cases, the practice will retain the right to terminate your agreement under the following circumstances:

- You lose your license to practice medicine.
- You lose or fail to obtain a required board certification.
- You commit a crime, particularly a felony or act of health care fraud.

- You are suspended, debarred by or fail to qualify for enrollment in a federal health care program (e.g. Medicare).
- You lose or fail to qualify for medical malpractice coverage.
- You fail to obtain or maintain hospital privileges.
- For any reason, if it provides you with a specified notice, usually three to six months, though longer periods are negotiable.

While the employee always has the right to terminate his or her employment agreement (the 13th Amendment to the U.S. Constitution outlawed involuntary servitude), many contracts require the physician to provide a minimum notice of his or her intent to terminate. This allows the practice to rearrange staffing schedules and search for a replacement. If you fail to provide the required notice, you may be liable for the costs to the practice, including the cost of temporary staff. As on the practice side, a typical physician termination notice provision is three to six months, though longer periods may be required depending on the specific circumstances.

- Physician Duties

The agreement should set forth the essential duties of your position. These usually include, but may not be limited to: required licensure and certification, staffing requirements, call requirements, and required hospital privileges. Staffing and call coverage requirements are often a source of practice conflict, so be sure you are comfortable with them in advance.

- Compensation

Currently, there are a number of popular models for structuring physician compensation. They vary in both complexity and their dependence on production. The following list sets forth those models used most often:

- 100% guaranteed salary: While this model is easy to administer, practices view it a disincentive to productivity and therefore is being offered less and less.
- Base salary plus productivity bonus: Practices like this model because they believe it promotes productivity. However, you should be very careful in reviewing and negotiating the terms of the bonus. Productivity bonuses should be based on objective, identifiable factors that are set in advance. Potentially, a large portion of your compensation will be based on the bonus calculation and you do not want an unwelcome surprise.
- Productivity: Colloquially referred to as “eat what you kill,” this model bases compensation solely on physician productivity. As with productivity bonuses, it is essential that the terms of the productivity calculation be clear. This includes a clear explanation of the overhead and other practice expenses that will be attributed to you. Also, if the position is in an academic setting, or otherwise involves significant teaching or other non-reimbursed services, be sure your compensation takes into account the time spent on such services.

- Equal sharing: This model is increasingly rare and mostly seen in smaller, physician-owned groups. Because it distributes profits evenly among the physicians, it is the simplest from an administrative standpoint. However, may want to be cautious of this model, since the least productive physicians will be rewarded equally with the most productive physicians.
- Capitation: Capitation, most often utilized by HMO's and some Medicaid programs, involves pre-payment of health care premiums to contracted physician groups for coverage of a certain, defined enrollment population. To convert capitation payments into physician compensation, practices will distribute the payment either on an equal basis or pursuant to a formula. Capitation fluctuates with market factors, utilization and the practice's bargaining power and may lead to significantly varied compensation for year to year.

Lastly, it should be noted that your compensation model may change over time. For example, if you are new to practice or the geographical area, it is reasonable to require a guaranteed salary or base salary for a period of time. The guarantee may expire after or fade-out over a set period of time, typically one to three years. This will allow you some time to develop a practice capable of supporting compensation based purely on productivity.

- Relocation; Loans

If you will be relocating to take the offered position, the practice may offer to pay for your moving expenses, real estate commissions if you are selling a home, and/or temporary living expenses. It is also not uncommon for a practice to offer a relocating physician a loan to assist with a down payment on a home, or other relocation expenses. These loans, which are typically interest-free, are often forgivable in whole or in part, provided the physician remains employed with the practice for a specified period of time. Be sure to discuss any loan offer with your accountant, as it may have an impact on your income taxes.

- Reimbursement of Expenses

Many practices will reimburse certain practice-related expenses, such as license fees, continuing medical education costs, travel costs and professional association dues. Your employment contract should include a description of reimbursable expenses.

- Employee Benefits

Your employment contract should also include a description of the employee benefits offered. These include basic health benefits, retirement benefits (e.g. pension, 401(k) or 403(b) plans, profit-sharing), vacation and leave. Make sure you understand both what is offered and your responsibility for the costs of such benefits.

- Malpractice Insurance

The practice will require you to be covered under its malpractice insurance and your eligibility for such insurance will likely be a continuing condition of your employment. The part of this provision you will want to pay particular attention to is that dealing with “prior acts” or “tail” coverage. If the practice carries a “claims made” malpractice policy, and most do, the policy will only cover acts for which a claim is made while the policy is in effect. In other words, if you leave the practice, the policy will not cover any claims made by your patients after the termination date of your employment. “A prior acts” or “tail” policy, which provides coverage for such claims, will be necessary. Your employment contract should specifically identify who is responsible for the premium on your tail policy – you or the practice. Responsibility may depend on the circumstances of your termination. If you leave the practice voluntarily or breach a term of your employment agreement, the practice may require you to pay for your tail coverage. If, on the other hand, the practice terminates you for no cause or breaches its obligations under your agreement, it is reasonable to require the practice to pay for your tail coverage.

- Restrictive Covenants

Saving the best for last, also called “noncompetition” provisions, restrictive covenants restrict where and when you may set up shop after you leave the practice. Together with compensation, restrictive covenants are often the terms most contentiously negotiated and for good reason. While their enforceability is dependent upon the laws of the particular state in which you practice, *reasonable* restrictive covenants are often enforceable and cannot be ignored. To be deemed *reasonable*, noncompetition provisions generally are defined by time period and geographical location. For example, your employment contract may prohibit you from practicing in your specialty, within a 20 mile radius of the practice, for a period of 1 year following termination of your employment. The time period and geographical location are often negotiable, but how do you know what is reasonable? Reasonable time periods are dependent upon circumstances, but typically do not exceed 2 years. A good rule of thumb in defining the geographical scope is to make sure you are able to make a living, in your specialty, outside the defined geographical area, without having to move your home. In evaluating the geographical area, consider not only where your office will be, but the hospital where you maintain privileges.

- Ownership of Patient Records

Most practices will want to maintain ownership of all patient records. This means that if you leave the practice, you may not simply pack up your patients’ records and take them with you. Federal and state laws provide that every patient may obtain a copy of his or her record upon request, but the process is often time consuming and burdensome. Also, in some states, practices may assert trade secret protection over patient lists, making it very difficult for you to identify your patients once you leave. If at all possible, negotiating ownership or

viewing and copying rights over the patient records may save you from conflict and protect your patients' continuity of care down the road.

Lastly, many modern physician employment agreements, particularly in large practices and institutional settings, are based on standard forms which reference physician or employee handbooks, codes of conduct, standards of care and other external documents. If your contract contains such references, read them. They are part of your contract, just as if re-written therein, and a breach of any referenced documents will be deemed a breach of your employment agreement.

3) *Get Comfortable With It.*

In closing, do not sign an employment agreement until you fully understand and are comfortable with its terms. An experienced health care attorney is your best asset to negotiating a contract that is successful for you and your future practice. The following is a list of things to look for in hiring an attorney:

- Experience

Health care is a very specialized and heavily regulated body of law, and the failure to navigate it can lead to serious civil and even criminal liability. Physician compensation arrangements are not exempt from scrutiny, particularly if a hospital or other health care facility is a party of the arrangement or if the practice provides certain non-physician services (e.g. physical therapy services, drugs or durable medical equipment). An attorney with significant health care experience will not only negotiate the best business terms for you, but also make sure the agreement is compliant with federal and state regulation. It is also preferable to obtain an attorney licensed in the state in which you will be practicing, as the laws of one state may differ greatly from the laws of another.

- Availability

As stated above, communication is essential to the negotiation process and your attorney should be a communication facilitator. This means making himself or herself available to both you and the practice's attorney. Promptly returning phone calls and emails is a good indication of your attorney's ability to effectively communicate during the negotiation process.

- Listening Skills

Your attorney's job is to represent you. To do this effectively, your attorney must understand your wants and needs. He or she must take the time to listen to your goals and concerns and answer all your questions.

- Fee Structure

Upon engaging an attorney, you will likely be asked to sign an engagement letter. This letter should, in detail, set forth the attorney's fee structure. Typically the fee

will be calculated based on the attorney's hourly rate, which should be set forth in the engagement letter. The more time the attorney spends on your employment contract, the more it will cost you. Alternatively, an attorney who negotiates many employment agreements may have established a flat fee. This means that no matter how much or how little time he or she spends on your agreement, you will pay the fee set forth in the engagement letter.

- Referrals

Lastly, do not hesitate to ask your physician peers for attorney referrals.

Steven A. Eisenberg maintains an active healthcare and business practice with an emphasis on counseling clients in the healthcare industry. These clients include hospitals, physicians, joint ventures, ancillary providers, pharmaceutical and information technology companies, medical device manufacturers and researchers.

Mr. Eisenberg has advised clients regarding a variety of business and regulatory issues, ranging from corporate structuring to compliance with the complex regulatory scheme facing clients in the healthcare industry. Representative engagements include the sale of a reference laboratory business by a health system, multiple hospital acquisitions, outsourcing of a health system's supply chain functions, acquisition of a medical device distributor, outsourcing of information technology systems by a health system and technology licensing in the healthcare field.

Mr. Eisenberg has also advised clients regarding the organization and structure of healthcare entities and joint ventures, including surgery centers, imaging centers, cardiac catheterization centers and renal dialysis facilities. He is often involved in hospital-physician relationships such as joint ventures, physician recruitment, practice acquisitions and others. In addition, he has assisted clients in a variety of corporate planning alternatives in the healthcare field and has represented healthcare facilities in the outsourcing of services.

For the second year in a row, Mr. Eisenberg was named an "Ohio Super Lawyer" in the field of Healthcare Law in a special issue of Law and Politics magazine. Mr. Eisenberg has written and spoken extensively on issues affecting clients in the healthcare industry. He is a member of the Ohio and Cleveland Bar Associations.

Steve can be reached at 216.861.7903 or <http://www.bakerlaw.com/stevenaeisenberg/>.

Emily E. Williams practices in the firm's business group, with a principal focus on corporate governance, mergers and acquisitions and general corporate and regulatory matters relating to the healthcare industry. Ms. Williams has represented a wide array of healthcare entities, from individual physicians and practice groups to hospitals and clinical laboratory facilities. Her experience includes negotiating and drafting service agreements, employment and recruiting agreements, as well as office leases. Ms. Williams also has experience forming business entities and providing advice concerning structuring a variety of business transactions in the heavily regulated healthcare setting.

Ms. Williams is a member of the Ohio State Bar Association. During law school, she served as a law clerk for the U.S. Attorney's Office for the Southern District of Ohio in its Health Care Task Force and was a member of *The Ohio State University Journal on Dispute Resolution*.

Emily can be reached at 216.861.7373 or <http://www.bakerlaw.com/emilyewilliams/>.