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Negotiating Your Employment Agreement: Key Legal Issues for New Physicians

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Contract Negotiation Basics

- Know your bargaining position (be realistic)
- Decide needs vs. wants vs. acceptables
- Communication style and tone matter
 - Who are you talking to
 - How are you communicating
 - Will you hire an attorney to assist
- Have at least one viable exit strategy before executing

Consider the Work Environment & Market

- Hospital
 - Academic Medical Center
 - Pediatric
 - Adult
- Other Health Care Provider
 - Skilled Nursing Facility
 - Long Term Care Facility
 - Hospice
- Large or small private practice
- Government
- Locums tenens
- Big city vs. small town



Why Negotiation Matters

- Handshakes create good beginnings, contracts create good endings
- Hired by doctors, fired by lawyers
- Written contract terms typically control
- Leadership changes over time



Key Contract Provisions

- Compensation and benefits
- Restrictive covenants
- Scope of duties
- Outside activities
- Call coverage
- Length of term
- Termination options
- Professional liability tail coverage

Compensation & Benefits

- Salary/Comp Model
 - Salary (with or without express guarantee)
 - Productivity comp/wRVU (full, partial)
 - FMV limitation
- Bonus opportunities (signing, ongoing)
- Loan assistance/forgiveness
- Other benefits (recruiting assistance, PTO, CLE time, employee benefits (health, disability, life, retirement), payment for professional expenses, etc.)

Sample Language

- Salary with temporary guarantee:
 - “As of Start Date, for the first twelve (12) months of employment, subject to any earlier termination, Physician shall be paid a salary of [X] (\$XXX,XXX) per year, payable in equal monthly installments.”
 - Consider length of guarantee
 - Consider what happens if productivity declines

Sample Language (cont'd)

- Productivity (wRVU):
 - “Thereafter, Physician’s compensation shall be the Physician’s Actual wRVU Production annually multiplied by the wRVU Rate set forth below (“Actual Earnings”). For purposes of bi-weekly payment, Physician shall be paid Estimated Earnings based on Estimated wRVU Production (both defined below), calculated as follows:
 - Employer shall pay Physician at a rate of \$__ per wRVU (“wRVU Rate”).
 - Per wRVU rate typically determined by compensation survey and/or independent third party valuation firm
 - As of the Start Date, the Estimated wRVU Production number shall be ____.
 - How is this number calculated
 - Is it realistic for your specialty
 - Is it the same as other physicians in your specialty/practice
 - What happens if productivity falls below target

Sample Language (cont'd)

- Productivity (wRVU):
 - Physician shall be paid bi-weekly an estimated number of wRVUs to be produced (“Estimated wRVU Production”) multiplied by the wRVU rate, payable biweekly in accordance with standard payroll practices, subject to standard taxes and withholdings. Annually, Physician’s Estimated Earnings shall be reconciled with Physician’s Actual Earnings with any discrepancies paid by the owing party (Physician or Employer) to the owed party (Physician or Employer) within thirty (30) days.”
 - True-up period based on actual productivity
 - Deadline for true-up payments
 - How are wRVUs calculated (what’s included and what’s excluded)
 - Expect exclusions (example: where payment denied by 3rd party payor)
 - Can wRVU calculation be audited

Sample Language (cont'd)

- Bonus:
 - “During the Term of the Agreement, Physician shall be eligible to earn an annual bonus for each 12-month term of the Agreement (“Measured Period”). The total bonus amount will be determined by calculating the number of wRVUs produced by the Physician in the Measured Period multiplied by ___% (“Total Bonus Amount”).”

Sample Language (cont'd)

- Loan Forgiveness:
 - “Due to the substantial need for Physician’s Services in the Service Area, Employer shall advance as a loan _____Dollars (\$XX,XXX) for payment of student loans utilized by Physician for medical school. Physician agrees to repay the loan amount in equal monthly installments, with such amount and related interest forgiven by Employer on a monthly basis for each month Physician is employed by Employer.”

Ownership/Partnership

- Conditions
 - Try-out period
 - wRVUs
 - Specialty



Sample Language

- “Upon the successful completion of the initial twelve (12) months of the term of this Agreement and Physician passing his/her _____ board, the Physician shall be offered the opportunity to purchase an equity position in the Employer equal to that of all current shareholders, for a purchase price calculated at fair market value, in a manner consistent with past practices. Physician shall be obligated to execute appropriate purchase and joinder agreements in connection therewith.”

Restrictive Covenants

- In the context of an employment agreement, a restrictive covenant is a provision in a contract that places limits on former employees' professional mobility or restricts their solicitation of the former employer's customers and employees
- AMA generally considers restrictive covenants to be against public policy
- Restrictive covenants are generally disfavored by courts as restraints of trade and are unenforceable unless certain requirements are met
 - The law does not permit unreasonable limitation on employees' abilities to change employers or solicit patients or former co-employees
 - Greater enforcement for restrictive covenants contained in equity agreements

Restrictive Covenants

- Non-Compete
 - Geographical scope (county, radius)
 - Duration
 - Specific activities permitted/prohibited
 - Carve-outs
- Non-Solicitation
 - Patients
 - Staff – administrative and professionals
 - Duration
- Notice to Patients
 - Who authors
 - Who sends



Sample Language

- Non-Compete:
 - “Physician agrees not to and shall not, without the written consent of Employer, directly or indirectly, individually or as a Physician, agent, partner, independent contractor, shareholder, consultant, director, officer, clerk, principal, investor, trustee, lender of money, or in any other relation or capacity, during his employment and for a period of two (2) years after his cessation of employment with Employer:
 - (i) participate, engage, become interested, or have a financial interest, directly or indirectly, in any operation, entity, or enterprise that is competitive with the business operated by Employer within _____ County, Ohio;
 - (ii) engage in any activity which is in competition with Employer’s business within _____ County, Ohio, including, but not limited to, practicing medicine; or
 - (iii) directly or indirectly solicit any other person to engage in any of the foregoing activities.”

Sample Language (cont'd)

- Non-compete II:
 - “During the Term of this Agreement, and for a period of one (1) year following expiration or termination of this Agreement, Physician shall not, directly or indirectly, on his or her own behalf or on behalf of any other person, company, corporation, partnership, sole proprietorship, governmental agency, organization, joint venture, or other entity, individually or collectively, in any fashion, form or manner, within _____ County, Ohio, or any county contiguous to _____ County, Ohio, engage in the practice of medicine or surgery or provide any other services substantially similar to those required to be provided by Physician under this Agreement. This Section shall expressly not apply upon termination of this Agreement by Physician for cause.”

Sample Language (cont'd)

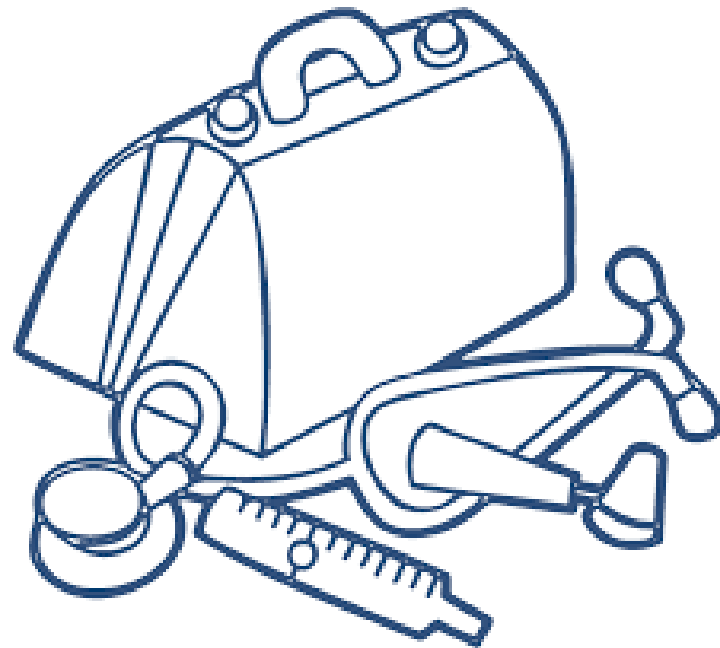
- Non-solicitation:
 - “Physician agrees not to and shall not, without the written consent of Employer, directly or indirectly, individually or as an Professional, agent, partner, shareholder, consultant, director, officer, clerk, principal, investor, trustee, lender of money, or in any other relation or capacity during her or her employment and for a period of two (2) years from the date Physician is no longer employed by Corporation:
 - (i) interfere with or disrupt any relationship, contractual or otherwise, between Employer and any patient, prospective patient, or physician of Employer;
 - (ii) in any way divert from Employer any business whatsoever or influence or attempt to influence any customer or prospective customer of Employer not to do business with Employer; or
 - (iii) entice, solicit, or hire away any of Employer’s personnel to work in or for any other business.
 - The term “prospective patient” shall mean any person that resides or is otherwise located within _____ County, Ohio.”

Sample Language (cont'd)

- Notice to Patients:
 - “In the event of termination of the Physician’s employment, the parties agree that the only notice to the Employer’s patients of such termination or of the assumption of private individual practice by the Physician, shall be made by the Employer at the Employer’s expense by written notices to patients treated by the Physician as the primary provider stating the fact and date of termination and the forwarding address and telephone number of the Physician. No other notice to such patients shall be submitted by or for the Physician except as permitted herein.”

Scope of Duties

- Make sure the job description (and allocation of time) matches what was discussed
 - Clinical
 - Administrative
 - Teaching
 - Research



Sample Language

Exhibit A Clinical Services

- “Physician’s services shall include, but not be limited to:
 - Discharge all of the responsibilities as a member of the active medical staff of Employer.
 - Participate in Employer’s medical staff activities and committees and assist Employer in carrying out utilization review, peer review, medical staff credentialing.
 - Expand the availability of professional medical services in the Employer’s service area.
 - Perform Health Risk Assessments on all patients if applicable for Physician’s specialty.
 - Establish call coverage relationships with other physicians employed or approved in advance by Employer in order to assure continuity of care consistent with other physicians in the same specialty.
 - Teach medical students, residents and/or fellows as requested.
 - Perform such duties and assignments as assigned by Employer.
 - Physician shall provide services to indigent, Medicaid and Medicare patients without discrimination.”

Outside Activities

- Restrictions
- Scope/approval process
- Compensation vs. volunteer
- Negotiate known desired carve-outs upfront when possible
- Consider conflicts of interest



Sample Language

- “Physician will devote his/her entire business and professional time and attention to the provision of Services to Employer.
 - 1) Outside Activities. The expenditure of reasonable amounts of time for personal activities, outside investments, and charitable and professional organization activities shall not be deemed a breach of this Agreement provided such activities do not materially interfere with the services required to be rendered to the Employer hereunder.
 - 2) Outside Activities and Accounting. All medical practice income and activities accepted or undertaken by Physician shall be for the benefit of the Employer. The Physician shall disclose, in writing, to the Employer any and all agreements or contractual arrangements for which Physician will be compensated for services provided by him/her during the term of this Agreement. Outside activities such as teaching, lecturing engagements, writing of treatises and articles, and consultative work for any governmental or other agency, may be undertaken by the Physician, but all collections shall be remitted to the Employer.”

Call Coverage

- Hour requirements/ratio
- Exclusivity
- Payment



Sample Language

- “Physician agrees to provide 24-hour coverage for trauma care patients at Employer. Physician shall be available to provide Services for patients on an emergency basis. Such obligation means being available immediately for telephone consultation, and on-site availability within fifteen (15) minutes if required by the circumstances.
- In consideration of the Services provided pursuant to this Agreement, Employer will pay Physician _____Dollars (\$XXXX) for each 24-hour period Physician is responsible for providing coverage. Employer will pay the Physician based on the submission of a finalized schedule by Employer. Physician shall not participate in any other call or coverage program for any other healthcare provider throughout the Term of this Agreement.”

Length of Term

- Initial and Renewal Terms:
 - “Term. The term of this Agreement shall begin on or about _____, 2019, and end three (3) years later (“Term”) and shall automatically renew for subsequent additional one (1) year terms subject to earlier termination (“Renewal Terms”).”

Termination Options

- Exit strategy
- Without cause
 - Implications (non-compete, tail, etc.)
- With cause
 - Implications (non-compete, tail, etc.)
 - Typically defined VERY broadly in favor of employer
 - Right to cure will depend on circumstances

Sample Language

- Without Cause:
 - “Either Employer or Physician may terminate this Agreement at any time without cause upon one hundred twenty (120) days prior written notice to the other Party”
 - Typically mutual
 - Need sufficient time to find new position
 - Employer may not allow you to work during termination period, but would pay

Sample Language (cont'd)

- With Cause (by physician):
 - “For purposes of this Agreement, “Good Cause” is defined as any one of the following events and the failure of the Employer to cure the default within 30 days after written notice by Physician:
 - (i) failure on the part of the Employer to pay the compensation due under the terms of this Agreement;
 - (ii) failure on the part of the Employer to provide Physician with equitable access to revenue opportunities; or
 - (iii) failure on the part of the Employer to assign call coverage responsibilities to Physician in an equitable fashion.”

Professional Liability Tail Coverage

- What is it
- Scope and duration
- Who is buying
- When is it triggered



Sample Language

- “In the event Physician’s employment with Employer is terminated, other than by Physician for Good Cause, the Physician shall be required to maintain insurance coverage for any liability which directly or indirectly results from the Physician’s provision of medical services or from acts or omissions that occur in whole or part during the term of this Agreement (the “continuing coverage”) through the procurement at his sole expense of an extended reporting endorsement (“tail”) applicable to the insurance coverage maintained during the term of this Agreement.
- In the event Physician terminates his employment for Good Cause, the Corporation shall at its sole expense obtain tail coverage.”

Additional Employment Contract Provisions

- Start date vs. effective date
- Confidentiality
- Exclusive negotiations
- Indemnification
- Medical records completion
- Breach
- Dispute resolution

General Tips for Success

- Credentialing packet – fill it out on time
- Be responsive – administrators/staff
- Ask questions – don't assume
- Read all paperwork, including your contract
- Be entrepreneurial
- Don't disparage
- Attend meetings
- Hire a lawyer when needed (health care v. general business lawyer)

QUESTIONS?



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