The Anatomy of an Employment Agreement

Making sure the most important issues are addressed in your contract

By Sanja Ord, JD

The ever-changing landscape of health care delivery and strict federal and state regulations of the health care industry have made it common practice for employers to require documentation of employment arrangements. The terms to which the parties agree are very important for all involved, as they address important legal issues that can affect both the employer and the physician, now and in the future.

Employment offers and corresponding agreements will be unique but contain many typical provisions. In some cases, medical groups or other institutional providers will have "standard" agreements which, because of a desire to maintain consistency or to address some prior past experience within the group, may not be subject to much negotiation. As an example, some employers may require all of their employed physicians to agree to a non-compete provision to protect the group's business interests. In those situations, there may be little room for negotiation.

In other cases, more negotiation is possible. A physician will typically know, from his or her conversations with the potential employer, how much (if at all) the potential employer is willing to negotiate. Other times, having an attorney discuss specific provisions (as they apply to a physician's particular situation) with the employer's attorney can result in the employer modifying some provisions.

This article will outline some of the most critical issues to consider in these negotiations, and provide some negotiation tips on getting these issues addressed in your employment agreement. This article is not intended to be and it does not constitute legal advice, but it is only a general overview of issues relating to employment agreements for physicians.

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Term and Termination of the Agreement

A typical employment agreement will usually have a fixed term (such as a one- or two-year term) but may also be an "at-will" arrangement in which there is no specified term. Some agreements will automatically renew for subsequent one- or two-year terms. Other agreements may require that compensation or other terms be revisited at the end of each defined term and the parties agree in writing before the agreement renews for additional periods. It is important to know the length of the employment arrangement, as well as how and when the agreement will terminate.

For example, the required notice for terminating an "at-will" agreement is typically governed by state law and in many cases may only require 30 days' notice prior to termination. Some agreements have provisions that allow both parties to terminate the agreement for any reason or no reason. Such terminations may require that an advance notice be given to the other party such as a 30-, 60- or 90-day notice ahead of the termination. Termination of the agreement may trigger other provisions, such as restrictive covenants. A physician should consider whether the notice period is sufficient to either move out of the area, if necessary, or find another job in the same area.

Employment agreements also typically contain provisions that allow an employer to immediately terminate a physician's employment without notice of termination. Such events may include the loss, suspension or restriction of a physician's license, loss of medical staff membership or clinical privileges at hospitals where practice is required, loss of professional liability insurance or failure to qualify for professional liability insurance, conviction of a felony or a physician's exclusion from Medicare or Medicaid programs, etc.

Termination of an employment agreement may also affect a physician's medical staff membership and clinical privileges at the various hospitals where he or she practices, if the physician's employment requires hospital privileges. It is important that a physician know whether his or her clinical privileges will terminate upon termination of the employment agreement. Automatic terminations of clinical privileges are known as "clean sweep" provisions. If there is a "clean sweep" provision in the employment agreement, the physician will not be entitled to any due process rights under any applicable medical staff bylaws.

Duties and Responsibilities

A physician should ensure that his or her duties are clearly stated in the agreement. Are there specific office hours required? Does this include nights or weekends? Are there specific on-call requirements? If so, how often? Will call obligations be equitably divided among the physicians in the group? Broadly written statements such as "physician shall be subject to call responsibilities" do not give the physician a clear outline of what the call responsibilities entail. A statement such as "the physician shall take calls one Saturday a month between 7 a.m. and 7 p.m." is a much better statement and serves to protect the physician. In addition, some employment arrangements include administrative responsibilities in addition to clinical responsibilities. The employment agreement should clearly outline the administrative duties required and how the physician will be compensated for those duties, especially if the physician's compensation is based on clinical productivity.

Outside Activities, Vacation Time and CME Activities

Often times, physicians like to "moonlight" to earn additional income or to explore additional opportunities outside of their full-time employment. If a physician knows that he or she may be interested in such outside activities, it is important to create carve-outs for those activities during the negotiation process. The agreement should address how approval for outside activity will be handled, who gets to keep the income from such activities (the employer or the physician), and whether additional professional liability insurance for those activities will be required. Therefore, the discussion of outside activities and documentation of the understanding between the employer and the physician is important to ensure the physician's ability to pursue those outside activities.

Physicians should also ensure that their vacation, sick leave, CME leave (and reimbursement for CME expenses) and maternity leave if applicable, are clearly set forth in the agreement, employer policy or in a side letter signed by both the employer and the physician if the employer is not willing to include these details in the agreement.

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Does this include nights or weekends?
Are there specific on-call requirements?
If so, how often?

Compensation

Federal law and some state laws mandate that a physician's compensation must be fair market value and that it cannot be based on the value or volume of his or her referrals. Compensation ranges vary based on a physician's specialty and regional considerations. There are a variety of objective resources for physicians to determine their salary ranges, such as surveys published by the Medical Group Management Association (MGMA), SullivanCotter or the American Medical Group Association (AMGA).

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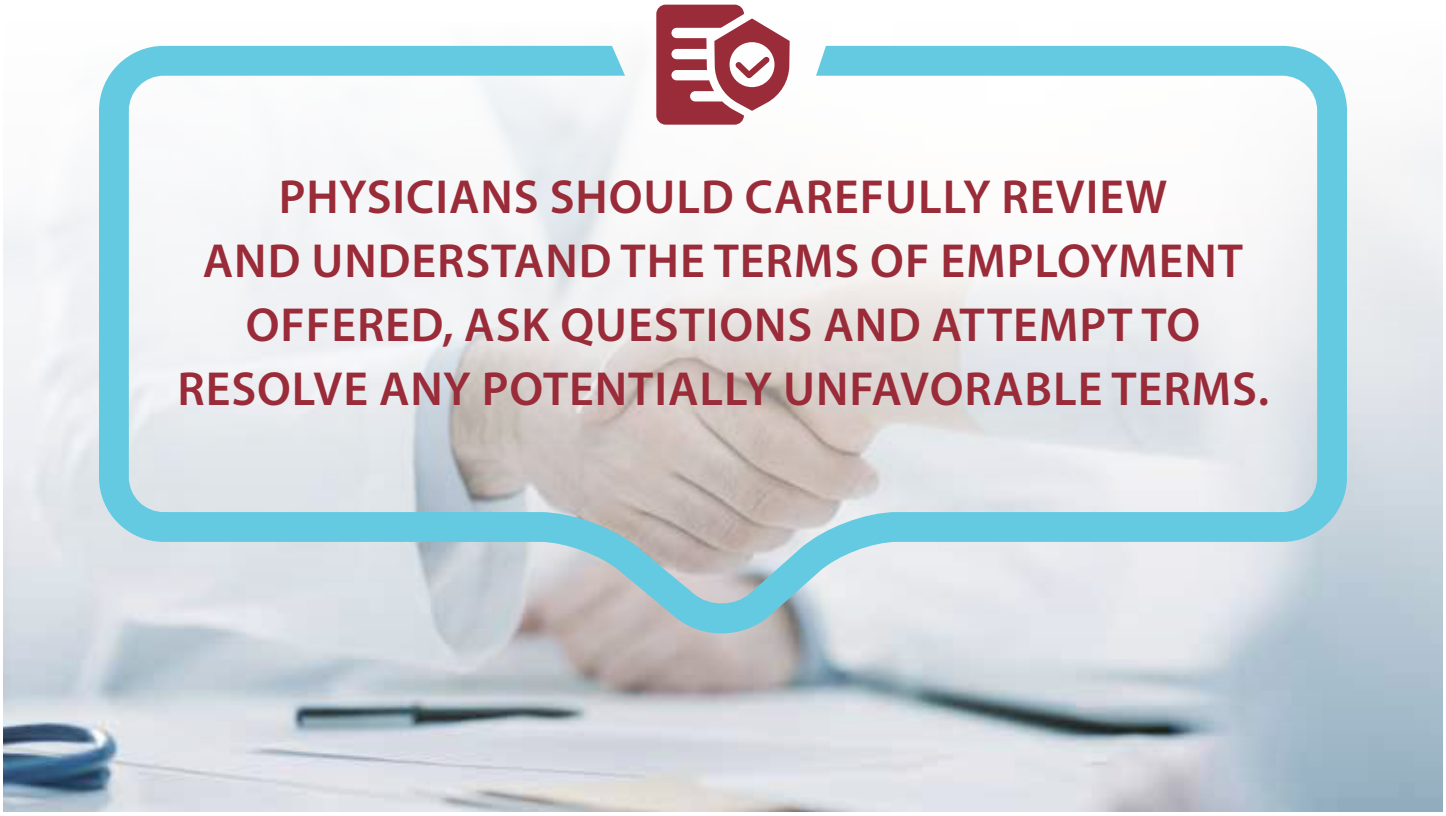

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A physician's compensation can be in the form of a set annual base salary, a mix of an annual base and a productivity model, or a pure productivity compensation model. Some employers may also offer sign-on bonuses, relocation expense reimbursement, loan forgiveness, retirement benefits, etc. It is crucial that any such offers be included in the employment agreement and described with specificity. Some of these offers may include other agreements with hospitals (for recruitment assistance agreements), and require signing of promissory notes or ancillary agreements.

Malpractice Insurance

During the employment agreement review process, a physician should be aware of (1) what type of malpractice insurance will be provided; (2) what the policy limits are; (3) who will pay for the insurance; and (4) whether tail insurance will be necessary. In Missouri and Illinois, the typical limits are $1 million per occurrence and $3 million in the aggregate, but these limits may vary according to applicable state law.

There are two types of policies: claims-made and occurrence-based coverage. An occurrence-based policy covers any claims that occur during the time the policy was in effect, regardless of when the claim is made. If the employment terminates, no tail insurance will be necessary for this type of coverage. On the other hand, a claims-made policy will only cover claims that are made during the time the policy was in effect. If the physician leaves employment and the policy expires, the physician will not be covered unless the physician obtains an extended reporting endorsement or "tail insurance" policy that will extend the coverage back to the date when his or her employment began.

Claims-made policies are more prevalent because they are not as expensive as occurrence-based policies. However, some larger institutional employers may have self-insurance programs that provide occurrence-based coverage. Typically, employers will pay for the insurance premiums during the employment period, and the physician will be responsible for obtaining and paying for tail insurance after the employment ends. Tail insurance can be expensive, and physicians should negotiate to require the employer to cover tail insurance costs if the employer terminates the agreement without cause, or if the physician has to terminate the agreement because of the employer's uncured breach.

Non-Compete and Non-Solicitation Provisions

It is important for the physician to know when any type of restrictive covenant (such as a non-compete and/or non-solicitation provision) will apply. It may not be appropriate for a non-compete to apply in all circumstances (for example, if the physician terminates due to the employer's uncured breach). Non-compete provisions should be specific in terms of time and geography. For example, a non-compete that states: "the physician shall not practice within 10 miles of Employer's office at ABC address for a term of two years" is clear with respect to both time and geography. However, the following provision: "the physician shall not practice within 10 miles of the Employer's office(s)" could subject the physician to multiple restrictions measured from any office the employer has currently, or may add in the future, and the timeframe for the restriction is not stated.

Non-solicitation provisions typically preclude a physician from offering to provide services to patients from the employer's practice or offering jobs to the employer's employees after the physician has left employment and are often written very broadly.

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Knowing the specific terms of non-competition and non-solicitation agreements are critical in a physician's consideration of an employment agreement, as it can affect his or her future practice. Often, language can be negotiated to reasonably limit the scope of these restrictions.

Opportunities to Become a Shareholder, If the Employer Is a Physician Practice

Finally, if a physician joins an independent physician practice, it is often with the expectation of eventually becoming an equity participant in the practice after a certain time period of employment. Ideally, language should be included outlining the employer's agreement to consider the physician for equity participation, and the timeframe for consideration. The language should include the employer's obligation to inform the physician, within a reasonable time following the physician's eligibility to become a shareholder, of the employer's decision relating to the physician's shareholder status.

There are many issues addressed in physician employment agreements, and the issues discussed in this article will most likely appear in some form in most. Physicians should carefully review and understand the terms of employment offered, ask questions and attempt to resolve any potentially unfavorable terms. If negotiation is difficult, engage competent counsel to assist with the negotiation to ensure these critical issues are adequately addressed.