

# UNDERSTANDING AN EMPLOYMENT AGREEMENT

New York Chapter American College Of Physicians



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# KEY TERMS:

- **Due Diligence - What do you know about the employer?**
  - **What will be expected of you**
  - **Hospital Privileges**
  - **Health Plan Credentialing**
- **Compensation – Value Based Payment Arrangements**
- **Malpractice Insurance**
  - **Know the difference between "Claims made" or "Occurrence" insurance policies**
  - **Tail Coverage- why it is important**
- **Term and Termination (sample term provisions)**
- **Covenants Not to Compete**
- **Medical record requirements**

# NEW YORK JOB MARKET

- Overall the job market for new physicians in New York continues to be strong.
- Demand for primary care physicians (generalists)\* remain stronger than the demand for non-primary care physicians (specialists).
- Since 2008, the demand for generalists has surpassed the demand for specialists.

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\*In this report, primary care includes family medicine, general internal medicine, general pediatrics, and combined internal medicine and pediatrics. Non-primary care includes all other specialties.

*Source: Center for Workforce Studies, School of Public Health, University at Albany*



# WHAT AN EMPLOYMENT AGREEMENT IS AND ISN'T



# AN EMPLOYMENT AGREEMENT:

- **Defines the relationship** between you and your employer.
- Sets out the **rights and responsibilities** of each party.
- Typically is the **controlling document** if a dispute arises.



# AN EMPLOYMENT AGREEMENT:

- Is not the norm – most people never have an employment agreement.
- The default = “at will” employment
  - **Either party may terminate the arrangement at any time, for any reason, with or without notice and with or without cause.**
- An employment agreement might or might not change “at will” status.
  - Opportunities for negotiation.



# WHAT TO LOOK FOR...



# DO YOUR “DUE DILIGENCE”

- **Investigate the potential employer as much as they investigate you.**
  - What do you know about the employer?
  - Have you talked with other recently-hired physicians at the medical group or hospital?
  - Have you asked about any recent physician departures and the reasons those physicians left?
  - What kind of policies does the employer have for maternity leave? Disability coverage? On-call?
  - What changes are expected in the practice: technology, affiliations, shared financial risk, etc.?
  - How is the “work-life” balance? Atmosphere?





# WHAT PREREQUISITES ARE THERE TO COMMENCING PRACTICE?

- Medical license, DEA registration to prescribe controlled substances.
- Medical staff applications and privileges.
- Managed care plan contracting and credentialing.
- Enrollment in Medicare and Medicaid.



# WHAT WILL YOU BE EXPECTED TO DO?

## — Duties/Services:

- **Exclusive service to employer.**
- No moonlighting.
- Certain hours/days.
- Participation in on-call rotation.
- Hospital staff privileges, Medicare enrollment, managed care credentialing.
- Medical records documentation.
- Proper coding.
- **“Playing well with others.”**



# HOW WILL YOU BE COMPENSATED?

- **Base Salary**, with or without Productivity or Bonus.
  - Base Salary may be guaranteed, or
  - May be adjusted to reflect individual performance or performance of the group as a whole, meeting or exceeding Quality Indicators, etc.
- **Productivity** may be based on collections, RVUs (relative value units), % of profits.
- **Bonus** cannot be based on volume or value of referrals for designated health services.



# HOW WILL YOU BE COMPENSATED (CONT'D)

- Ongoing shift from unit-based pricing/revenue to **value or outcomes-based** pricing/revenue.
- Medicare's RVUs (pricing set by specialty, procedure, and geography) have long factored into physician compensation in private practices.
- Movement away from straight salary to **salary plus variable component**.
- Variable component increasingly based on value/outcomes:
  - Managing chronic conditions
  - Keeping patients out of ED
  - Keeping patients from being readmitted to hospital, etc.



# WHAT BENEFITS WILL YOU RECEIVE?

## Common Benefits:

- Health, life, disability insurance.
- Moving Expenses.
- Vacation.
- Allowance for Dues, Subscriptions, CME.
- SEP, Simple, 401(k) or other deferred compensation or retirement option.
  - There may be opportunities to negotiate additional benefits.



# WHAT SHOULD YOU LOOK FOR REGARDING MALPRACTICE INSURANCE?

- “Claims made” or “occurrence” insurance policies.
  - You need to know the difference.
- Claims made: claims covered for as long as policy is in effect.
  - Policy typically ends when employment ends.
  - **Unless “tail” coverage is purchased, a subsequently filed claim related to the period of employment will not be covered.**
- Occurrence: Tail coverage is built in. Premium is higher.
- If it is a claims made insurance policy, *will employer be paying for the tail coverage upon termination of agreement?*



# MEDICAL MALPRACTICE COVERAGE (CONT'D)

- Statute of limitations on claims varies by state, age of patient.
- NY: legal claims may be filed within 2 ½ years of occurrence, unless patient is a minor.
  - If minor: 2 ½ years after patient reaches age of majority, or 10 years, whichever comes first.
    - Ex: patient was age 15 at the time. Lawsuit must be filed by the time patient is age 20 ½.
    - Ex: patient was age 3 at the time. Lawsuit must be filed by the time patient is 13.



# WHAT ARE THE “TERM” AND “TERMINATION” PROVISIONS OF THE CONTRACT?

- Contract will have a defined Term (length of time).
- Must look at the termination provisions as well.
  - **May not really be a “two-year contract”, if it can be terminated by either party on 90 days’ notice.**
- Termination: immediate and/or with notice:
  - **Cause and No Cause**
    - Death, Disability
    - Misconduct
    - Loss of license, privileges, Medicare participation.
    - Objective vs. subjective triggering events.
      - Subjective reasons are as determined by the employer





# TERM AND TERMINATION (CONT'D)

- Whether there is a notice provision and length of notice can be critical.
- **It takes at least 90 days to be credentialed with new employer/hospital.**
- That's after you locate a new position.
- **Termination provision more important than Term.**
  - Ask for 120 or 180 days' notice for No Cause termination.
  - Or some combination of notice and possibly severance pay with benefits.



# SAMPLE TERM PROVISION

“The term of this Agreement shall be for twenty-four (24) months from \_\_\_\_\_, 2018 through \_\_\_\_\_, 2020, **unless earlier terminated as provided herein**, and shall be automatically renewed for successive twelve (12) month terms **until termination occurs as hereinafter provided**. In the event that either party to this Agreement elects not to renew the Agreement beyond the initial twenty-four (24) month term, that party shall give the other party notice in writing sixty (60) days prior to the end of the initial term or sixty (60) days prior to the end of any twelve (12) month renewal of the Agreement.”

# SAMPLE TERMINATION PROVISION

This Agreement and the physician's employment hereunder may be terminated at the discretion of the Employer upon the happening of any of the following events:

- (i) The death of the physician; or
- (ii) The disqualification of the physician to practice medicine in the State of New York, which disqualification includes any revocation or suspension of the physician's license to practice medicine; or
- (iii) Revocation or suspension of physician's clinical privileges at any facility in accordance with the due process afforded by the medical staff bylaws of such facility(ies); or
- (iv) Any surrender by or on behalf of a physician of such physician's license to practice medicine; or
- (v) The physician incurs a disability through mental or physical incapacity which renders the physician incapable of treating and caring for patients in the same manner and in accordance with the same standards of practice and procedures applied by the physician prior to the disability, and which disability has or is reasonably expected to continue for a period of at least three (3) consecutive months as determined by a physician upon whom the Employer and Employee have mutually agreed; or



# SAMPLE TERMINATION PROVISION (CONT'D)

- (vi) Whenever the Employer and the physician shall mutually agree to termination of the physician's employment in writing, signed by both Parties; or
- (vii) In the event that the physician engages in personal misconduct, or a breach of this Agreement, or any rules or regulations of the Employer which breach is of a material nature as determined in the sole discretion of the Employer; or
- (viii) The giving of at least sixty (60) days written notice from the physician notifying the Employer of his intention or desire to resign as an Employee; or
- (ix) In the event that the physician is sanctioned, suspended or excluded from participation in the Medicare or Medicaid programs; or
- (x) The withdrawal or suspension of the physician's license to prescribe or dispense controlled substances; or
- (xi) The failure to become board certified within the first five (5) years of residency; or
- (xii) The giving of at least sixty (60) days written notice from the Employer to the physician terminating physician's employment hereunder; or**
- (xiii) Physician's illegal use or abuse of drugs or alcohol.



# WHAT OTHER CONTRACT TERMS MIGHT THERE BE?

- **Representations and Warranties** – *i.e.*, licensure, insurability, board certification, DEA registration, not a party to a civil, criminal or administrative suit or proceeding, unaware of any threatened actions of such a nature.
- **Medical records ownership.**
  - Important to preserve access to records after termination.
- **Non-compete or non-solicitation** provisions.
- **Confidentiality/Non-disclosure.**
- **Non-binding terms** relative to becoming a future shareholder or member.
- **Dispute Resolution** – Employers tend to favor arbitration.



# ARE THERE ANY RESTRICTIVE COVENANTS?

- Covenants not to **compete**, not to **solicit** patients.
- NY: generally enforceable if **reasonably necessary to protect employer interest**, and reasonable as to time, scope, and distance.
- Burden is on party seeking enforcement to bring action for injunctive relief/damages.
- Courts will balance public policy considerations: “public should not be harmed by enforcement.”
  - Details of balancing approach may vary by state.
- Some courts have refused to enforce where employer has acted in bad faith.

# RESTRICTIVE COVENANTS (CONT'D)

- Employer's perspective: have made substantial investment in you: training, introduction to patients, assistance in building a practice, etc.
- Your perspective: don't want to find yourself unable to practice where you have built a reputation, are a member of the community, have a home and family, etc.
- **Need to think about your exit strategy before you sign.**
- May be able to negotiate shorter or more narrow non-compete.



# WHO OWNS THE MEDICAL RECORDS OF PATIENTS I TREAT?

- Medical records belong to the practice.
- You have an obligation to maintain accurate records.
- **Professional Responsibility**
  - All physicians practicing medicine in New York have a duty to maintain a record for each patient which accurately reflects the evaluation and treatment of the patient.
  - Failure to do so is considered professional misconduct under § 6530 of the New York State Education Law.





# MEDICAL RECORDS (CONT'D)

## — Duty to Retain

- NY: Physicians have a professional duty to retain medical records for at least six (6) years.
- Obstetrical records, records of minor patients:
  - records must be retained at least six (6) years and until one (1) year after the minor patient reaches the age of twenty-one (21) years.
- **Exception:** Where a statute or regulation imposes a duty to hold medical records for longer period, the physician has a professional duty to do so.
  - **Ex:** Federal law requires that a patient's most recent mammogram be kept for ten (10) years.
- Failure to retain medical records is professional misconduct.



# MEDICAL RECORDS (CONT'D)

- Negotiate continued **access** to records after termination of employment as needed to respond to any legal claims, investigations, etc.



**THANK YOU**

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