

# Negotiating Your First Employment Contract



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Considering accepting that first position with a new employer? You've probably already considered such issues as interpersonal chemistry and location before accepting, but you also need to understand the terms of the position and be sure your understanding is reflected in the contract. From compensation to termination provisions, understanding the terms of your employment contract will help you avoid unpleasant surprises days, months or even years down the road.

**Compensation.** It is crucial to understand how you will be paid. All too frequently, physicians are surprised two or three years into an employment contract that they were not paid in a manner consistent with their original expectations.

**Compensation Formula.** Understanding the formula, if one is offered, is the next challenge. Will that formula be based upon charges, collections, patient visits, relative value units or a combination of all of the above? If it is based upon revenue, does the formula also take into consideration an allocation of expenses and whether these expenses are allocated on a pro-rated basis, or are they tied into the revenue received by the practice? Conceivably, if a physician within a three-person group is generating 50 percent of the revenue, that physician may also be responsible for 50 percent of the expenses as opposed to 33 percent of the expenses.

**Bonuses.** Understanding that you will receive a bonus and whether that bonus is discretionary or based upon a formula is critical. Often contracts will provide that the bonus is within the employer's discretion. In such circumstances, the newly employed physician should rely solely upon the base compensation for planning purposes. Having a formula that sets forth how the bonus will be determined is obviously preferable. Additionally, you should know when the bonus will be paid. Is it contingent upon being employed at a certain period of time, such as the last day of the fiscal year of the employer, or pro-rated based upon a partial year of service?

**Signing Bonus.** Signing bonuses can be offered in specialties where there is a high demand. Often these bonuses are paid upon starting work at the employer. However, the bonus may be subject to partial repayment if the employee terminates the contract during a certain period of time. The circumstances under which the contract is terminated also may play into whether or not repayment is required.

**Restrictive Covenants.** A favorite question centers on whether a restrictive covenant is enforceable. In Pennsylvania, the answer is yes. Whether a specific covenant is enforceable will depend upon the facts of the situation at the time that the employer endeavors to

enforce it. As a general rule, the employer must have a protectible interest and the covenant must be reasonable in its geographic scope and duration. If you are employed by an emergency medicine group and desire to join a primary care group, the emergency medicine employer no longer has a protectible interest in enforcing the covenant because the services provided in the new employment do not compete with the services of the former employer. However, if you are terminated by a multi-office group of primary care physicians, it is plausible the practice will have a protectible interest in preventing you from taking a position with another primary care group in the market. The same rules generally apply to New Jersey.

**Enforceability.** Whether a covenant is enforceable in its geographic scope will vary widely. In Pittsburgh, a covenant that provides that the physician cannot compete within a 20-mile radius of a Pittsburgh hospital may not be enforceable because the geographic scope is too broad. For example, the patients of a primary care physician may not choose to follow their physician outside of the 20-mile radius in such a densely populated area where there are many options for medical providers, so the restriction would be too broad. However, in a more rural community, a 50-mile restrictive covenant may be enforceable because the physician may be the only doctor providing a certain type of specialized care in a much broader community.

Generally speaking, a restrictive covenant in Pennsylvania that goes beyond two years, and certainly three years, pushes the outer limits of enforceability. The shorter the duration, the more likely the covenant will be enforced. The law regarding restrictive covenants varies widely from state to state, so it is important to understand the state law in the area where you desire to practice.

**Liquidated Damages.** When negotiating restrictive covenants, one option to consider is providing for liquidated damages. If the party in breach of the covenant (the employee) pays a certain sum of money to the employer, then the employee can escape the limitations of the restrictive covenant. Liquidated damages have to be reasonable and have some correlation to the interest being protected by the employer.

**Termination With and Without Cause.** When negotiating a restrictive covenant, if the employer terminates the employee without cause, arguably that covenant should not be enforceable. However, if the employee quits or is terminated for cause (breach of duties, loss of license, loss of staff privileges, etc.), then the restrictive covenant should be enforceable.

**Termination Provisions.** Once the compensation and restrictive covenant issues are hammered out, it's time to focus on termination provisions. A physician may believe that he or she has signed a two-year contract, but if ter-

mination provisions would enable the employer to terminate the contract upon 90 days written notice without cause, then the term is 90 days. Most employers want a "without cause" provision in the employment contract to protect themselves from potentially embarrassing situations. Misbehavior by employed physicians may give rise to a cause for termination. However, because of the circumstances surrounding the termination, the employer may prefer to terminate the physician quietly and forego the public embarrassment associated with the bad behavior. On the other hand, employees often feel threatened if the employer can terminate the contract upon a certain period of notice without cause and are justified in arguing that for the first term of the contract, the employer can only terminate the contract for cause. This gives the physician some security, especially if moving a great distance to accept the new position.

Some termination provisions are very subjective, such as the loss of license, privileges or competition with the employer. However, some of the termination provisions, such as breach of a material term, are objective. When the contract provides that it may be terminated upon notice of breach of a material term, it is reasonable for the employee to have an opportunity to cure the breach of contract.

**Malpractice Insurance.** Another area of significant concern for physicians is malpractice insurance. The majority of employment contracts provide that the employer is responsible for maintaining malpractice insurance. There are two principal types of insurance: occurrence and claims made. Occurrence insurance provides that if the act giving rise to the claim occurred during the period in which the contract was in force, the contract will cover the physician regardless of when the claim is brought. Under a claims-made policy, the claim has to be made while the policy is in force. If an action occurred in the year the claims-made policy was in force but the claim is not brought until the subsequent year, the physician, absent the purchase of a "tail policy," would be uninsured.

The question then is who is responsible for the tail-policy premium. From the employee's perspective, the employer is reaping the benefit of the lower premium by having a claims-made policy and hence, the employer should be responsible for the tail. However, many employers believe that the physician should always be responsible for the tail. A compromise may be that if the physician is terminated for cause or quits, she or he is responsible for the tail but if the employer dismisses without cause, then the employer would be responsible for the tail.

**Gaining Equity.** This article would be incomplete if there were not at least a peripheral discussion of acquiring equity in the practice that you join. Discuss this before you sign the first contract. Having a letter of intent is advisable so that you have a written expectation as to when and under what conditions you will receive equity. "Equity" generally means that you will be compensated in a manner consistent with the other owner-physicians, and that you will have an interest in the assets of the entity at the time you leave. There are many ways to determine how you will acquire equity in the practice. Agreeing upon these terms prior to joining the group is *always* advisable.

This article does not provide all of the answers or even begin to raise all of the issues related to employment, but rather raises some pertinent issues faced by physicians especially when addressing the first contract of their career.

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