

EVALUATING EMPLOYMENT AGREEMENTS

START

You join the ranks of employed physicians. Move forward 1 space.



Employer adds 8 hours a week to your part-time schedule. Contract doesn't define "part-time." Lose a turn.

At one time or another in their professional careers, most physicians will be required to sign employment agreements. The type of employer and the complexity of the contract may vary; still, most agreements share basic concepts that physicians must understand before they sign. This article will explain these concepts and help family physicians identify issues that need to be negotiated.

Term and termination

The term of an employment agreement may be one or more years. Many hospitals and health systems use stated terms of at least one year, while physician groups often fix the term at the number of years until the employee may have the opportunity to become an owner of the group, if partnership is an option. It is important not to be fooled by the length of the term, however, as it can be affected by the termination provisions. If either party can terminate the employment agreement without cause by providing a certain number of days of written notice (usually 30 to 90 days), the term of the agreement is really just the length of the notice period. "Without cause" termination provisions are used by many employers, most commonly physician groups. Hospitals and health systems tend to forgo these provisions and are more likely to specify a fixed term of employment, especially if the physician's practice has been acquired by the hospital or health system, although in recent years I have seen an increasing use of without-cause termination provisions from these types of employers as well. In such cases, the length of

the notice period may be longer (e.g., 180 days).

In addition, employment agreements almost always contain provisions that enable the employer to terminate for cause. These provisions also may require that the employee receive written notice of the cause for termination and an opportunity to cure the alleged default. It is to the employee's advantage to ensure that the agreement allows for this. For example, a physician who fails to follow an employer's policies may be able to cure such a breach if he or she is advised of this failure and works to correct the deficiency in question. The length of period during which a physician can attempt to cure an alleged default typically runs from five to 30 days.

Schedule

Because the scope of family medicine is broad, the explanation of the duties of a family physician are often not specifically defined in the employment agreement. The key duties that should be defined relate to the physician's schedule and obligations for call and coverage responsibilities. It is particularly important for part-time employees to define the schedule, especially if they are paid a fixed salary or other flat per diem rate and their lifestyle requires a fixed schedule or flexibility. Employees will often try to document in the agreement any prom-

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WELCOME TO
LIBERTY
GREATER MONROE'S
FASTEST-GROWING
COMMUNITY

You terminate employment with cause; therefore, restrictive covenant can't be enforced. Move forward 3 spaces.

You're offered a better job, but new employer doesn't like your "claims-made" malpractice insurance. Who pays for tail coverage? Lose a turn.

accountable care organizations (ACOs) and the focus on providing quality care in a cost-efficient manner.

Many physician groups still pay bonuses based on a physician's collections in excess of a gross collections threshold or work RVUs in excess of a gross RVU threshold. Some hospitals and health systems still pay incentive compensation based on physicians' individual net profit, in which the collections for the services they perform are reduced by various overhead expenses allocated to them. Unfortunately, overhead expenses are often out of the physician's control. It is often difficult to negotiate an incentive compensation formula with hospitals and health systems, as they have generally developed these formulas for use with all of their physician employees and are not likely to revise them for any one physician in particular.

Business expenses

Closely following compensation in importance to many physicians are the fringe benefits and reimbursable business expenses specified under the employment agreement. Regardless of whether the employer is a health system, a physician with sole ownership of the practice, or a physician group, most employers will pay for a physician's state medical license fees, hospital staff dues, and federal and state drug registration expenses. As the economy has tightened and Medicare and third-party payment has declined, employers' willingness to pay for physicians' business expenses has declined. Employers will often provide an allowance to employees for continuing medical education, dues, journals, and professional society memberships, but they usually will not pay the full expenses. Hospital and health system employers tend to be more generous than physician groups in this regard. In addition, if a physician is moving to take a new employed position, full payment or an allowance for moving expenses is often provided.

Malpractice insurance is another business expense that most employers pay directly. However, the key issue is often not the payment for malpractice insurance but rather the type of malpractice insurance provided. If the employer is providing "occurrence-based" malpractice insurance coverage, then no reporting endorsement ("tail coverage") is required upon termination and the employee



does not have to worry about the continuation of his or her coverage after leaving the employer. If the malpractice insurance is "claims-made" coverage, then a reporting endorsement may be required upon termination of employment. This would cover the employee for claims rendered after termination for services rendered prior to termination, which is necessary unless the employee is permitted to take the claims-made policy to his or her next job. A physician's future employer often does not want an employee to bring his or her claims-made based insurance policy from the previous job because the new employer would then be paying premiums that relate to coverage for services rendered with the prior employer.

The responsibility of who pays for tail coverage upon termination of employment is a key issue that should be set forth in the employment agreement. It is more common for hospital and health system employers to offer to pay for tail coverage in all instances than it is for physician groups to do so. The payment of tail coverage upon termination can be handled in many ways: employer pays tail coverage; employee pays tail coverage; employer and employee split the cost of tail coverage equally; or tail coverage payment depends on the method of termination. In the last option, the employer often will pay for tail coverage if the employer terminates the agreement without cause or the employee terminates the agreement for cause. The employee would pay for tail coverage if the employee terminates the agreement without cause or the employer terminates the agreement for cause.

Benefits

Fringe benefits for physician employees have also been cut back over recent years. More physician employees are

The key issue is often not the payment for malpractice insurance but rather the type of malpractice insurance provided.



New employer details
future partnership provisions
in your contract.
Move forward 2 spaces.

Need cash for daughter's wedding.
Moonlighting opportunity at local hospital's ED.
Contract requires employer's consent.
Employer agrees. Move forward 1 space.

required to contribute to their health insurance expenses than ever before, and many employers now pay only for individual coverage, not family coverage. Additional benefits such as life and disability insurance are sometimes provided by private physician groups but not as often as hospitals and health systems. Most employers do offer a retirement plan, with hospitals and health systems generally providing more options.

A key issue to examine is paid vacation and continuing medical education absences. Some employers will try to avoid specifically referring to these entitlements in the agreement itself, instead referring to policies on these benefits. However, unless specific entitlements are set forth in the employment agreement, the employer's policy could change and vacation and CME time could be reduced without the physician's consent. Fewer employers are providing for paid sick time than ever before, and many employers are combining vacation, CME, and sick time into "paid time off" that incorporates all three concepts into one pool of time.

Restrictive covenants

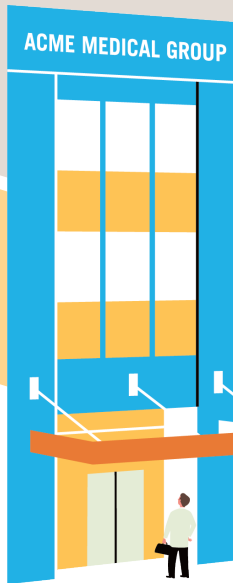
Depending on the state where you live, restrictive covenants may be an issue in your employment agreement. Some states do not permit the enforcement of restrictive covenants, some limit the ability of employers to enforce restrictive covenants, and some enforce restrictive covenants that are reasonable in scope and duration and are reasonably necessary to protect the employer's business

interests. A restrictive covenant should be limited in duration (often one to two years following the termination of employment) and mileage (which varies depending on the location of the employer) to reasonably protect the employer's interest against competition by the employee. A reasonable geographic radius restriction might be 30 miles in Boise, Idaho, but 1 mile in downtown Manhattan. Employers may sometimes be willing to agree that the restrictive covenant will not be enforced in certain instances, such as the employee terminating the agreement for cause.

Some employment agreements include liquidated damages in the restrictive covenant, and some states require this. This means the parties agree in advance on the amount of damages the employer would be entitled to in the event that the physician employee breached the restrictive covenant. In some instances, these liquidated damages serve to "buy out" the restrictive covenant (i.e., if the amount is paid, then the physician employee can practice without violating the restrictive covenant), and in other instances these liquidated damages are in addition to the employer's right to seek injunctive relief.

Non-solicitation provisions

In addition to including restrictive covenant provisions, many employment agreements include non-solicitation provisions. These provisions are often allowed in states that will not enforce restrictive covenants and apply regardless of whether the physician employee practices



“If it is not in the agreement, the employer did not specifically agree to it.”

Employer sells practice, assigns your employment agreement to new owner. Your consent not required. Lose a turn.

You're down-sized, but termination-without-cause provision ensures that you receive six months' notice. Return to start.

FINISH

outside of the restrictive covenant area following termination. Most non-solicitation provisions focus on preventing employees from soliciting former patients, employees, and referral sources.

Confidentiality

Many employers also include confidentiality provisions in their employment agreements. These prevent an employee from using or disclosing confidential information of the employer, including the employer's patient lists and trade secrets. Employers are often willing to limit the definition of confidential information to information that is not known by or generally available to the public.

Assignment of rights

Most employment agreements do not permit the employee to assign his or her rights, duties, and obligations under the agreement to any other individual. However, most employers will provide that they can freely assign the agreement or can assign the agreement without the physician's consent in certain circumstances, such as a sale of the practice. If it is important to a physician employee that the employer be the same person(s) that he or she was negotiating with when entering into the contract, this provision should be negotiated prior to entering into the employment agreement.

Buy-in provisions

Physicians who become employees of private physician groups will want an indication of whether or not they will have an opportunity to become a co-owner in the future. These provisions are almost always statements

of “intent” and not promises from one party to the other that the employee will become an owner at a specific date in the future. However, an employer may be willing to document the buy-in process and whether a purchase price is expected to be paid for any such buy-in. The more that the employer is willing to specify about future partnership, the better it is for the employee, since it may help to limit or avoid surprises when co-ownership discussions begin.

Boilerplate provisions

Finally, there are certain boilerplate provisions to which every physician employee should pay attention. The “entire agreement” clause provides that the agreement supersedes all oral or written discussions, correspondence, or negotiations between the parties prior to the agreement. I always explain to my physician employee clients that “if it is not in the agreement, the employer did not specifically agree to it.”

The notice provision is also important. It defines how formal written notices are to be given, which is important for employees when receiving notice of termination without cause, receiving notice and opportunity to cure a potential default, or providing notice that they intend to leave the employer for cause or without cause.

The foregoing sets forth an analysis of the key components included in many physician employment agreements. The physician who is unsure about an employment agreement and whether it accurately reflects his or her discussions with a proposed employer may find it useful to engage a health care transactional attorney to assist with the review of the agreement. **FPM**

Send comments to fpmedit@aafp.org.