Third Edition

The Physician's First Employment Contract

A Guide to Understanding and Negotiating the Contract...from the Employee Physician's Perspective

Michael L. Kreager

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Cover design by Johnna Nieto.

Mike Kreager
Kreager Mitchell PLLC
7373 Broadway, Suite 500
San Antonio, Texas 78209
(210) 829-7722
mkreager@kreagermitchell.com

Mike Kreager is a business lawyer and is board certified in tax law by the Texas Board of Legal Specialization. Mike has been selected annually as a Texas Super Lawyer, published by Thompson Reuters, beginning 2006, and listed in America's Best Lawyers, published by Woodward & White, beginning 2005. The firm serves as counsel for physician practices across Texas.

In addition to writing this popular guide, Mike authored two books for physicians: *Employment Contracts for Physicians: The Comprehensive Guide* and *What's Your Practice Worth: A Comprehensive Guide to Practice Valuations and Sales*. Both books are available on the Texas Medical Association's website, www.texmed.org.

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THE PHYSICIAN'S FIRST EMPLOYMENT CONTRACT
(*Third Edition*)

A GUIDE TO UNDERSTANDING AND NEGOTIATING A PHYSICIAN EMPLOYMENT CONTRACT … FROM THE EMPLOYEE PHYSICIAN'S PERSPECTIVE

Part I: Introduction

Purpose. I wrote this guide for you to read ***before*** signing your employment contract. It's packed with practical information from four decades of reviewing, negotiating and writing physician employment agreements. When you finish, you will be equipped to protect yourself against unfair contract provisions and able to negotiate the most favorable employment agreement possible. If you want more information, consider purchasing *Employment Contracts for Physicians: A Comprehensive Guide* from the Texas Medical Association (www.texmed.org).

Overview of the Guide. This guide has four parts. Part I is pre-contract preparations. Part II explains each term of the contract and adds cautions and negotiating tips. Part III focuses on hospital recruiting agreements, which can have very dramatic consequences for you. Part IV covers alternate employment arrangements.

> **Caution:** Prior editions of this guide used far too many qualifiers, such "usually," when introducing standard provisions. The qualifiers were meant to identify situations where exceptions might apply. This edition omits them. Just be mindful that a contract provision this guide calls "standard" can have an exception or variation.

Professional Advisors. Read the contract from beginning to end, but hire an attorney who specializes in physician employment contracts to advise you.[1] ***Remember, your employer's attorney wrote the contract. Have an attorney on your side to level the playing field!*** It will cost a fee, but that fee could save you from an unpleasant employment relationship. As you read the contract, make a list of concerns and send them to the attorney to address.

Standard Provisions Covered. This guide discusses standard contract provisions. If you encounter a provision that is not discussed here, discuss it with your attorney.[2] This guide suggests negotiating tips to consider and signals "***cautions***" to warn you about important contract hazards.

Before You Get Your Contract. At the outset, carefully vet the group you plan to join. When you interview, learn as much as you can about the way the physicians interact. It is supremely important that you feel you will be a good fit in the practice and mesh with the various personalities and the practice culture. Talk separately with support staff and with the more recently hired physicians. If possible, talk to physicians who have left the group—they can provide valuable insight.

[1] You can find experienced attorneys on the Internet but avoid sites that are not sponsored by a lawyer or law firm. Be sure to confirm the cost. Feel free to pose specific questions about the contract that cause you concern. You may have an attorney in your family or who is a friend, but unless they are experienced with physician contracts, don't use them.

[2] If you are inclined, email us a copy of the provision so that we can discuss it in subsequent editions of this guide.

Ask questions. What's the workload? How many daily patient encounters are expected? What professional development or mentoring does the group provide? Are you be expected to grow your individual practice? Must you develop your own referral sources? Will you work in one office or bounce among several locations? How are administrative decisions made? Which physician or administrator "manages" the group? How are new patients assigned? Is the payor mix low?[3] The answers to these questions can have a dramatic effect on your compensation.

When considering hospital employment, take the time to understand the administrative side. In other words, do the administrators and their staff "run" the practice? Are they responsive to the physicians' needs? How will your schedule be set? Are you allowed input? How is vacation and call allocated?

Ask for Changes to the Contract. ***The employer wants you to sign the contract as is. The employer may say "this is our standard contract and, to maintain uniformity, we don't permit changes."***

Even though it feels overwhelming, you should nonetheless feel totally confident and empowered to ask for changes. **If you have a reason for the change, ask for it and give the reason for changing it**. Employers

[3] The payor mix refers to the distribution of patients at the location who are covered by commercial insurance, Medicare or Medicaid, or are uninsured. If your clinic location is in a low payor mix, the clinic will have lower than average revenue per patient than a clinic located in a higher payor mix.

will listen to a physician's request, and you may very well point out a provision that should be changed.[4]

Part II: The Physician Employment Contract

The Parties to the Contract. The first paragraph of the contract identifies the "parties." The parties are the individuals and entities legally bound by the contract. You will be one party, designated as the "employee" or the "physician." The employer will be the other party, referred to in this guide interchangeably as the "group," the "practice," or the "employer." The employer will be a legal entity.[5]

Physician-Owned Employers. Physician-owned employers are one of two forms of legal entities: a professional association (abbreviated as a PA)[6] or a professional limited liability company (abbreviated as a

[4] My experience is that <u>you</u> should ask the employer for the change. The employer will respond more favorably to a request from you than someone acting on your behalf, even though your natural tendency is to ask your attorney to negotiate the change. We still recommend you list the changes and discuss them with the employer. The wording doesn't matter. What matters is to deliver the message "peer to peer." An attorney making the requests creates an adversarial posture causing the employer to push back reflexively.

[5] Texas and a few other states outlaw the "corporate practice of medicine," which can be summarized as prohibiting non-physician owned entities from employing physicians. The Texas Medical Association website has a white paper on the prohibition of the corporate practice of medicine.

[6] In some states the employer is a professional corporation. A professional association and a professional corporation are the same.

PLLC).[7] Each entity is governed by state business law statutes.

If you are headed to a state other than Texas, you can skip the next section on HCOs as they are unique to Texas.

HCO (5.01(a)). Another employer of physicians is an HCO. This entity is called colloquially a "5.01(a)."[8] An HCO is a Texas non-profit corporation that the Texas Medical Board (TMB) certified as meeting very specific requirements. An HCO may employ physicians as an exception to the Texas prohibition on the corporate practice of medicine. You will know you are being employed by an HCO if the contract refers to the employer as a "certified non-profit health organization." If in doubt, the TMB website lists the certified HCOs.

Unlike other employers, an HCO has no owners, but it can have a member, such as a hospital system, insurance company or a management company.[9] The member can wield extensive power over the HCO. Consequently, HCOs are used by hospitals and management companies to employ physicians, often in large numbers.[10] The HCO must have a governing physician board of directors.[11] But,

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[7] A PLLC is a more popular due to its advantages over a professional association.

[8] 5.01(a) was the number of the section in the Texas Medical Practice Act that created this entity. 5.01(a) was re-codified as Chapter 162 of the Texas Occupations Code, but HCOs are still referred to as "5.01(a)s."

[9] Texas business laws do not permit a non-profit corporation to have shareholders.

[10] Baylor Scott and White, a Texas non-profit with 48 hospitals, is reported to employ 1,200 physicians.

[11] The Texas non-profit corporation statute requires a minimum of three directors. Chapter 162 requires all directors must be

importantly, the non-physician member makes all the financial and non-medical administrative decisions for the HCO, and the board of directors makes only the medically related decisions.[12]

In states that do not prohibit the corporate practice of medicine, the employer may be a business entity owned and controlled by non-physicians, such as an insurance company, a management company or a hospital system. The employed physician has no "say" in management.

Start Date. When the employer and you sign the employment agreement, it will be a binding legal contract. The contract's first paragraph should state the date the contract is signed and becomes binding on the parties, to wit, the "effective date." You will not start working on the effective date. Instead, the contract will state later in the text your anticipated start date, the "commencement date." Be realistic about the commencement date, keeping in mind the time needed to (i) obtain a state medical license, (ii) become credentialed with the group's insurance plans, and (iii) obtain active hospital medical staff privileges.

> **Caution: Do not assume that the credentialing process is automatic**. The insurance companies take time to add you to the practice's managed care plans.[13] Keep in mind

Texas physicians who are actively practicing medicine, but the definition of "actively practicing" is quite liberal.

[12] Chapter 162 requires the HCO to have "due process" procedures in place addressing the termination of an HCO physician's employment.

[13] The practice may not bill you under another physician's name while your credentialing is being completed. That

> the practice will have many managed care plans, and you will need to be added to each of them. **Be proactive about the process**. Contact the employer after you sign the contract and learn which staff person is responsible for getting you credentialed. Provide the information needed to complete the credentialing process. Check periodically on the progress. You want to be credentialed on all the plans before you start work. Some employment agreements will delay the commencement date until you have credentialed with the plans covering most of the practice's patients.

Duties. This section describes your responsibilities and can be extensive.[14] You will be expected to work full time, exclusively for the group. The group must approve any exceptions to work outside the practice. If you want to practice only part-time, discuss your needs with the group. Employers are beginning to accommodate part-time requests. If you plan to moonlight, ask for the contract to allow that activity and for you to retain the earnings.

As to patients, the group reserves the right to assign patients among its physicians. This reservation can have a significant impact on your ability to grow your individual practice if the physicians with longer tenure have the first opportunity to take new patients. Discuss with your employer how new patients are assigned. It's important that you have an equal shot at new patients, particularly in surgical specialties. And you want to be on

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practice is illegal, but it sometimes occurs in a practice's zeal to bill before the credentialing process is completed.

[14] Sadly, you'll find many provisions repeated throughout the contract.

the look-out for any propensity to direct the low paying patients to you and higher paying patients to the senior physicians in the group. Recall the payor mix discussion.

The contract will obligate you to comply with standards of care and medical ethics and with the employer's policies and procedures. You agree to complete timely and thoroughly patient medical records and submit timely, even on the same day, completed billing information for patient encounters. A hospital employment contract will be very detailed in listing the duties and responsibilities of the employed physician, often in a separate, multi-page addendum.[15] In addition, under hospital employment, the physician may refer patients only to the hospital's other facilities and its other employed physicians, with very few exceptions.

> **Negotiating Tip:** The employer is entitled to expect that you will adhere to its policies and procedures. However, it is equally reasonable to ask that the policies and procedures be in writing and furnished to you in advance. Ask for and review a copy of the policies before signing the contract and ask that the contract obligate the employer to give you the policies in advance in writing.

The duties section will contain one-sided statements to the effect that you will work diligently and use your best efforts in performing your duties. The employer will reserve the right to dictate to you how to perform your duties. As a counterbalance, these statements may be

[15] Hospital contracts contain audits of your coding and you can be required to attend coding compliance school and/or be charged a penalty if your coding compliance falls below the hospital's standards.

tempered by the stated expectation that you will exercise your independent medical judgment. Generally, these one-sided statements are acceptable and do not usually present difficulties in the employment relationship.

The duties' section will obligate you to work at any of the employer's present or future locations as dictated by the employer. If the practice has more than one location, ask that the contract specify a street address, with the requirement that a future change of location requires your agreement.[16]

Some contracts, particularly for primary care physicians, will indicate the average number of patients you are expected to see, sometimes expressed as a weekly or monthly average. Failure to meet the average is a ground to terminate your employment.

> **Caution:** If your contract has a stated workload, ask the group if it has had problems with physicians not meeting its productivity expectations. Inclusion of a minimum number of encounters indicates the group has had problems. An open discussion about expectations could avoid future problems.

Ownership and Setting of Fees. The group owns all fees you generate and all accounts receivable. You will see a statement that you reassign your right to Medicare and other reimbursements to the group. The blanket reassignment is not objectionable and is a permitted exception to Medicare's rules prohibiting the reassignment of claims. The employer will set the fee schedule for your services. There may be a statement that

[16] You'll see the importance of this request in the discussion on covenants not to compete.

if you receive payment directly, you will promptly return it to the employer.

Managed Care Contracts. You will authorize the employer to enter into managed care contracts with payors on your behalf. You will give the employer the right to sign your name if the managed care plan requires the participating physician to sign an addendum to the contract.

> **Negotiating Tip:** If the employer has the right to sign your name, add a condition that the employer may sign your name only to contracts that do not impose a personal indemnification obligation upon you.

Honoraria. All payments for medically-related services, such as speaking and writing honoraria, medical director fees, chart reviews or expert witness fees, belong exclusively to the group and not you. You should ask for the contract to allow earnings from these activities on your own time to be retained by you if they do not interfere with the performance of your duties.

Keep in mind the group is paying you and wants to capture all revenue from your medical services. On the other hand, many of these outside activities have no connection with the group's medical practice, particularly if you pursue them on your own time.

> **Negotiating Tip:** Feel confident in asking the employer to insert a waiver permitting these activities without the employer's prior permission, which will allow you to keep the fees for those activities.

Call Coverage. The employer will assign night, weekend and holiday call coverage. You will want to clarify the contract to say that call will be assigned on an equal basis with the other physicians and on a mutually agreed rotation. Discuss this topic in your interviews, as call schedules vary widely among practices and specialties.

Make sure that your contract expresses your call obligation in writing consistent with what was discussed in the interview. If you don't want to take call, ask that any call responsibility be deleted from the contract. If you are a subspecialist, discuss whether there are other specialists available to provide call relief.[17]

> **Caution:** For a newer physician with a young family, holidays and spring break represent cherished family time. For larger practices, make sure that these highly sought-after dates are rotated equitably and not on a seniority basis.

Compensation. The compensation sections of the contract will be of prime interest to you. The contract should specify how much and how often you will be paid. Employers use a variety of compensation methodologies. No matter the methodology, the amounts payable to you are always gross amounts, meaning that the employer will withhold income, Social Security, Medicare, and other employment taxes. Your actual "take home" pay will be net of the taxes.

Stated Salary. Traditionally, the employer will express a newly employed physician's compensation as an annual or monthly base salary (e.g., $150,000 per year or $12,500

[17] Some hospitals will pay a stipend to specialists for being available for call. Discuss with the employer who gets to keep the call stipend.

per month). The base salary will be payable monthly, twice monthly (e.g., the 15th and the last day of the month), or bi-weekly according to the employer's established payroll practices. A fixed salary offers you financial security and the ability to qualify for a mortgage to buy a new house.

With a few phone calls you should be able to assess the starting salary for your specialty. A great source is the Medical Group Management Association (www.mgma.com), which conducts extensive annual surveys. For a fixed fee you can get a quote for your specialty. In addition, CPAs and lawyers may subscribe to the MGMA's survey and be able to give you a salary range.[18] The survey results are broken down by decile, mean and medium. Other salary surveys are available for free on the Internet. Hospitals will rely on the MGMA survey in setting the salary, sometimes setting it below the mean or median. **Remember, your salary is always negotiable and do not be timid in asking for more money.**

Formula Compensation. When the employer pays you a fixed salary, it bears the risk that you won't earn a profit. To minimize the risk of losing money, the employer prefers to pay you under a formula tied to your work or profitability. You may start with a fixed salary for a year and move to a formula to determine your compensation, or you may start with a formula.

Compensation formulas vary, but the examples in this guide will give you enough information to deal with the formula offered to you. I will walk you through

[18] Keep in mind that the survey results are based on responses collected in the preceding year and lag the most current developments.

collection-based compensation formulas and wRVU-based formulas. Since compensation under a formula cannot be known until the end of the period to which it is applied, the employer will give you a "draw." Before getting to the formula itself, I'll start first with the draw. Then I'll give examples of collections-based compensation models, introduce the concept of the "true up" against the draw, and finish with wRVU compensation models.

The Draw. A draw is a monthly amount, such as $15,000 per month. The draw is a reliable monthly payment to live on. ***But remember, a draw is always a loan***. When the formula is applied, the employer reduces the amount payable to you under the formula by the prior draws it advanced to you. Thus, the compensation you earn under the formula model is used to repay the prior draws; thus, the reason to consider them a loan. The draw will have the look and feel of salary, since it's a fixed amount, paid on regular payroll dates, e.g., bi-weekly, but don't be deceived, it is a loan!

Collections-Based Formulas. Private practices use formulas that are collections driven. Collections is shorthand for the employer's actual cash collections (not billings) for your services. Accordingly, be sure you understand what collections are credited to you. For example, will you receive credit for collections for ancillary services, such as labs or imaging you order, or for services performed by physician extenders you supervise.

Relying on the amount of collections is a simple but effective way for the employer to hold you accountable for productivity. If you aren't efficient, your collections will suffer, and your pay will reflect the inefficiency. If

the employer pays you a fixed salary, it bears the risk that you don't see enough patients to generate enough billings to cover your salary.

Three Examples of Collection-Based Compensation Formulas. Here are three examples of collection-based compensation models that are representative of the models used by employers.

First Example—Percentage of Collections. The employer pays you a fixed percentage of collections, such as 40%. You make 40% times your collections during the year. If collections are $400,000 for the year, you will earn $160,000 (40% *times* $400,000). If the employer pays you a $10,000 monthly draw, you will earn a $40,000 bonus at the end of the year ($160,000 *minus* $120,000 [$10,000 × 12 months]), bringing your total annual compensation to $160,000.

Second Example—Percentage of Collections Above a Threshold. The employer again pays you a $10,000 monthly draw, but in this example the formula is 50% of the collections over a stated threshold. The threshold is an amount that should cover your draw and a share of overhead, with some left over to assure the employer a profit. In primary care practices, overhead (the cost to run the practice) hovers around 50% to 54% of collections. If the formula pegs the threshold at $400,000, the threshold will cover your share of overhead ($200,000) and your draw ($120,000), leaving a profit of $80,000 for the employer. If you collect $500,000, you will earn a $50,000 bonus, bringing your total compensation to $170,000.

Third Example—Percentage of Profit. This example is more complicated. In this example, the employer pays

you 70% of the difference between the annual collections and the sum of two "buckets" of expenses:

1. The first "bucket" of expenses is equal to the employer's total annual overhead divided by the number of physicians. Overhead is the cost to run the practice, excluding the costs associated with each of the physicians in the practice.

2. The second "bucket" is the specific expenses relating only to you. These expenses include: (i) your draw, (ii) employment taxes on your compensation, (ii) contributions to your retirement plan account, (iii) the premiums for your health and liability insurance, (iv) professional liability insurance premiums, (v) dues and subscriptions, (vi) patient expenses such as injectables, and (vii) the cost of your continuing medical education (CME).

This formula first calculates your profit by subtracting your share of overhead (the first bucket) and your "direct" expenses (the second bucket) from your collections. The formula then allocates the profit between the employer and you. In this example, 70% of the difference is your share of the profit. The employer retains 30%. The employer is willing to allocate to you a larger share of the profit to provide an incentive to maximize collections. If you don't first collect enough to cover your share of overhead and your draw, there is nothing left for you.

Using this formula, assume $500,000 in collections, a $10,000 monthly draw, a 50% overhead share, and direct expenses of $40,000. The profit is $90,000 [$500,000 – ($250,000 of overhead + $160,000 of direct expenses) = $90,000]. Your share of it is $63,000 (70% of $90,000).

Thus, your annual compensation is $163,000 [$120,000 of draws + $63,000 of profit share].

True Up. The "true up" is a two-part mechanism the employer uses to finalize your compensation under the formula models. First, the formula is applied at the end of a year to determine the actual compensation you earned. Second, the employer subtracts the prior draws (advances) from the actual compensation. If there is a positive difference, the employer will pay you the difference as a bonus. The three prior examples all have positive differences. However, if the difference is negative, the employer must recover the deficit. What happens if you are negative? Do you have to write a check to the employer for the excess draws?

> **Caution:** Focus on how the employer recoups a deficit. Some employers carry it forward until the next true up, while others reduce the draw pending the next true up. You can negotiate how deficits are treated, beginning with asking that the repayment obligation be deleted. It is not an unreasonable request—you should be able to rely on your draw. As a backup, ask for time to repay the deficit, such as a repayment plan without interest.

If you could have a repayment obligation, ask the practice to run sample calculations, making assumptions about your productivity. A sample will help you better understand the allocation of the practice's expenses to you and the collections required to have a positive number at the end of the accounting period.

The formula model can be beneficial *if* you can produce high collections. However, it is usually better to start with

a guaranteed base salary during your first year while you are establishing your practice and avoid the risk of a deficit. Thus, the formula model is best crafted as a bonus opportunity only, without the penalty of a deficit. It allows you a fixed salary and an opportunity for a bonus if you exceed the employer's performance expectations.

The examples applied the formula to annual collections. It is possible to apply the formula on a quarterly basis. A quarterly true up allows you the opportunity to receive bonuses during the year and the employer the opportunity to recoup deficits before the end of the year.

Hospital Employment Contracts. Hospitals compete with physician-owned practices as prospective employers. The hospital's financial motivations are beyond the scope of this guide but suffice it to say there are significant economic reasons for the hospital to employ physicians.

wRVUs. The hospital uses a compensation formula based not on your collections but on the work, you perform. Your work is measured by work resource value units (wRVUs). The wRVU is tied to the Current Procedural Terminology (CPT) codes used for billing. Each wRVU unit is assigned a value by the Centers for Medicare and Medicaid (CMS).

The more complicated the procedure or the longer a procedure takes, the higher the number of the wRVUs assigned to the procedure. A level 4 office visit has a wRVU value of 1.5. The hospital will translate the CPT codes used to bill patients to the corresponding number of wRVUs. As was the case for assessing a base salary, the MGMA and other survey organizations provide summaries of wRVUs produced by specialty.

The hospital employment agreement will state that you will earn a fixed salary for a year. For example, the hospital will pay you $20,000 a month during the first year of employment. After the first year, the hospital will pay you based on wRVUs you produce. You will earn a fixed amount for each wRVU, for example, $45 for each wRVU. This amount is usually called the dollar conversion factor per wRVU. If you generate 5,555 wRVUs in the year, you will make $250,000 if each unit is worth $45.

The dollar conversion amount is a negotiated amount with the hospital. Again, MGMA's surveys can be helpful in benchmarking dollar conversion amounts and the hospitals will use them to make their offer. The survey will indicate the conversion amount, for example, at the mean and at the 90th percentile. The hospital may propose a conversion rate at or slightly below the mean.

> **Caution:** Try to get data on the dollar conversion factors applicable to your specialty. You can use that data to negotiate a higher conversion factor.

There are aspects of the wRVU model that are attractive relative to collection-based models. Under the wRVU model, the hospital will pay you for the work performed, regardless if the hospital is paid. In the collection-based formula, you are penalized if the patients or the insurance company does not pay for your work or if the practice does a poor job collecting the billing. However, read the fine print at the end of the hospital contract that defines what counts as an wRVU.

Hospitals will exclude some wRVUs. wRVU credit for procedures for which there are no assigned codes won't

be counted. Hospital contracts always exclude wRVUs associated with any ancillary diagnostic activities not actually performed by the physician. Similarly, you will not receive credit for work performed by a midlevel provider you supervise.

The hospitals favor the wRVU model because it holds you directly accountable in a way not possible if it pays a fixed salary—only work performed is paid. By using wRVUs, the hospital can adjust your compensation periodically to correlate to your production. If the hospital chooses to pay you a stated draw, the draw can be adjusted up or down in subsequent reporting periods to account for the change in your activity over prior periods.

For example, if your total units for a quarter are 10 percent less than the prior quarter, the contract will reduce subsequent draws by 10 percent.

> **Caution:** The assumptions underlying wRVUs and their dollar conversion in your contract can have a dramatic effect on compensation. Use the survey results to your advantage. Negotiate dollar conversion amounts that are above the mean, thereby maximizing your total compensation.
>
> **Caution:** wRVU production is based on your CPT coding. Ask for "audit" rights. In other words, you need to know the number of wRVUs you coded. Make sure that you get a monthly statement showing your wRVUs and the correlation between those wRVUs and the codes you used. If you add these accounting rights to the contract, you'll be better able to track your

compensation between the annual or quarterly true ups.

Term of Contract. Employment contracts are for a specified duration, referred to as a "term," such as one or two years.[19] If your contract is for a stated term, e.g., two years, it will expire at the end of two years. To avoid automatic expiration, a fixed term contract may contain an automatic renewal provision.[20] The contract term will renew automatically for a like period at the end of the initial term or a subsequent renewal term. If your contract omits an automatic renewal, calendar the expiration date. Otherwise, the contract could expire without noticing it.

Termination. One or more sections of the contract will discuss ending the contract before its scheduled term.

Death and Disability. Your contract will end upon your death or disability. Disability should be defined in the contract. Disability is the inability to perform the essential functions of your job for a set time. The time will range from 60 to 180 days, sometimes referred to as the "qualifying period." At the end of the qualifying period, your contract will end. The employer may add the right to have you examined by a physician to determine if you are disabled.

Your salary will continue only for a fraction of the qualifying period, i.e., to the extent of unused paid time

[19] The fixed term is called the "initial term." Terms might range from one to five years. You may encounter a contract that doesn't state a term but continues until terminated, which is acceptable.

[20] The subsequent terms are called the "renewal term."

off.[21] Thus, personal disability insurance is a must and is discussed later in the guide.

For Cause. "For cause" is shorthand for a reason to end your employment. There will be an extensive list of 10 to 20 "for cause" items that allow the employer to terminate your employment with little or no notice.[22] For cause grounds for termination progress from specific reasons to subjective, generalized reasons. Examples include the loss of your medical license, the loss of hospital privileges, exclusion from the Medicare program, becoming uninsurable for malpractice, or conviction of a crime. The laundry list will include generic catch all provisions, such as unbecoming conduct, which are entirely subjective.

Try to limit the for cause list to truly egregious acts, such as the loss of your medical license, and delete the subjective items. Usually the right to terminate "for cause" is reserved exclusively to the employer, but occasionally you are given the right to terminate for cause, e.g., nonpayment of salary.

> **Caution:** The contract will authorize the employer to terminate your employment immediately for cause, without notice. If that is the case, request notice be given even if the termination is immediate. There is a practical reason for notice. The addition of notice will

[21] As will be discussed, PTO is only a few weeks each year, and the unused balance of PTO will not carry over to subsequent years of employment.

[22] You'll observe I say terminating your employment, as opposed to terminating the contract. This usage is intentional, as other obligations in the contract will continue to apply after the end of your employment, e.g., a covenant not to compete.

avoid the employer holding for cause events in reserve and notifying you of an occurrence that may be months old.

Opportunity to Cure. Sometimes the "for cause" list includes events that are not so catastrophic as to require immediate termination. For example, failing to comply with a specific policy could be a "for cause" event. But what if the failure to comply is a minor lapse. In this instance, make sure you have the right to "cure."

The right to cure has two components. First, the employer must notify you of the occurrence of the "for cause" event and second, give you time, 10 to 30 days, to rectify the situation. If you cure the default, the contract cannot be terminated "for cause," and it will continue. The specific ask is to move "for cause" events involving compliance with the contract to a separate section that permits notice of the infraction and the opportunity to correct the situation before you are fired for cause.

Negotiating Tip: The laundry list of "for cause" events will include subjective infractions, such as failing to meet the expectations of the employer in performing services. Ask the employer to move these subjective items to the "notice and opportunity to cure" list for which the employer must first give you notice and an opportunity to remedy the infraction.[23]

Without Cause. Your contract will allow either party to end your employment by just telling the other party. No reason need be given. But the notice must be given a

[23] If the employer doesn't want to add a separate section, the notice and cure opportunity can be added to some of the specific "for cause" events.

minimum number of days before it is effective. Hence, this termination provision is called termination "without cause" or "termination for convenience." The required minimum notice will range from 30 to 120 days, with 60 and 90 days being "standard." The notice should be the same for the employer and for you. Infrequently, the employer's required notice is shorter than the notice you must give, which is unfair. Ask for the notice to be the same for both of you. The employer may reserve the right to relieve you of your duties during the notice period, e.g., "stay home," which is perfectly acceptable if the employer must continue to pay your salary. If you are on a productivity compensation model, it could impact your earnings.

On rare occasions, the contract allows the employer to end your employment without cause but omit a reciprocal right for you. This omission is unacceptable and, if encountered, you should insist on the inclusion of a reciprocal right to terminate employment without cause. Failure to do so could limit your ability to pursue other opportunities without financial risk.

> **Caution:** If you become unhappy and end the contract without cause, you must continue to work for the remainder of the minimum notice, e.g., work until the end of the 90 days' notice. First, it is only fair that you give the group time to find your replacement. Second, if you don't give the minimum notice, the group may hold you responsible for the costs to cover your absence. If you need a shorter amount of time, talk to your employer; a shorter transition may be possible.

> **Warning:** Penalties are being added to the contract if you do not work after giving notice. If a penalty is included, make sure it is reasonable both in the amount and in application. For example, the contract may require you to pay an amount equal to a month's salary if you don't work all 90 days. But that penalty is not fair if you fall short only a few days.

Payments After Termination. Your contract should say what you will be paid when it ends. If you are on a fixed salary, you won't be entitled to severance. But if your compensation is based on collections, will you continue to receive collection credit after the end of employment and if so, for how long?

> **Negotiating Tip:** If you are paid based on a collections-based formula, ask that the employer continue to give you credit for collections for six months after the end of your employment. You provided the work that generated the collections and you should be paid for them.

Employers who pay a signing bonus or reimburse moving expenses will want you to repay the amount if you quit within a few years after arriving. If that is the case, ask that the obligation "burn off" on monthly basis. In other words, if you receive a sign-on bonus, you agree to repay the employer 1/24 of the bonus times the number of months remaining between your separation and the second anniversary. If you quit at the end of one year, you will repay one-half of the signing bonus. The repayment obligation should be imposed only if you quit or are fired for cause and should be waived if you are terminated without cause by the employer, die or become disabled.

Effect of Termination. When your employment ends, the contract will require you to transition your patients to the other employed physicians and to complete your patient charts and billing records. You will be required to return the employer's property.

Texas Medical Board Rule 165.5, available on the TMB's website (www.tmb.state.tx.us), requires you to let patients you've seen know you are no longer employed and to inform them how they may get their medical records. Chief among these procedures is mailing a letter to the patients you saw in the prior two years.

Rule 165.5 requires the employer to cooperate with you in complying with the notification process. On occasion, the employer will assume some of the physician's patient notification responsibility to control patient communications and prevent the loss of patients. Rule 165.5 does not address this type of delegation. The delegation could save you significant mailing expenses, but keep in mind you must confirm to the TMB compliance with the Rule within 30 days after the end of employment.

Vacation and Other Leave. Your contract should include paid time off (PTO) for vacation, sickness, personal leave and continuing education. You should expect a minimum of two or three weeks' PTO, with three weeks being more common. PTO does not carry over from one employment year to the next. It is "use it or lose it." Moreover, the employer will not pay for unused PTO at the end of employment. Most practices count sick days as a PTO day and don't have a separate sick leave policy.

Larger practices have a staff physician handbook containing policies for sick leave and other absences. If maternity leave is a concern, ask the practice for its maternity leave policy, but smaller practices will not pay for maternity leave. The federal Family and Medical Leave Act (FMLA) only applies to employers with more than 50 employees. Leave for military service is also covered by the federal Service Members Civil Relief Act (SCRA), and you should get specific advice if being called to active duty is a possibility.

> **Caution:** The contract will require prior scheduling of PTO. Be sure to understand how PTO is scheduled and if the physicians with senior tenure have priority, particularly for highly desirable holidays and spring break.

> **Caution:** Be mindful if you are on a productivity formula, any PTO taken reduces compensation.

Continuing Medical Education. CME is an important component of your contract, as CME is required for licensing and board certification. The general rule is one week off annually for CME, in addition to your PTO. The employer should pay the full cost of your CME, such as registration fees, lodging and travel, subject to a cap. A common reimbursement cap is $2,500, but it can range from $1,500 to $3,000. Sometimes the allowance for CME is bundled with reimbursement of professional expenses, such as licensing and dues, and the cap for bundled reimbursement is generally $5,000. If you are paid on a formula, this expense might be a subtraction to your compensation.

A Word About Professional Liability. The following paragraphs discuss medical liability insurance, so a brief discussion about professional liability is in order. Bottom line—you are always personally liable for an injury to a patient—even if you are employed.[24]

Amount of Insurance Coverage. Lawyers disagree on the amount of insurance to carry. Some lawyers say that too much insurance encourages personal injury lawyers to sue and therefore argue for lower amounts to deter suits. Nevertheless, some minimum insurance is required for active hospital medical staff privileges. Having more than adequate malpractice insurance coverage is advisable to protect your personal assets notwithstanding contrary opinions. The insurance will pay an attorney to defend you, including against frivolous claims. Fortunately for physicians, Texas and other states adopted tort reform, which limits the recovery for non-economic loss, i.e., pain and suffering. This legislation has tempered the size of verdicts in favor of the patient.

Professional Liability Insurance. The employer, and not you, should pay the premiums for your professional liability insurance coverage. You should be interested in the amount of coverage, known as the "policy limits." Most hospital staff bylaws require a minimum amount of insurance to have privileges. The customary minimum

[24] The legal system calls this type of injury a "tort." To win a case against you, the patient (or the family of a patient) must prove by a preponderance of the evidence that you were negligent. Negligence is an act or failure to act that falls below the level a reasonable person in your specialty would perform under similar conditions. In addition, if you are found liable, due to the legal doctrine of "vicarious liability," the employer is liable, meaning the patient can recover from either of you, but only to the limit of the verdict.

limits in Texas are $200,000 for each occurrence and $600,000 as an annual aggregate for all occurrences. Hospital-based practices, such as pathology and radiology, are customarily required to carry higher limits, usually $1 million per occurrence and $3 million annual aggregate.[25]

Prior Acts. The insurance purchased by the employer will cover only the time you work for the group. Thus, consider whether you need to arrange for insurance coverage predating your employment, sometimes called "nose" coverage. If you are taking a position out of residency or fellowship, you probably do not need to worry too much about pre-employment insurance, although it is not unheard of for a resident to be sued after leaving training.

"Claims-Made" vs. "Occurrence" Policies. Employers prefer to purchase malpractice insurance policies issued on a "claims-made" basis, meaning you are insured only if the claim is made while the policy is in effect. The other basis of insurance is "occurrence," meaning you are insured if the claim is for an event that occurred while the policy was in effect, no matter when the suit is brought against you. Occurrence policies are attractive because no tail policy need be purchased.[26]

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[25] Texas does not have statutory minimum malpractice insurance limits.

[26] The premiums for claims-made policies are lower in the first three or four years than occurrence policies. The difference in premium cost reflects the risk the insurance company undertakes. It is unlikely a suit will be filed against you in the first or second year of employment. The risk increases the longer you are employed. Since the claims made policy only applies while you are employed, the insurance company's risk is low in the first few years, translating into a lower premium.

Self-Insured Coverage. Hospitals may choose to self-insure. If that is the situation, be sure to obtain information about the self-insurance, as there is possibly no actual insurance policy but only an accounting reserve, perhaps not funded, that is entered on the employer's books for possible claims. Self-insurance is distinctly different from a traditional insurance policy.

An insurance policy is a contract between you, as the insured, and the insurance company, insuring against the risk of loss. Your name appears on the professional liability policy. You can look to the insurance company, instead of the hospital, to defend the claim and pay any loss. Self-insurance is an internal accounting arrangement of the employer, which estimates the expected cost of its claims and makes an accounting entry for a reserve to pay them when they occur.

The insurance company bears all the risk, up to the policy limits, if you are sued. If you are covered by self-insurance, the employer bears the risk of loss for you and everyone else it self-insures, other doctors, nurses, etc.

The hospital, not you, controls the lawsuit against you and whether to go to trial or settle. The hospital's risk management team may choose to settle the suit against you to "manage" its exposure and avoid surprises in the court room. Remember that any settlement of a medical liability claim against you must be reported to the National Practitioners Data Bank.[27]

The insurance risk is immediately greater for an occurrence policy because the insurance applies no matter when the suit is filed. Thus, employers save money for the first few years buying a claims-made policy.

[27] https://www.npdb.hrsa.gov

> **Negotiating Tip:** Ask the hospital about the insurance. If the insurance is self-insurance, ask the employer to buy an individual policy that names you as the insured. Some institutions have been known to accommodate this request. Under an individual policy, the insurance company is responsible for your coverage, as opposed to a risk management team employed by the hospital and answering to its executives.

Disclosure in the Insurance Application. Before the insurance company will issue a policy, you must apply for coverage. You must disclose any prior claims made against you or any events you know about that might give rise to a claim. While no one likes to air dirty laundry, it is important to give the insurance company full disclosure. If there is less than full disclosure, the insurance company can deny coverage if a claim arises later even if has nothing to do with the required disclosure.

Notice of Claims. You must give prompt notice of any lawsuit to the insurance company. Some states, like Texas, require a plaintiff to give the physician a "heads up" of a medical claim before filing suit.[28] If you receive a notice, send a copy to the insurance company immediately. If a lawsuit is filed, the insurance company is required to defend you. It will hire an attorney. This attorney has ethical obligations to both you and the insurance company.

While the insurance company may select the attorney to defend you, you should insist that the attorney is

[28] Texas Civil Practice and Remedies Code, Section 74.051.

acceptable to you. Make sure the attorney has the experience necessary to defend the type of claim being asserted against you. Not all claims fall within a professional liability insurance policy. Some claims are covered by general liability policies, so always err on the side of notifying all insurance companies who have issued insurance policies for your benefit.

Tail Insurance. The insurance coverage of a claims-made policy ends when your employment ends. If a patient sues you after the end of your employment, you are uninsured. To assure continued insurance coverage, your contract will mandate the purchase of a "tail policy."[29] On the other hand, if you had an "occurrence" policy there is no need to buy a "tail policy."

Extended Reporting Period Endorsement—"Tail Insurance." Tail insurance is not a new policy, but rather an endorsement that extends the period that claims may be reported to the insurance company for coverage under the claims-made policy. The premium increases with the length of the extended coverage. By statute, an injured person has a limited period ("limitations" and "statute of limitations") to sue for malpractice. The limitation on suing in most states, Texas included, is two years after the event or, if the event is not known, two years after the event is discovered. Therefore, protection under the tail policy is maximized if the reporting period has no expiration, but the endorsement will cost more.

[29] The employer's insistence for tail coverage is self-motivated. Remember the patient can sue the employer. Requiring tail insurance will assure the employer that you are covered, and any payment will come from the tail insurance company and not the employer.

Caution: Minors have additional time to sue. If you treat minors, you want a tail policy that does not expire.

Who Pays the Tail Premium? The tail policy premium can be a multiple of the annual premium for the claims-made policy. It is due when coverage begins. Look to see who must pay for the tail policy. The contract will say you buy the tail policy, no matter who ends the contract or if it expires at the end of the stated term.

If that is the case in your contract, ask the employer to buy the tail policy if it chooses to terminate your employment without cause, and in all other instances offer to buy the policy. Explain to the employer that it controls the decision to terminate without cause, not you, and therefore it's only fair that the employer pays for the tail policy in that event. An alternate negotiating strategy is to ask the employer to share the tail policy premium equally. Some employers are open to sharing the cost. Be mindful that the benefit of the tail policy is primarily for your protection against a lawsuit.

If you are to buy the tail policy, the contract will authorize the employer to buy the policy if you don't and collect the cost from you or withhold the cost from amounts due to you.

In contrast to private practice, the hospital will buy the tail insurance.[30] This distinction is certainly favorable to you and the hospitals use it as a recruiting incentive.

[30] Sometimes the hospital's agreement will make you responsible for paying for tail insurance if the hospital terminates your employment "for cause" or if you violate the covenant not to compete.

Nevertheless, remember that many hospitals self-insure the tail coverage.

Alternatives to a Tail Policy. If you must pay for the tail policy, ask that an alternate arrangement be included in the contract. In lieu of buying a tail policy, you agree to keep in effect a claims-made policy with a prior effective date that is the original date of your employment. If you go to work for another employer, you can ask the insurance company to begin the insurance coverage as of the start of your prior employment, called the "retroactive date." This arrangement is equivalent to a tail policy and is cheaper than the premium charged for an outright tail. However, this alternate arrangement may not work if you relocate out of the state where you worked.

Benefits. The employer should, at a minimum, provide health insurance and participation in qualified retirement plans, e.g., a 401(k). Your contract should list all the benefits the employer offered during recruiting. Even though the benefits are listed, don't be surprised if the employer reserves the right to change or terminate any of them at any time during your employment. This reservation is acceptable, except that it should not apply to the PTO allowance, the CME allowance and the payment of malpractice premiums. Be sure the contract says you will receive all benefits made available to its other full-time physician employees.

Summary Plan Descriptions. Participation in insurance and retirement plans is governed by the plan documents. Ask for summary plan descriptions (SPDs), which are preprinted documents prepared by the benefit provider, so you will know how the plan will benefit you. SPDs are a quick way to know what is provided and the conditions for participation.

Health Insurance. Most employers will pay the cost of your health insurance but require you to pay the premiums for your spouse and dependents. Larger groups and hospitals may provide life insurance, dental insurance, disability insurance (discussed in a subsequent section), and long-term care insurance.

Cafeteria or 125 Plans. As an employee, you are not taxed on premiums your employer pays for your health insurance coverage. Many groups will allow you to obtain dependent health insurance coverage and other types of insurance coverage, through a cafeteria plan or 125 plan (meaning Section 125 of the Internal Revenue Code) by using pretax payroll deductions. These plans allow you to save the taxes on paying for the additional benefits.

Disability Insurance. If your employer does not furnish disability insurance, make sure you have personal disability insurance coverage. Actuarially, your disability is more likely than death early in your professional career. If you pay for the insurance, the disability benefits will be tax-free when paid to you. If your employer pays for the insurance, the benefits will be taxable to you as ordinary income. If your family situation allows, get quotes for a longer exclusion period, such as 90 days, which will help reduce the cost of the insurance.

Retirement Plans. Retirement plans have very detailed specifics on your participation, such as minimum years of service before you become vested in employer contributions. Some retirement plans, such as a 401(k)[31] plan, allow you to defer a portion of your compensation ($18,500 in 2018) to the plan. The plan may call for the

[31] 401(k) refers to the Internal Revenue Code Section authorizing these types of retirement savings accounts.

employer to "match" your contributions. Contributions by you or the employer are not subject to income tax[32] and are always 100 percent vested.

Complex Internal Revenue Code provisions govern qualified retirement plans. Any withdrawals from your account before you turn 55 are subject to a 10% income tax penalty in addition to income taxes on the withdrawn amount. If possible, try to maximize your contributions to the retirement plan to provide for future retirement income.

Other Employment Benefits. Other benefits can include cell phone plan costs, subscriptions to medical journals, and membership dues in medical societies and board specialization.

There also could be one-time benefits, such as a "sign on" bonus and reimbursement of your moving expenses. Sign on bonuses vary widely. Again, survey information can be instructive. Hospitals will reimburse up to $10,000 of moving expenses subject to their documentation policies. Recall the repayment obligation that might apply if your employment ends in the first two years.

Mandatory Expenditures. Your contract may require you to maintain a car and a telephone line at home at your expense. These provisions are included not so much to shift the cost to you as to allow you to personally deduct these costs for tax purposes. Your accountant should advise you on the deductibility of these expenses on your individual tax return. These type of contract provisions

[32] The subsequent earnings on the contributions will be tax deferred. One exception to deductibility is a Roth retirement plan. Talk to your CPA or your personal financial planner about retirement planning.

are appearing less frequently in physician employment contracts.

Indemnification. The contract will contain a section saying that you indemnify (a legal word for reimburse) the employer. Indemnity is a legal concept that obligates one person to pay another person for losses that might occur in the future. An indemnity provision will require you to reimburse your employer for any money it pays because of your actual or alleged mistake. Let's say a patient sues the group for a mistake alleged to have been made by you. The indemnity obligation requires you to reimburse the employer if it has to defend against the suit.

If possible, seek to delete these types of obligations. The group should rely on the malpractice policy covering you, instead of your promise to indemnify it. The employer undertakes business risks when it employs you and profits from your services. If the employer won't delete an indemnity provision, ask that it be modified not to pertain to losses that are covered by insurance. And, of course, ask that the employer agree, reciprocally, to indemnify you for any mistakes it or its employees make.

Restricted Activities. Employers add a variety of restrictions on your activities. Primary among these restrictions is the covenant not to compete. Other restrictions include your promise not to disclose the employer's proprietary and confidential information, such as its patient list, referring physician list, fee schedule and unique policies and procedures. In addition, you may be asked to promise that you will not attempt to hire the employer's employees after you leave. The following paragraphs cover these restrictions in more detail.

Covenant Not to Compete. Covenants not to compete have become ubiquitous to physician contracts and your contract will include one. **Covenants not to compete limit your freedom to practice after the end of your employment and should be studied carefully before signing the contract.** Contrary to popular wisdom, covenants not to compete are enforceable if they meet common law, and in some states, statutory requirements.[33] For example, Texas has a law specifying additional requirements for the covenant to be enforceable. The covenant not to compete is a serious contractual matter that can severely limit your professional options when you decide to end your employment. Employers rely on noncompete covenants to protect their business from unfair competition and will spend the money to enforce them if a physician chooses to violate them.[34]

Minimum Requirements. Courts view an employment covenant not to compete as a restraint on trade that will be enforced only if it is necessary to protect legitimate interests the employer has in the employment relationship. Therefore, the employer must have an interest that requires protection, such as goodwill, trade secrets, and confidential information, which can include patient lists and referral sources.[35] If the covenant is necessary to protect the employer's business interests, the covenant's restrictions must be also **reasonable** as to

[33] Some states, not many, prohibit covenants not to compete, e.g., California.

[34] A majority of state supreme courts have ruled that a physician noncompete is not void as a matter of restricting the public's access to care, though courts will take into account the availability of specialists in the community.

[35] Goodwill is the intangible part of the practice that attracts a continuing flow of patients.

these restriction: geographic scope, duration and restricted activity.

Geographic Scope. The non-compete covenant will prohibit practicing within the area of a circle measured as a radius. The radius is linear and is not the distance traversed on streets.[36] A primary care practice should have a shorter radius than a specialty practice, since the primary care practice has a larger base for its patients located nearer to the practice than the specialty practice. In large metropolitan areas, a radius exceeding five miles should cause some concern. On the other hand, a radius of 25 miles may be entirely reasonable for a medical practice located in a less densely populated region. Be very mindful of the location or the locations to which the radius applies.

> **Negotiating Tip:** If the practice has more than one location, negotiate the "prime" location that has relevance to where you are assigned to practice. The radius should apply to the prime location and not the employer's other clinic locations. A radius that applies to multiple locations could result in you having to move to another city.

Duration. The non-compete may last only for a reasonable period after the end of your employment. Most lawyers believe a covenant should not extend more than two years, with one-year being common. Keep in mind that even if the restriction lasts only for one year, the geographic scope may still force you to move to another community.

[36] It is relatively easy to draw the restricted area on a map available on the Internet and the map will give you an idea of the reach of the restricted area.

Activity Restricted. The covenant should narrowly describe the type of medicine restricted. If a subspecialty is involved, the restriction should be limited to the subspecialty and not the general practice of medicine.

> **Negotiating Tip:** Consider asking for the addition of limited exceptions to preserve your options, such as working at a medical school, as a locum tenens, or at the Department of Veterans Affairs, without being considered in competition.

Unique Texas Requirements. For physicians practicing in Texas, Texas law requires the covenant not to compete to contain explicit provisions, or it will not be enforceable.[37] The employer must (1) give you access to a list of patients seen in the year before your termination, (2) supply you with a copy of patient's medical records upon the patient's authorization and the payment of a TMB-approved copying fee; (3) allow you to continue to treat patients with acute illnesses; and (4) most importantly, provide the right to buyout the restriction.

Buyout Amount. There are two choices for the buyout. One choice is an arbitrator decides the buyout amount at the end of your employment. This choice defers arriving at the buyout amount until it needs to be known. Although arbitration is often considered an expeditious resolution of disputes, it can still take up to a year to reach a decision. This delay will frustrate you. If you choose to compete, you'll be forced to pay the amount the arbitrator ultimately decides. If you want to avoid paying an unknown amount, you won't be able to work in the restricted area until the arbitrator makes a decision.

[37] Texas Business and Commerce Code, Section 15.50(b).

The second choice is to state the buyout amount in the contract. The stated amount can be a specific dollar amount or a formula. To date, there is no court guidance on how to calculate the buyout amount.[38] As a matter of pure convenience, the buyout amount is one year's compensation. As you can imagine, a buyout amount equal to your annual salary is not an affordable option, which means you are stuck moving to another city to avoid violating the restrictions.

> **Caution:** Covenants not to compete are in a constant state of development, and both court decisions and new laws could affect the statements in this guide. For this reason, consult an attorney if your contract contains a covenant not to compete.

Negotiations of Covenants Not to Compete. Always ask the employer to delete the covenant not to compete. If the employer insists on the covenant, ask that it not apply if: (1) you leave for any reason in the first year, or (2) the employer terminates your employment without cause. Sometimes employers will agree to limit the non-compete under those conditions. You should ask for changes to the geographic and temporal restrictions to limit them as much as possible. As noted above, ask for "carve out" activities that won't violate the non-compete.

Caution on Non-Competes. A non-compete covenant can have a very dramatic impact on your professional career. It is not unusual that your first employment opportunity will not endure. Unfortunately, the non-

[38] I wrote an extensive article on the buyout amount published in the *Baylor Law Review*, which can be accessed by an Internet search.

compete covenant can have a very chilling effect on your ability to find employment in the same community.

You selected an attractive community in which to start a career. You bought a house and started to put down roots. The non-compete may result in having to relocate to a new community. While you may have the right in Texas to buy out the restriction, you will not be financially able to do so—the price will be prohibitively high. **Bottom line: Think about the possible consequences of the non-compete before you sign a contract with one in it.**

Confidentiality Covenants. Employers want to protect their confidential information. This information extends beyond patient privacy issues and encompasses information that gives the group a competitive advantage. The employment contract will state that the employer will impart confidential information during your employment. You promise never to disclose that information. Unlike the covenant not to compete, the covenant not to disclose confidential information is perpetual.

> **Caution:** Even if your contract does not contain a confidentiality provision, employers still have protected rights in confidential trade secrets.
>
> **Negotiating Tip:** Ask for "carve-outs" to be added to the covenant. These carve-outs exclude confidential information you learn from other sources or that is generally known to the public and allow to answer lawful requests or government investigations.

Non-Solicitation. Separate from the covenant not to compete, employers ask that you promise not to hire any of its employees for a year after you leave. The promise

may also include any employees who were employed by the employer at any time during the year prior to your departure. These requests make sense and not objectionable.

Consequences of Violating Restrictions. The employer can seek an injunction if you violate your covenant not to compete. What these words mean is the employer can sue you and request an expedited court order prohibiting you from competing or violating a non-disclosure or non-solicitation covenant. If you don't comply with the court order, the court can hold you can in contempt. The employer may seek also the payment of money from you as part of its lawsuit to cover provable losses.

In the noncompete provisions, the contract will embed self-serving language. One universal statement is you acknowledge the restrictions are fair and reasonable and won't prevent you from earning a living.[39] The employer can use these admissions against you in court if you later try to challenge the enforceability of the restrictions, such as asking the restricted territory be shrunk from a 10 mile radius to a 5 mile radius.

While I find the admissions to be one-sided, I don't try to negotiate them—the employer's lawyers won't change or delete them. They have become to engrained in the employment contract. From my point of view, either the restriction to begin with is acceptable or it is not, and if it is acceptable, I believe the physician should observe the restriction upon departure. At the end of your employment, you can contest the covenant not to compete if you believe it is unreasonable, e.g., argue that a ten-mile

[39] The contract will contain another admission that the buyout amount is fair and reasonable.

radius is unreasonable and request the court to change it to five miles.[40] The employer will undoubtedly try to use the admissions to its advantage, but the court should independently determine if the restrictions are reasonable and not rely on confessions made before you started working.

Ownership of Medical Records. Medical records are an important asset to every practice. Because of their value, your contract will say that the employer owns any medical records you create. If you leave the practice, you may need access to these records (e.g., for a malpractice suit or patient complaint to the TMB.) If the contract is silent on this issue, you should ask your employer for limited access to the records for medical board complaints, governmental investigations or liability claims.

Inventions; Intellectual Property. The contract will provide that anything you invent, discover or write while you are employed belongs to the employer. It will go on to say that you will assign your ownership of the invention to the employer and assist it with patenting or otherwise protecting it.[41]

If you see this provision, ask that it be deleted, particularly if you are engaged in research or activities separate from your employed activities that could lead to an invention. While inventions are concrete examples, the contract

[40] Courts are empowered to "reform" the restrictions in a covenant not to compete to what the court considers reasonable considering the employer's interests to be protected. In Texas this reformation is required by the non-compete statue.

[41] This assignment is part of the "work for hire" doctrine in intellectual property law. If you might create intellectual property, ask for a "carve out" that excludes what you create and consider consulting an intellectual property attorney.

provisions can extend to writings, protocols, and processes as well.

Equity Ownership. Your employer will be a legal entity. At some point, you may want to become an owner, which is generically referred to as becoming a "partner." Typically, a group will consider you for "partnership" after one to five years, with two years being the most common.

If you want to be considered for "partnership," ask your employer to add language that it will consider you for equity ownership shortly before the second anniversary of your commencement date. The promise is not concrete, because the group does not want to commit in advance that you will become a partner until you have proven your productivity, but at least you have a commitment to be considered.

Specifics About Ownership. You will want to ask what the employer's expectations are to qualify to become a "partner." For example, what amount of collections must you consistently achieve? You should ask for specifics about becoming a partner. For example, is there a buy-in and how much is the buy-in? Will the group finance the buy-in or will you have to borrow the money from a bank? Ask for a copy of the agreements among the owners that govern their ownership. These agreements go by a variety of names, e.g., a "buy-sell agreement." Most importantly, try to obtain an understanding how the physician owners are treated differently from the staff physicians. Do they keep their collections after payment of direct and shared expenses? Do they share the profit of non-owner physician employees?

Ancillary Services and Entities. The business of medicine now requires physicians to take advantage of revenue-producing ancillary services. Many practices own clinical laboratories, diagnostic imaging centers, infusion, pharmacy and the like, to generate additional profit. While federal laws and regulations apply to physician ownership of ancillary services (notably the Stark law), many practices legally operate ancillary services.

You should understand the ancillary services the group can provide to patients, their revenue potential, and who provides them — your group or another, perhaps related entity. Some practices use one entity for professional services and another entity to provide ancillary services. These distinctions could affect your compensation. If you are entitled to a production-based compensation, you will want to receive credit for revenue generated from these ancillary services for your patients. Hospital employment contracts uniformly exclude ancillary income opportunities from the physician's compensation, principally due to the application of the Stark law.

Related Investment Opportunities. You should ask if the practice's physician owners own other entities related to the practice. For example, the senior owners of the practice may own the building where the practice is located. The entity owning the building rents it to the practice group. Thus, part of the group's overhead, which you pay for under the productivity models, becomes additional revenue for a subset of the practice's owners. Similarly, related entities may lease equipment or provide management services.

Be aware of these possibilities, and if they exist, make sure you will have the opportunity to participate in these

related entities. The hospital contract will strictly prohibit ownership of ancillary facilities, such as ambulatory surgery centers. The hospital views these opportunities as competitive with its business.

Governing Law. The contract will say which state's laws govern the enforcement and interpretation of the contract. The laws should be the state where you are working and not another state.

Venue. The contract will specify the location where a dispute must be resolved. The location where the dispute is to be resolved is referred to as the venue. Look to see if a specific venue is stated. It should be the city where you work. If it is another city, it could be much more expensive to resolve the dispute there than where you work. As an example, you may work in Houston, but the venue is specified to be Dallas, where the hospital is headquartered.

Attorney's Fees. Many states have laws that allow the court to award the party who wins a lawsuit over a contract the attorney's fees it paid to win. Your contract may reiterate the law.

Time Limit to Resolve a Dispute. Recall the prior discussion on liability and how long a patient can wait to sue you, two years. That limit is set by statute. Similar state laws apply to contract disputes; however, Texas and many other states extend the time to sue over a contract to four years. A contract will seldom shorten the time to sue the employer.

Mediation. Mediation is a process by which the parties attempt to resolve a disagreement through an informal meeting presided over by a neutral mediator. The process

may be described in the contract, or the contract may require the parties to follow the rules of a neutral dispute resolution organization described in the next section. Some lawyers prefer mediation because the employer and the physician may reach a compromise without resorting to a lawsuit or arbitration. Mediation is not binding on the parties. Any settlement is a voluntary resolution. If a settlement doesn't occur, the unhappy party can sue or arbitrate if arbitration is binding.

Arbitration. In lieu of bringing a lawsuit in the courts, some contracts specify binding arbitration as an alternate way to resolve a dispute. If you agree to binding arbitration, you cannot go to court to decide the dispute. The contract's arbitration provisions should, at a minimum, state where the arbitration is to be held, the number of arbitrators who will decide the dispute, and the rules that will govern the arbitration.

The most common arbitration rules are the commercial arbitration rules of the American Arbitration Association (AAA), a nonprofit national dispute resolution organization (www.adr.org). Other neutral organizations can be selected, such as the American Health Lawyers Association Alternative Dispute Resolution Service (www.healthlawyers.org).[42]

> **Caution:** The number of arbitrators can be important to you. The arbitrators are usually lawyers. A contract that requires three arbitrators means scheduling can become complex, as the calendared dates must be open for each of the three arbitrators, the employer and its attorney, and your

[42] The arbitration provisions can be extensive in specifying the procedures for the arbitration and is a matter for your attorney's review and counsel.

attorney and you. That means delays in presenting the dispute for resolution.

Which Is Better: Sue or Arbitrate? Attorneys differ in their opinions if it is better to have binding arbitration. Factors in favor of arbitration are the perceived speed of resolution, a professional decision maker versed in the subject matter, and reduced costs. Factors in favor of traditional lawsuits are well-defined rules of procedure and evidence, the opportunity for a jury trial, and the opportunity for appellate court review of the trial court's decisions. Your attorney is in the best position to advise you on adding or eliminating binding arbitration.

Part III: Hospital Assistance Agreements

Introduction to Hospital Assistance Agreements. Up to this point, our attention was on the employment agreement. In this Part, we focus on a contract that goes by several different names: hospital relocation agreement, hospital recruiting agreement or a hospital income guarantee. I group these names under this phrase: a "hospital assistance contract."

This contract is in addition to your employment contract. It will come directly from the hospital offering the assistance and is signed concurrently with your employment contract. The hospital assistance contract can be between just the hospital and you or among the hospital, the employer and you, but it will be separate from, and in addition to, your employment agreement.

It's important that you approach the hospital assistance contract with a heightened degree of caution. These contracts are seductive, in that they seemingly offer "free" money to the recruited physician. The "free" money is a

loan, which must be satisfied in one of two ways: (1) through continued service in the hospital community for a minimum number of years; or, (2) through actual repayment in cash of the loaned amount with interest. Exercise caution because the continuing service commitment may limit your professional opportunities. If you choose the hospital's assistance, use the support to build your practice to the point where you no longer need the financial aid.

> **Caution:** A hospital assistance contract is equivalent to a bank loan. The assistance is not free and must be repaid either in cash or through continuing service in the hospital's community. The hospital will hold you accountable to the contract's repayment obligations. If you owe the hospital, it will sue you to collect if you don't satisfy the community service conditions. Due to federal laws, the hospital can't look the other way if you owe it money under the assistance agreement.

Hospital Assistance Agreements. Hospitals offer financial incentives to recruit you to the hospital's service area. Even if you are finishing training in the same city, the hospital may legally offer a recruiting contract with financial guarantees to induce you to stay.

While the hospital is performing an admirable community service in attracting high-quality physicians and helping them establish their medical practice, the hospital is highly motivated by the referral relationship the arrangement engenders. Most hospitals have staff dedicated to recruiting physicians to join existing practices or to open a private practice in their community.

Limited Benefit; Limited Term. The financial assistance lasts only a year, which is usually called the "guarantee period."[43] The assistance is limited to supporting you in starting your practice or subsidizing the group employing you. As you will see below, the assistance is stated as a fixed amount, which is usually referred to as the "guarantee amount." The contract will state the assistance as a monthly maximum amount and as an aggregate maximum annual amount.

Technical Language. If you have trouble reading the contract, don't be alarmed; these contracts are difficult to understand. After reading the Elements Common to Most Hospital Assistance Agreements section below, you will find it easier to parse the technical language.

Retention Provisions. Hospital assistance contracts are cleverly designed to encourage you to stay in the hospital's service area by imposing financial disincentives to moving away. In exchange for the hospital's money, you are expected to remain in the hospital's community at least four years, i.e., three years after the end of the guaranteed year. If you leave the community, the hospital will demand immediate repayment of the advances (loans) paid to you during the first year, to the extent not forgiven, which is discussed below.

Regulatory Issues. Because you can refer patients to the hospital, the contract must comply with the Stark Law and Anti-Kickback Statute and their approved "safe-harbors," which are discussed in greater detail below.

Elements Common to Most Hospital Assistance Agreements. Though hospital assistance contracts may

[43] Two-year guarantees occur but are rare.

be worded differently and go by different names, they typically share very common elements.

First, the contract guarantees the physician a minimum salary or collections. Second, the contract offers the physician additional benefits, such as a "signing" bonus and assistance with marketing, a moving allowance, practice management training and software, and payment of professional liability insurance premiums.

Third, the contract will address the repayment of the financial assistance. Fourth, the contract imposes a variety of conditions, such as maintaining a full-time[44] practice in the hospital's community, covering emergency department call, maintaining a medical license, maintaining enrollment in Medicare/Medicaid programs, and maintaining active staff privileges with the hospital.

Remember, as with employment agreements, hospital assistance agreements can be negotiated. Keep in mind, however, that the hospital may be part of a national system; therefore, the contracting officer will resist changes that deviate from the hospital's contracting policy or uniform provisions. You should still feel empowered to negotiate the amount of the guarantee, the ancillary benefits, particularly the signing bonus, and the repayment time frame. There is survey information available that can provide guidance on what amounts to ask.

How Do You Get Paid the Guaranteed Assistance? The contract will specify the procedures to follow before the hospital will pay the monthly assistance. First, you must

[44] The contract is usually specific about the fact that you will practice full time (e.g., 40 hours per week, and no more than two weeks for vacation).

timely bill your patient encounters. Second, you or your employer must give the hospital a certificate stating how much you collected during the prior month. Third, the hospital inspects your records to confirm the amounts billed and collected.

Example of Assistance Payments. The hospital arrives at the guarantee amount by projecting your monthly salary and practice expenses for one year. Thus, a hospital might guarantee a minimum of $30,000 per month, out of which you will be paid a monthly salary of $18,000, and the remaining $12,000 is used to pay your operating expenses, such as rent, staff, supplies, and the like. The hospital will guarantee this amount for the first 12 months of your practice. The payments are made in arrears, meaning that you will receive a monthly payment following a month of service. Since you have no collections the first month, you'll receive a hospital payment of $30,000.

> **Caution:** Like compensation, you may negotiate the guaranteed amount with the hospital. The guaranteed amounts applicable to your specialty and region of practice are available from the same regional salary surveys discussed previously in this guide.

What the Guarantee Really Means. The guarantee amount is the maximum amount of assistance the hospital will pay. The guaranteed amount is not in addition to what you make. In other words, the hospital's assistance is measured against your actual collections. During the first few months, the hospital will pay the full monthly guarantee, because collections will be low and you will be ramping up your patient encounters.

After a few months, you will start collecting for patient encounters and have revenue. Your collected revenue will be deducted from the guaranteed amount, and the hospital will pay you only the shortfall. Continuing the prior example, if you collected $35,000 in a month, the hospital would not pay you because the collections exceed the $30,000 monthly guarantee.

> **Caution:** The guaranteed income the hospital's recruiters offer is tantalizing. For the first time, the physician will make a competitive salary, even if the physician's services do not yield that level of collections.

Use the hospital's support for its intended purpose—develop your medical practice by establishing yourself with patients, referring physicians, and the community. This point cannot be emphasized enough. At the end of the guarantee period, you want your collections to exceed what the hospital guarantees. Failure to invest in yourself during the one-year guarantee period will result in a very rude awakening when your compensation drops precipitously at the end of the year.

Excess Collections. If your collections in a month exceed the guarantee, the excess will be rolled forward to succeeding months. The hospital's guarantee for the succeeding month will be correspondingly reduced. So, if you collected $35,000 and the hospital guarantee was $30,000, the hospital's guarantee for the succeeding month would be reduced to $25,000. If you collect more than $25,000 in the following month, you will not receive a payment from the hospital, and the excess will reduce the following month's guarantee.[45]

[45] Earlier this guide mentioned the possibility that the hospital will pay you separately for call coverage or medical director

When you think about it, the reduction is only fair. The hospital is offering its assistance to make sure that you can earn enough to pay your salary and expenses while you establish your practice.

"True Up" at the End of the Guarantee Period. At the end of the "guarantee period" (e.g., the first year during which the hospital pays you monthly assistance), you will provide an accounting of your billings and collections, and the hospital's accounting staff will review the numbers. Based on this information, the hospital will determine the final net amount it paid over the guarantee period, a "true up." This amount will be what you owe to the hospital. Most hospital assistance contracts charge interest on this net amount, usually at the prime rate charged by a bank plus 1%.

The contract language to cover the true up is very tortured reading, but it is written to arrive at the net amount the hospital paid you. Many hospital assistance contracts now include examples in the exhibits to show how your collections reduce the guarantee amounts and how the net amount due to the hospital is calculated.

Repayment. You must repay the net amount plus the accrued interest due to the hospital, but if you satisfy a series of conditions, the hospital will forgive the amount due over time. The hospital will forgive a monthly installment for each month that you remain in its service community, (e.g., 1/36th of the balance due per month of continued practice in the service community).

services. Confirm if these payments count as collections which might reduce your guarantee payments.

If you leave the service community before the end of the contract or otherwise fail to meet the performance conditions, the remaining, unforgiven loan balance will be due. The amount is due in 60 days, but in some contracts, the amount may be paid over six months. Thus, as introduced at the beginning of this part, the hospital infuses the contract with serious financial disincentives from departing the community.

Performance Conditions; Breach of the Agreement. As mentioned, the hospital's assistance obligations are predicated on many conditions with which you must comply. If you do not observe the conditions stated in the contract, the hospital may declare you to be in breach of the contract, immediately stop making monthly assistance payments, and declare prior assistance it paid to be immediately due and payable.

Examples of Breaches. Many of the listed performance conditions are serious, catastrophic events, but they are usually events under your control, such as the loss of your medical license, the loss of staff privileges with the hospital, not providing emergency department coverage, failure to provide monthly collection reports or ceasing to actively practice in the community. With a breach of the contract, the hospital can terminate its assistance and declare the loan amount due.[46]

Remaining in the Hospital's Patient Community. As mentioned above, all hospital assistance agreements are conditioned on the recruited physician practicing full time in the hospital's service community for at least the contract period, usually four years—that is one year for

[46] A "breach" is the failure to observe or to perform a contract provisions, e.g., a default.

the guarantee period, followed by three years of service commitment. The federal safe harbor defines the geographic boundaries of the service community by the least number of contiguous ZIP Codes from which the hospital draws 75 percent or more of its in patients. In a large metropolitan area, the defined area may be geographically restricted. If you move your practice outside of this area, you will be in breach of the assistance agreement, and the hospital may seek repayment of the loan from you.

> **Caution:** The requirement to continue to practice in the defined area is very important to the hospital. If you do not fulfill practice in the defined service area, you can and should expect the hospital to take steps, including possibly legal action, against you to collect the remaining balance of the assistance.

Thus, it is critically important that you carefully evaluate the community to which you are being recruited to practice. You are making a very long-term commitment, and you cannot just abandon your commitment after the hospital's payments stop.[47] When you think about it, the commitment you make in the hospital agreement is just as significant as your obligations in a non-compete agreement with a group employing you.

> **Caution:** After the hospital's guarantee period expires, you will be on your own to earn a living from practicing medicine. Your compensation can be significantly influenced by the payor mix

[47] Hospitals disavow in their assistance agreement any responsibility for the success of your practice and you state that you evaluated the community and the opportunity for success before you signed the contract.

in your ongoing service area. In other words, if you must remain in a community whose population is indigent or uninsured or covered by Medicaid, you may not be able to earn a salary that is competitive with other markets with a better payor mix. Understand the payor mix before you sign on to receive a hospital guarantee.

Special Issues of Concern. The hospital assistance contract ends upon your death or disability. If the hospital contract is terminated before the end of its four-year period, the loan becomes due. You should ask the hospital to delete any provision that makes the loan due upon your death or disability—as those events are beyond your control. Truly, those events are risks for which the hospital is in a better position to bear than your family.

Restrictions on Investments in Competing Enterprises. The hospital assistance agreement prohibits investment opportunities. A common example is to prohibit the physician from owning an interest in a hospital, diagnostic imaging center, ambulatory surgical center (ASC), or more broadly, any entity that competes with the hospital's business. Obviously, the hospital is protecting its sources of revenues from physician encroachment.

Caution: The restrictions described are for the duration of the hospital contract (e.g., four years). As your practice matures you may be offered opportunities to invest in entities, such as ASCs, that compete with the hospital's business. The restriction could preclude you from taking advantage of an investment opportunity that could supplement your practice income and the

hospital will take measures to ensure your compliance, e.g., a lawsuit.

Other Financial Assistance. The hospital's assistance contract includes "up-front" monetary assistance paid at the beginning of the contract to help you establish your practice. Subject to meeting the regulatory requirement that the assistance meets fair market value standards, this assistance can be customized to your needs.

Examples of Other Assistance. Types of assistance include (1) a fixed amount up to which the hospital will reimburse the physician for relocating to the hospital's community, usually in the range of $10,000 to $15,000; (2) the first year's professional liability insurance premium, not to exceed a stated amount, or alternatively, the premium for a tail policy; (3) marketing expenses, up to fixed amount, to market your practice through advertisements in the media; (4) specific practice needs, such as billing software; and (5) monthly payments of medical education loans.

Another form of upfront assistance is a signing bonus of $5,000 to $25,000. The hospital will pay a portion of the bonus when you sign the contract and the remainder when you begin practicing in the service community. The foregoing are just examples of what you will commonly encounter, but this part of an assistance contract is one in which you can negotiate for payments that will best help your practice to succeed.

Repayment of Up Front Assistance. As in the case of the monthly income guarantee, the hospital will treat the additional assistance as a loan and amortize it like the guaranteed income assistance. However, if the "upfront" assistance is the only assistance, i.e., there is no income

guarantee, the upfront assistance is forgiven on a slightly different basis as the guarantee amount. For example, it has become common for signing bonuses and relocation reimbursements to amortize over the first two years of the contract. In other words, if you leave before two years, you must repay the hospital the amount paid divided by 24, times the number of months remaining in the two-year period.

Loan Forgiveness. As mentioned, the hospital will forgive the loan you owe over three additional years. Practice in the service community for three addition years and you will not owe the hospital anything.

Tax Consequences of Loan Forgiveness. While loan forgiveness sounds great, you must remember the amount forgiven will be income to you and subject to federal income tax. The hospital will send you and the IRS a Form 1099 showing the amount forgiven. You must report the forgiven amount on your tax return and pay the associated federal income tax. Texas does not have a state income tax, but other states have an income tax that would apply to the forgiven amount.

> **Caution:** Consult your accountant about the tax treatment of the hospital's assistance payments and the subsequent forgiveness of the repayment obligation. Loans are not subject to federal income taxes, meaning receipt of the money when loaned is not taxable, but the amounts subsequently forgiven are subject to taxes.
>
> Your tax advisor and you should understand at the outset of the contract how the hospital treats its loan advances to you and subsequently the forgiven amounts. The proper, though

> cumbersome, treatment is not to issue a Form 1099 for the amounts advanced to you but to issue the Form annually for the amounts forgiven during the prior year.

Coordination with Group Employment. The prior discussion focused on the recruitment of you as an individual to the community to practice. The same concepts apply when you are recruited to join a group. However, instead of a contract between just the hospital and you, the contract is with three parties: the hospital, the employer, and you.

Only the Incremental Cost. When the hospital assists an existing practice to recruit you, the Stark Law is specific on the amount of assistance it can offer the employer. The hospital may assist the employer only with the incremental cost of adding you as a member. This amount would include your salary, benefits and the added, actual cost the practice will incur to support your position, such as adding a nurse or buying additional equipment. By contrast, the hospital may more fully assist the physician setting up his or her solo practice, because all startup costs are needed to open your practice. In that vein, it is not uncommon to encounter several solo practitioners, each contracting separately with a hospital, who later combine as a group when the initial assistance ends.

Parties Responsible for Repayment. The hospital assistance contract provides for repayment in three ways. The first requires the assistance be paid directly to the employer. In that the instance, the employer must sign the contract and use the payments only for the employed physician's benefit. In addition, the group must also agree to repay the loaned amount of assistance if the recruited physician doesn't satisfy the contract conditions, such as

practicing in the community for the requisite time. Employers rarely want to be responsible for repayment because they don't control a physician's decision not to satisfy the loan forgiveness conditions.

In the second form, the contract provides the assistance will be paid only to the physician. In that instance, only the recruited physician is liable for repayment. In a third form, the employer repays its incremental costs in adding the physician as an employee, and the physician is responsible for the remaining assistance payments.

Collateral for Repayment. The hospital assistance contract requires the employer to pledge your receivables to secure the repayment of the guaranteed amount. The contract will also require the group to pay your receivables to you if you leave the group before the end of the first year. This latter requirement is added to give you a source to repay the loan.

Contracting Challenges. While the foregoing rules applicable to hospital assistance contracts are straightforward, the actual contract terms for the arrangement can be more problematic. For example, if the payments are made to the group and you meet the conditions for loan forgiveness, who gets the Form 1099 and who pays the income tax on the forgiven amount? If the payment is made directly to the physician, how does the money pass to the practice that is incurring the cost of the physician?[48] If the physician doesn't satisfy the forgiveness conditions, how does the group protect itself when the hospital is looking to it for repayment? There

[48] One solution is to require in the employment contract the physician endorse the hospital's check to the employer.

are solutions to these questions, but they do require careful drafting and consideration of the consequences.

Federal Anti-Kickback Statute and Stark Law Provisions.

Federal Laws. Hospitals receive significant revenue from the federally sponsored Medicare and Medicaid programs. Consequently, to deter abuse, federal laws restricting payments to physicians for referrals apply to hospital assistance contracts. The two principal laws are the Anti-Kickback Statute and the Stark Law. In the context of hospital assistance contracts, the two laws and their exceptions overlap in many respects. The following highlights the portions of both laws and their exceptions that apply.

Anti-Kickback Statute. The federal Anti-Kickback Statute prohibits payments in exchange for referrals of patients covered by federally sponsored health programs.[49] As hospital assistance contracts can significantly benefit communities that do not have sufficient physicians, the Department of Health and Human Services adopted a "safe harbor" that contains a series of conditions. This exception is referred to as a "safe harbor." The term "safe harbor" means that, if the conditions specified in the regulations are observed, the contractual relationship will not violate the Anti-Kickback Statute.

The safe harbor requires the physician to be recruited to a health provider shortage area (HPSA) among its

[49] 42 U.S.C. §1320a-7(a). You can find a summary of this statute at this CMS site: https://www.cms.gov/Medicare-Medicaid-Coordination/Fraud-Prevention/Medicaid-Integrity-Education/Downloads/fwa-laws-resourceguide.pdf

conditions. Nevertheless, a 2001 CMS Advisory Opinion 2001-04 allows a hospital to satisfy the HPSA condition by demonstrating its community has a shortage of physicians trained in the recruited physician's specialty.

Anti-Kickback Safe Harbor. In addition to the physician shortage requirement, the safe harbor lists the following conditions:

1. There must be a written agreement signed by the hospital and the recruited physician.
2. The recruited physician, if leaving an established practice, must receive 75 percent of his or her revenues from new patients not previously seen by the physician in his or her prior practice.
3. The hospital's benefits may not last for more than three years, and the assistance may not be renegotiated during the assistance period.
4. The recruited physician is under no obligation to refer to the hospital or generate business for it.
5. The recruited physician must be free to establish privileges at other hospitals.
6. The amount or value of the hospital's assistance may not be tied to the physician's referrals to the hospital.
7. The recruited physician must agree to treat patients receiving federal health care assistance in a nondiscriminatory manner.
8. The payment or exchange of anything of value must not benefit, directly or indirectly, any person (other than the recruited physician) or entity in a position to make or influence referrals of items or services payable by a federal health

care program to the hospital aiding the recruited physician.

Stark Law. The Stark Law prohibits a physician from referring a Medicare or Medicaid patient to any hospital if the physician has a financial relationship with the hospital.[50] A financial relationship includes payments under a hospital assistance contract. Fortunately, the Stark Law and its regulations contain an exception, as "safe harbor," specifically for hospital assistance contracts.[51]

Stark Law Safe Harbor. The safe harbor outlines the following conditions with respect to hospital assistance agreements:

1. The hospital assistance contract must be in writing and signed by the parties to it.
2. Except for the costs incurred by the employer in recruiting the new physician, the remuneration must be passed directly through to, or remain with, the recruited physician.
3. In the case of an income guarantee of any type made by the hospital to a recruited physician who joins a physician practice, the costs allocated by the employer to the recruited physician do not exceed the actual additional

[50] All government-sponsored health programs are covered by the law, but Medicare and Medicaid are the primary programs. The Stark Law covers 11 designated health services and inpatient referrals are covered by the law.

[51] Section 1877 of the Social Security Act (42 U.S.C. §1395nn), also known as the physician self-referral law and commonly referred to as the "Stark Law." A brief summary can be found here: https://www.cms.gov/Medicare/Fraud-and-Abuse/PhysicianSelfReferral/index.html.

> incremental costs attributable to the recruited physician. If the employer is in a rural area or a health professional shortage area HPSA, the rules in this condition are relaxed.
> 4. The records of the actual costs and the passed-through amounts must be maintained for five years and made available to the Secretary of Health and Human Services.
> 5. The hospital's assistance is not determined in a manner that considers (directly or indirectly) the volume or value of any actual or anticipated referrals by the recruited physician or the employer (or any physician affiliated with the employer) receiving the direct payments from the hospital.
> 6. The employer may not impose restrictions on the recruited physician that unreasonably restrict the physician's ability to practice medicine in the hospital's service community. 42 CFR §411.357(e)(4).

Fair Market Value. Central to the federal regulatory safe harbors is the assistance must be for fair market value. The hospital may not pay more than the fair market value of its assistance to the physician or the employing group. Paying more than fair market value is illegal and can lead to serious civil and criminal consequences for the hospital and you. This requirement means that the hospital must pay only assistance that would be needed to attract the physician to the hospital's service area.[52]

The salary must be competitive, but not more than what a new physician would be paid to come to the community.

[52] To assure it pays fair market value, the hospital will rely on the opinion of a third party valuation expert in addition to survey information.

The additional overhead assistance must be at its fair market value, such as the actual projected cost of staff, rent, and insurance premiums. The hospital will document the fair market value of the assistance through written opinions of valuation consultants or internal evaluations that the assistance does not exceed what the services would cost in the open market. As for overhead costs, the hospital will require copies of paid invoices for its records.

Relocation. To prevent abuse, the hospital cannot offer assistance to a physician practicing in its service area. If are you completing training or have been in practice for less than one year, you can be recruited to any geographic area, including the hospital's service area. If you have been practicing for more than one year then additional requirements apply.

You can be recruited if you have been practicing for more than a year if you to physically relocate your practice at least 25 miles from the prior practice location. Or your relocation results in at least 75 percent of your patient encounters come from patients you haven't treated in the last three years.

Non-Compete Covenant. Prior to 2007, the Office of the Inspector General (OIG) of the Centers for Medicare & Medicaid Services (CMS) interpreted the recruitment safe harbor to prohibit an employer imposing a covenant not to compete in the employment agreement. The OIG reversed this interpretation in 2007, stating that covenants not to compete were not categorically prohibited.

Subsequently, in Advisory Opinion 2011-01[53], CMS reached a much more employer-friendly conclusion. CMS believes that an employer may impose a covenant not to compete even if you and/or the employer are receiving payments from a hospital under a hospital assistance contract. It seems CMS believes that a covenant that otherwise satisfies the applicable state's law on restrictive covenants does not "unreasonably restrict the physician's ability to practice in the geographic area serviced by the hospital." In the specific advisory opinion, the OIG concluded that a one-year, 25-mile post-employment restriction met the safe harbor's conditions.

> **Caution:** Many employers will add you as an employee only if the hospital will provide financial support through a hospital assistance contract; however, the employer will restrict your ability to compete in the hospital service area after your employment ends. Be mindful that the employer may discharge you on short notice without cause. If your employment ends within 4 years, you must pay the remaining balance of the hospital note if you cannot remain in the hospital area.

> **Negotiating Tip:** It will be important to convince the employer to: (a) remove the covenant not to compete altogether; (b) delay its enforcement; or, (c) add an obligation that the employer must pay the loan for you if it terminates your employment without cause. The hospital may be an ally in these negotiations.

[53] You can find Advisory Opinion 2011-01 here: https://www.cms.gov/Medicare/Fraud-and-Abuse/PhysicianSelfReferral/Downloads/CMS-AO-2011-01.pdf

IRS Requirements. Tax-exempt hospitals face additional requirements under the Internal Revenue Code and its regulations pertaining to tax-exempt organizations. A charitable hospital must satisfy these requirements, in addition to the Anti-Kickback and Stark requirements, to maintain its tax-exempt status. The IRS has summarized these requirements in Revenue Ruling 97-21 (April 21, 1997).

Part IV: Other Agreements

Independent Contractor Agreements. You may be offered an agreement in which you are an independent contractor. Hospice care organizations, nursing home facilities, inpatient psychiatric facilities, independent urgent care and emergency facilities use independent contractor agreements.

A physician independent contractor agreement is like a physician employment contract. Both contracts are professional services contracts. They differ in two principal respects. First, under general common law principles, the employer does not have responsibility for the actions of an independent contractor.[54] The circumstances of the relationship determine independent contractor status, not the mere recitation of "independent contractor." If the employer exerts control over you, such as the ability to approve or direct the scope of work, the means of work, the location of work, and similar items, the relationship will be deemed to be an employment relationship even though it has been designated an independent contractor relationship.

[54] Recall the doctrine of "vicarious liability" discussed in Part 2. It does not apply to independent contractors.

The second difference is the responsibility for employment taxes and benefits. An employer must pay employment taxes on the wages of its employees. Independent contractors are responsible for those employment taxes, commonly called "self-employment taxes.". The IRS will apply common law factors in determining employee versus an independent contractor.[55] The factors are grouped into three categories: behavioral control, financial control and type of relationship.

An employer might prefer an independent contractor relationship with you if your services are akin to shift coverage. Treating you as an independent contractor will allow the Employer to shift other employment costs to you. These would include health insurance premiums, retirement contributions, professional liability insurance and other professional expenses, e.g., licensure and dues.

In addition to self-employment taxes, the independent contractor is responsible for making quarterly estimated income tax deposits. If employed, the employer is responsible for withholding its share (one-half) of employment taxes.

Letter Agreements. I have seen on a few occasions the entire employment arrangement embodied in a "term sheet" or offer letter. A term sheet or offer letter are very informal.

A term sheet or offer letter or expression of interest can be a useful tool in as a precursor to make sure the

[55] See IRS Publication 15-A, pages 5-6 and 7-9. Physicians are mention on page 5. These tests supersede the prior 20 factor test.

employer and you agree on the major employment terms, but it should not supplant a carefully written, thorough employment contract. If the parties agree on the major points, then the group asks its attorney to prepare the formal contract.

> **Caution:** Relying on a letter agreement is risky, because it will omit critical employment terms, if your employment ends, it is too late in the game to be concerned about what your rights are.

Good luck in negotiating your employment contract and keep in mind our suggestion that you hire an attorney to assist you. We wish you the best in your professional career. Send us examples of your employment agreement if you think they are interesting and perhaps should be covered in this guide or the more comprehensive book. On the following pages you will find checklists to use when evaluating employment contracts and hospital assistance agreements.

Mike Kreager
August 2018

Checklist for Employment Contract

- ❖Start Date: _____
- ❖Base Salary: _____
- ❖Bonus; Fixed Amount or Formula: _____
  - ❖ Request Sample Calculation: _____
- ❖Duties: _____
- ❖Location Assigned: _____
- ❖Equitable Call Coverage: _____
  - ❖ Weekend, Weekday, Holiday: _____
- ❖Mentoring; Referral Relationships: _____
- ❖Professional Liability Insurance Limits: _____
- ❖Tail — Who Pays: _____
- ❖Termination: _____
  - ❖ Without Cause; Minimum Notice: _____
  - ❖ Cause: _____
- ❖Payment After Termination; Bonus Payment for Post-termination Collections: _____
- ❖Benefits: _____
  - ❖ Group Health Insurance; Employee; Dependent: _____
  - ❖ Disability Insurance: _____
- ❖ Qualification Period; Benefit: _____
  - ❖ Life Insurance Amount: _____
  - ❖ Dues, Subscriptions, Licenses: Amount: _____
  - ❖ CME Amount: _____
  - ❖ Vacation: _____
  - ❖ Sick Leave: _____

Checklist for Employment Contract (cont'd)

- ❖Confidentiality Covenant: _____
- ❖Non-solicitation Covenant: _____
- ❖Non-compete Covenant: _____
  - ❖ How Far: _____
  - ❖ How Long: _____
  - ❖ Buy-out Amount: _____
- ❖Inventions Covered: _____
- ❖"Partnership" Opportunity: _____
- ❖Governing Law: _____
- ❖Dispute Resolution; Arbitration: _____

Checklist for Hospital Assistance Agreement

- ❖Guarantee Amount: _____
  - ❖ Monthly Amount: _____
- ❖Guarantee Duration: _____
- ❖Contract Duration: _____
- ❖Repayment of Loan; Terms: _____
- ❖Loan Forgiveness; Terms: _____
- ❖Conditions: _____
  - ❖ Practice in Community: _____
  - ❖ Death or Disability: _____
  - ❖ Restrictions on Investments: _____
- ❖Upfront Additional Payments: _____
  - ❖ Sign Up Bonuses: _____
  - ❖ Relocation Expense Reimbursement: _____
  - ❖ Malpractice Premium: _____
  - ❖ Software: _____
  - ❖ Marketing/Advertising: _____
  - ❖Medical Education Debt Payments: _____
  - ❖ Other: _____
- ❖Default Consequences: _____

Notes: _____
_____
_____
_____

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