

UNDERSTANDING A CONTRACT: "TOP 10 THINGS TO LOOK FOR BEFORE SIGNING"



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RETENTION OF NY-TRAINED PHYSICIANS

- NY trains more residents than any other state.
 - But less than half of new physicians stay in NY after completing training.
- Proximity to family is main reason cited by new physicians to practice outside of NY.
- **Income guarantees** are the most influential recruitment incentives in decision to accept a practice position.
- **Career development opportunities** are also important to those residents who reported staying in NY.

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



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PHYSICIAN WORKFORCE PROFILE

- According to a study commissioned by Jackson Healthcare (a national healthcare staffing agency), in 2013:
 - **40%** of physicians employed by or through a hospital:
 - 26% employed directly by hospitals;
 - 14% employed by a practice owned by a hospital or health system;
 - **37%** worked in physician-owned practice (with or without ownership stake);
 - 15% in solo practice;
 - 8% worked as independent contractors.
- Most of you will become employees.



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UNDERSTANDING A CONTRACT: WHAT AN EMPLOYMENT AGREEMENT IS AND ISN'T



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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.



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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.



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WHAT TO LOOK FOR...




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#1 – 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?



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#2 – 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 possibly Medicaid.



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#3 – 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.”**



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#4 – 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.



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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.





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#5 – 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.
 - May be opportunities to negotiate additional benefits.



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#6 – 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, claim is not covered.**
- **Occurrence:** Tail coverage is built in. Premiums reflect.
- If it is a claims made insurance policy, *will employer be paying for the tail coverage upon termination of agreement?*
 - Agreement might be silent, or say employee is responsible.

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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.
- **Can see why “tail coverage” important.**

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

- Contract with have a defined Term (length of time).
- Must look at the termination provisions as well.
 - **It's not really a “three-year contract.”**
- 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.



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TERM AND TERMINATION (CONT'D)

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



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SAMPLE TERM PROVISION

“The term of this Agreement shall be for twenty-four (24) months from _____, 2016 through _____, 2018, **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.”



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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.




#8 – 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.



#9 – 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.
- Courts have refused to enforce where employer has acted in bad faith.

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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 restricted out of ability to practice where you have built a reputation, are a member of the community, have a house and family, etc.
- **Need to think about your exit strategy before you sign.**
- May be able to negotiate shorter or more narrow non-compete.




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SAMPLE NON-COMPETE PROVISION

“The Physician agrees that she will not, at any time during a twelve (12) month period after her employment terminates (the “Restricted Period”), (i) compete with the P.C. in the practice of medicine within a [ten mile] radius of each of the Employer’s offices as currently exist or may exist in the future (“Restricted Area”), (ii) interfere with the Employer’s relationship with, or (iii) endeavor to entice away from the Employer, any hospital or managed care entity with which the Employer has a contractual relationship, or any person who was an employee, patient or referral source of the Employer during the term of her employment. Nothing herein shall preclude Physician from maintaining or exercising clinical privileges at hospitals located within the Restrictive Area, provided however, Physician agrees that she shall voluntarily resign her privileges at any hospital, regardless of its location, where the Employer is under contract to provide medical services.


In the event of a breach or threatened breach of the Physician of this provision, the Employer shall be entitled to an injunction restraining the Physician from (i) disclosing or removing from the offices of the Employer in whole or in part, any such Confidential Information; (ii) interfering with the Employer’s relationships with its employees, patients and referral sources, or with any hospital or managed care entity with which the Employer has a contractual relationship; and/or (iii) rendering any professional medical services to (A) any patient of the Employer who has been solicited by the Physician in violation of this Agreement, or (B) any person, firm, corporation, association, or other entity to whom any such Confidential Information, in whole or in part, has been disclosed by the Physician in violation of this Agreement or is threatened to be disclosed by her.

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SAMPLE NON-COMPETE PROVISION (CONT'D)

...The parties acknowledge that the type, period and territorial limitations of the restrictions imposed herein are required for the protection of the Employer, and the goodwill to be associated with the business of the Employer, and that the Employer would not have entered into this Agreement with the Employee without receiving the additional consideration offered by the Employee in being bound by these restrictions. The parties further agree that the execution of this Agreement by the Employer is expressly conditioned upon the acknowledgement on the part of the Employee that said covenant not to compete is enforceable, and that the Employer may apply to any court of competent jurisdiction to enjoin any violation of the covenant, threatened or actual. The parties further specifically agree that in the event of the necessity of enforcement by resorting to application to the courts for injunctive relief, neither party will be required to post any bond in order to obtain an injunction whether temporary or permanent.



If any court of competent jurisdiction determines that any of the restrictive covenants in this agreement or any part hereof, is or are invalid or unenforceable, the remainder of the restrictive covenants shall not thereby be affected and shall be given full effect, without regard to invalid portions. If any of the covenants should ever be determined to exceed the temporal, geographic or occupational limitations permitted by applicable laws, those provisions shall be and are hereby reformed to the maximum temporal, geographic or occupational limitation permitted by law."



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#10 – 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.

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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 reached 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.



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MEDICAL RECORDS (CONT'D)

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



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THANK YOU

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