



UNDERSTANDING AND NEGOTIATING YOUR FIRST EMPLOYMENT AGREEMENT

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OUTLINE OF PRESENTATION

- Term and Termination
- Duties, Schedule and Location
- Outside Employment ("Moonlighting")
- Compensation
- Permitted Absences - Vacation/CME/Sick Time ("PTO")
- Benefits
- Expense Payment/Reimbursement
- Malpractice Insurance
- Restrictive Covenants and Non-Solicitation Provisions
- Confidentiality
- Assignability of Agreement
- Future Practice Opportunities (for Private Practice)
- Boilerplate Provisions
- Negotiating Tips

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Term and Termination

- Term of Agreement
 - Often contingent on licensure, staff privileges and third party payor credentialing
 - Fixed term
 - Termination provisions may mean that a fixed term is not so "fixed"
 - Automatic renewal provisions

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Termination Provisions

- Termination
 - **Example - "without cause":** "Notwithstanding anything contained herein to the contrary, this Agreement may be terminated at any time by either party for any reason or no reason, with or without cause, upon ninety (90) days' advance written notice to the other party."
 - "For cause" termination may be immediate or written notice and an opportunity to cure may be provided.
 - **Simple Example - "for cause":** "This Agreement may be terminated by Employer at any time upon the breach or failure to perform any term, obligation or condition of this Agreement. However, for such termination to be effective, Employer must have first given thirty (30) days' written notice of the breach to Employee and the Employee must not have cured the breach to the satisfaction of Employer during that thirty (30) day period."

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Termination Provisions

- Examples of specific "for cause" termination reasons:
 - Loss, suspension or restriction of license or DEA registration
 - Loss, suspension or restriction of medical staff privileges
 - Loss of malpractice insurance coverage
 - Loss, suspension or restriction of billing privileges
 - Violation of policies, rules or regulations
 - Unprofessional or unethical conduct
 - Abuse of drugs or alcohol
 - Absence for a defined period of time as a result of a disability
 - Unsatisfactory performance

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Duties, Schedule and Location

- Duties are often general (e.g., "... provide services in the specialty of family medicine ...")
- Administrative duties
- Compliance with policies (often not attached or provided)
- Scheduling provisions are often vague (e.g., "Services will be provided on a full-time basis ...")
- It is important for part-time schedules to be more specific
- Night and weekend obligations
- Call and coverage responsibilities
- Practice locations – definition may be important in developing a practice (and for restrictive covenant)
- Obligations to provide inpatient services at hospital

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Outside Employment ("Moonlighting")

- Many employment agreements require exclusive service
- Non-clinical services such as speaking and writing or expert witness work may be set forth in agreement
- Seeking permission for outside services:
 - An opportunity that is already known (e.g., a specific urgent care center on weekends)
 - Opportunities that may come to light in the future – provide that employer's consent not be unreasonably withheld
- Some agreements require all intellectual property to become the property of employer – pay careful attention to related policies (especially with a hospital or health system)

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Compensation

- Most agreements still include base salary
- Incentive compensation
 - Employer's "sole discretion"
 - Percentage of collections above a threshold level or based on physician's "net" income (including expense component)
 - Changing focus of health care has led to different methodologies:
 - Exceeding an established work RVU target
 - Satisfying quality measures
 - Patient satisfaction
 - Citizenship metrics and meeting administrative requirements
 - When is the incentive compensation payable?
- Fraud and abuse, Stark and state self-referral law issues
- Signing bonus?
- Recruiting Agreement?

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Compensation

- Simple Incentive Compensation Example:
 - "In addition to the payment of Base Salary to Employee, to the extent that collections received by the Employer during the first Employment Year exceed \$300,000 for professional services rendered personally by Employee (other than "designated health services," as that term is defined under federal and/or state law, as amended from time to time)(hereinafter referred to as "Employee Collections"), Employer shall pay to Employee incentive compensation in an amount equal to twenty percent (20%) of the excess of Employee Collections over \$300,000. Such incentive compensation, if any, shall be payable within sixty (60) days of the end of the Employment Year."

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Permitted Absences

- Vacation
- Absence for CME
- Sick time – is any provided? If so, is it a few days or an extended period?
- How is maternity leave handled (e.g., is there a defined policy)?
- "PTO" – combination of all paid time off
- Placement of provisions – in agreement itself or in attached policies (which likely can be revised without employee's consent)

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Fringe Benefits

- Increasingly limited (especially in private practice)
- Generally better benefits from hospital and health system employers
- Health insurance – individual or family coverage?
- Life insurance – on the decline with private practice employers
- Disability insurance - on the decline with private practice employers
- Retirement plans
- May refer to outside documents – employees need to see them and determine if they may be changed without employee's consent

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Expense Payment/Reimbursement

- Non-discretionary items – license fees, medical staff dues, DEA registration
- CME allowance
- Professional society dues and journals
- Board certification or re-certification fees
- Moving expense allowance
- Business use of cell phone
- Malpractice insurance

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Malpractice Insurance

- Some states require a minimum amount of coverage
- Basic types:
 - Claims-made
 - Occurrence
- Payment of reporting endorsement ("tail" coverage):
 - Employer pays
 - Employee pays
 - Employer and employee split in some fashion
 - Payment of "tail" depends upon manner in which the agreement is terminated

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Malpractice Insurance

- Sample "middle ground" malpractice tail payment provision:
 - "In the event that Employee's employment is terminated by the Employer without cause under Section __ or by Employee for cause under Section __, Employer shall purchase a reporting endorsement (tail coverage) for the claims-made malpractice insurance policy covering Employee upon termination of this Agreement. In the event that Employee's employment terminates for any other reason, the Employee shall purchase at Employee's sole cost and expense a reporting endorsement (tail coverage) for the claims-made malpractice insurance policy covering Employee upon termination of this Agreement."

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Restrictive Covenants and Non-Solicitation Provisions

- Restrictive Covenants:
 - **Simple Example:** "During the term of this Agreement and for a period of two (2) years thereafter, Employee will not provide family medicine services in any manner or capacity within a 5-mile radius of any then-existing offices or practice locations of Employer."
 - Types of restrictions:
 - Injunctive relief
 - Liquidated damages (a defined monetary amount or a formula to determine such an amount)

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Restrictive Covenants and Non-Solicitation Provisions

- Restrictive Covenants (continued):
 - Are there limitations on the application of the covenant? If so, these are often based on reason for termination (e.g., it does not apply if employee terminates employment for cause)
 - State law restrictions – may not be enforceable in its entirety or may be limited by state law
 - Generally must be reasonable in geographic scope and duration and must be reasonably necessary for the protection of the employer's business
 - Common issues include covenants that apply to locations at which an employee did not work or that include locations operated by a future employer at which the employee will not provide services

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Restrictive Covenants and Non-Solicitation Provisions

- Non-solicitation provisions:
 - Are often just as important to an employer as a restrictive covenant
 - Often go beyond "solicitation" to contacting or treating former patients
 - Typical targets of non-solicitation provisions:
 - Patients of employer (often not limited to patients that employee treated)
 - Employees or contractors of employer
 - Employer's referral sources
 - Employer's contractual arrangements
- State law limits may apply here as well

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Confidentiality

- Definition of confidential information is usually broad
- Often includes financial information, trade secrets, patient lists and charts
- Terms of the agreement are also often deemed to be confidential to prevent colleagues from comparing terms
- Employer may explicitly provide access for limited purposes (e.g., request of a patient, defense of a malpractice claim)

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Assignability of Agreement

- Employees are generally prohibited from assigning their rights and obligations under the agreement
- Ability of employer to assign may be broad:
 - To anyone
 - To an affiliated entity
 - To an individual or entity that acquires or merges with employer
- This may be important to a physician who does not want to be employed by a hospital or health system

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Future Practice Opportunities (for Private Practice)

- Usually not legally binding
- May be placed in a separate "letter of intent"
- Timing of possible buy-in
- Price of the buy-in:
 - Fixed price or formula? Or, is the employer unwilling to commit?
 - Manner of payment – payment for equity vs. income differential
- How will net income be divided as owners?
- Voting rights and governance; are there "senior doctor" rights?
- What has been done in the past?

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Boilerplate Provisions

- "Entire agreement" clause: Example - "This Agreement constitutes the entire understanding between Employer and Employee related to its subject matter. All oral or written prior or contemporaneous understandings, discussions or agreements with respect to this subject matter are expressly superseded by this Agreement, including but not limited to letters of intent signed by the parties."
- Notice provisions
 - How is notice provided?
 - To whom does notice have to be provided?
- Amendment of agreement
- Attorneys' fees provisions
- Arbitration provisions

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Negotiating Tips

- Be prepared
- Evaluate the employer and the practice at which you will provide services – will you be happy there? The agreement is **not** the only thing to consider
- Remember – oral promises are not enforceable
- Understand the agreement – you will not obtain every change you desire, so focus on key provisions (especially with a health system) and understand what you are agreeing upon
- Leverage (or recognizing lack of leverage) is key
- If the agreement refers to outside policies, review them prior to employment to avoid surprises
- Try not to take the process personally
- If you have an attorney review the agreement, try to use one who specializes in transactional health care matters

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Questions?



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Time and Attention!**

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