

Negotiating your Employment Agreement: A Physician's Checklist

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 the 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, 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 that you want them.

2. **Read it, understand it, and negotiate it!**

Before you can negotiate any of the terms of your agreement, it is essential that you read and understand all 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 a 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. 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 the 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 an act of health care fraud.
 - You are suspended, debarred by or fail to qualify for enrollment in a federal healthcare program.

- 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 US Constitution outlawed involuntary servitude), many contracts require the physician to provide a minimum notice of their 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 of the practice, including the cost of temporary staff. On the practice side, a typical physician termination notice provision is three to six months, though longer periods may be required based on 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 several 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 as a disincentive to productivity and therefore is being offered less and less.
 - Base salary + 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 considers the time spent on those 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. You may want to be cautious of this model since the least productive physicians will be rewarded equally to the most productive physicians.
 - Capitation: Most often utilized by HMOs 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 from year to year.

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

- **Relocation:** If you will be relocating to take the offered position, the practice may offer to pay for some of your moving expenses, real estate commissions, if you are selling a home, and/or temporary living expenses. It is 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 (pension, 401(k), 403(b), profit sharing, etc.) 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 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 when 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 act" or "tail" policy provides coverage for such claims, and will be necessary. Your employment contract should specify the identity of who is responsible for the premium on your tail coverage – you or your employer. Responsibility may depend on the circumstances of your termination. If you leave the practice voluntarily or breach the 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 non-competition 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 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 period and geographic 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 one year following the termination of your employment. The time 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 can make a living, in your specialty, outside of the defined geographic area, without having to move your home. In evaluating the geographic 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 patient records and take them home with you. Federal and state laws provide that every patient may obtain a copy of their 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 healthcare attorney is your best asset in negotiating a contract that is successful for you and your future practice. The following is a list to look for in hiring an attorney:

- Experience: Healthcare 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 healthcare facility is a party to the arrangement or if the practice provides certain non-physician services (such as physical therapy, drugs, or durable medical equipment). An attorney with significant healthcare experience will not only negotiate the best business terms for you but will also make sure the agreement is compliant with federal and state regulations. It will also be preferable to obtain an attorney licensed in the state in which you will be practicing as the laws of one state may greatly differ 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 themselves 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. They must make the time to listen to your goals and concerns and answer all your questions.
- Fee structure: Upon engaging with 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 negotiated many employment agreements may have established a flat fee. This means that no matter how much or how little time they spend 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.

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