

**THE PHYSICIAN EMPLOYMENT AGREEMENT
Basic Clauses and Considerations**

by

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Scope of Seminar

This seminar is intended to provide osteopathic residents and medical students with an introductory look into the basic physician employment agreement. We will highlight many of the common provisions found in these contracts, along with many of the mistakes and pitfalls that we see in our day to day practice.

Objectives of Seminar

At the conclusion of this presentation, the participant will be able to:

- Understand the common language and terms found in physician employment agreements;
- Recognize mistakes commonly made by physicians when entering into a contract; and
- Obtain knowledge necessary to enter into an employment agreement, while avoiding potential problem areas that often trap many physicians.

The following information highlights some of the most common provisions seen in physician employment agreements. This paper does not take the place of a health care lawyer experienced in negotiating and evaluating physician business transactions. No two employment agreements are created equal. Each agreement must be reviewed on its own terms. Even though the language may appear to be boiler plate, many of the terms may be negotiable. Below are some basic clauses and considerations with which every physician should be aware.

Who are the parties to the Agreement?

The Agreement should set forth the precise legal names of all the parties. Anyone who is required to perform obligations under the contract should be named. If the party is a legal entity such as a partnership or corporation, this should be indicated in the contract. All parties and entities who are listed as parties must sign the agreement.

What is the term of the Agreement?

The agreement's beginning and ending dates should be clear. In most situations, there are two dates at the beginning of the relationship that should be defined: the "effective date" and the "starting date" of the agreement. The effective date is the day that mutual obligations between the parties go into effect and become enforceable. This date may precede the physician's starting date, which he or she actually commences work, because the parties may need to rely on promises to each other.

Most physician employment agreements are for one or two year terms, and will state that the contract will automatically renew at the end of each term. The "term" section of the contract must be read in conjunction with the "termination" section, which usually appears later in the Agreement. This is because the termination paragraph usually allows the parties to end the contract before the end of its term for a variety of reasons, or even for no reason at all. Thus, what appears to be a one or two year contract may in fact be a contract that could be terminated tomorrow if there is a reason, or in 60 or 90 days without stating a reason.

What are the physician's responsibilities?

A good contract will provide at least some detail about the physician's typical duties, the physician's typical schedule, where the physician typically works, and expectations about call. A contract that simply says the physician will "perform the usual duties of a physician" doesn't give either party much information about the expectations of the other party. Attention to this section is particularly important for physicians who wish to work part time, to work only a specific schedule or in a specific clinic, or who have special arrangements concerning call. This section can also be used to answer questions about what level of involvement in administrative duties is

anticipated and whether certain community activities are expected.

What are the employer's responsibilities?

A good contract will also define the employer's duties. These might include items such as providing office space, support staff, supplies, billing services and the like.

How will the physician be compensated?

Total physician compensation may be subject to tax, fraud and abuse, and anti-self-referral laws. Generally, pursuant to these laws, physician compensation must be fair market value demonstrating reasonable compensation. Fair market value is determined by comparing the entire compensation package, including benefits, insurance and signing bonuses to industry standards for the relevant specialty and geographic market. In any compensation arrangement, the physician and the employer are protected from legal scrutiny when the compensation is determined to be fair market value.

Compensation usually has two components: cash and benefits. The typical employment agreement will provide for a guaranteed salary for the first one to two years. After that, the physician is usually compensated based on production.

It is important to remember that some medical groups might offer an employed physician an opportunity to buy into the group after a period of time. This type of agreement in which the physician would be able to purchase shares or options in the group may or may not be part of the initial employment agreement. Such arrangements might be referred to as a "buy-in" clause or "partnership" arrangement. It is preferable to have these types of arrangements drafted separately from the employment agreement since their duration is likely to be longer than the employment agreement.

Family health insurance, dental insurance, life insurance, an allowance for continuing medical education (CME), paid time off or vacation and sick pay, short-term disability insurance, long-term disability insurance and retirement plans are common benefits.

Are malpractice insurance and tail coverage provided?

Most employers provide professional liability insurance when the physician works for the employer. The employment agreement should indicate whether such insurance will be "occurrence based" or "claims made."

Generally speaking, claims made policies cover the physician only if the claim is brought within the policy period. When the policy period expires (usually when the physician leaves the employment), and if no claim has been brought, the insurance company has no obligation to

provide coverage if a claim is made after expiration. Additional tail coverage is needed to cover claims made after the policy expires, for acts or omissions committed during the period of the policy. An occurrence based policy, on the other hand, covers the physician for any alleged acts or omissions that occurred while the policy was in effect, even if the claim is brought well after the policy expires.

Today, most employers provide a "claims made" policy, that will require tail coverage when the physician leaves. The employment agreement should outline who will pay for this "tail" coverage. Employers often pay for tail coverage, sometime splitting the cost with the physician depending on length of service, and sometimes do not pay for such coverage at all. If the employer does not offer tail coverage, the physician should make sure that the cost of purchasing tail coverage is reflected in the overall compensation package.

Is there a Covenant Not-To-Compete?

A Covenant Not-To-Compete is common in most physician contracts. This clause prevents a departing physician from competing with the employer in a specific geographic area (usually a radius of between five and fifty miles) for a specific period of time (usually one or two years). These restrictive covenants are enforceable under Florida law.

Is other employment permitted?

If so, who entitled to the income from the outside employment? Some employers prohibit outside employment; others allow it but require that the income be turned over to the employer. If the physician anticipates "moonlighting," the physician should negotiate to minimize the employer's control over outside employment and income from it. If the physician expects to be involved in significant volunteer activities as a physician, the contract should say whether the employer has the right to approve or reject such volunteer activities.

How can the agreement be terminated?

The termination clause of the agreement is probably the single most important clause in the contract because it can dash the expectations of one or both of the parties. Close attention should be paid to the terms and the conditions.

The termination section usually allows the employer to immediately terminate the physician's employment if certain events occur, such as the physician losing his or her medical license, being convicted of a felony or dying. Many contracts also permit immediate termination if the employee's license is restricted, if privileges are significantly restricted, or the employee becomes disabled.

Almost all contracts also permit early termination by either party by simply giving notice. While the notice periods range from 30 to 180 days, most physician employment agreements permit either party to terminate the agreement with 60 to 90 days notice. This type of term essentially leaves the physician with a contract which lasts only for the stated notice period.

Will the physician have continuing access to records?

Most employment agreements say that the patient records belong to the employer. However, the physician should negotiate for reasonable access to them even after the physician leaves the employer if access is necessary for purposes of defending a malpractice action, a credentials committee investigation, or a Florida Department of Health inquiry. Access to such records is very helpful, and sometimes necessary, to defend these kinds of actions.

Who controls the physician's research and writing results?

If the physician employee will be doing research, publish books or papers during work time or even after hours, the research results and the written materials belong to the employer unless there is a written agreement that gives the physician the ownership rights to these materials.

Recruitment incentives?

Some employers, especially those in rural areas, may offer special incentives to a physician in order to bring the employee to the community. Both parties should review such incentives carefully to ensure that the incentives are permitted under federal law.

How will disputes be resolved, and who will pay the costs and attorney's fees?

Ordinarily disputes are resolved in the courts, and each party will pay their own litigation costs and attorney fees. Sometimes, however, the parties will agree to use arbitration as an alternative way of resolving disputes. While each process has its advantages and disadvantages, arbitration is generally faster and less expensive than litigation.

Unless the parties agree otherwise, each party to a lawsuit, mediation or arbitration ordinarily will pay his or her own attorney's fees and costs. However, most physician employment agreements include a clause obligating the losing party to an enforcement action to pay for all legal fees of both parties.

Miscellaneous "boilerplate" provisions.

Most employment agreements have a series of "boilerplate" provisions that usually come at the end of the agreement. Most of them usually just restate what is already the law on these points. However, it is necessary to still review these sections carefully.

Is it possible to change the employer's contract?

Most employers use a standard employment contract for all physician employees. Generally, large employers are less likely to change their form to accommodate the physician than small organizations. Small employers are often willing to make at least some changes to their agreements. Even if the employer won't change the form, it may be possible to clarify certain provisions through use of a letter signed by the physician and the employer. Such a signed letter may be helpful in interpreting the contract at a later date.

Are all exhibits, covenants and incorporated agreements attached to the contract?

Many employment agreements will incorporate additional exhibits and covenants into a contract by reference. It is critical for the physician not to sign the agreement until any and all exhibits, covenants, or addenda are initialed and attached.

ALWAYS REQUEST AND RECEIVE A SIGNED COPY OF THE CONTRACT!

Finally, the biggest mistake that is routinely made by physicians is after executing the employment agreement they fail to request and receive a fully executed copy of the document from the employer. The physician should always insist of having a copy of the contract with all the original signatures on it, and it is prudent for your lawyer to keep a signed copy as well.

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