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## Physician's Employment Contract Guide

### **Part 1: Before You Get to the Contract**

#### Letter of Intent

After you have courted prospective employers, and it is time to solidify the relationship, request a "letter of intent" (LOI) before receiving the contract. It helps ensure that what was agreed upon verbally ends up in the final contract. With a letter of intent, you can make sure you and the employer are on the same page before a contract is drafted. The LOI should highlight the key terms of the proposed employment relationship such as salary, bonus opportunities, vacation, benefits, partnership opportunities and the restrictive covenant. An additional benefit of the LOI is the security it offers insofar as it bolsters the seriousness of the employer's intent to hire you (i.e. the employer is not just wasting your time).

If the LOI sufficiently outlines the terms you and the employer verbally agreed to and you are interested in moving forward, it is time to further document the terms of employment in the form of your employment contract. If the LOI does not accurately outline the oral agreement, consider that a red flag and if you want to proceed, do so with caution. Verify every representation and make sure your employment contract includes each and every oral agreement reached.

### **Part 2: Receipt of the Contract**

#### Evaluating the Employer.

The prospective employer should be willing to provide you with much of the background information you would need in order to make a well reasoned decision. Along with the contract, you should receive the employer's policies and bylaws; in addition to financial statements and reports depicting the employer's financial status. If the group does not offer these this information, as many will not, ask for them (especially if these documents or the information in them are referenced in the contract). As a practical matter, it is unlikely the group will allow you, as a prospective employee, to view its finances. You should however, have some written assurance of the financial stability of the practice.

Additionally, you should have information on:

- a) the average and range of compensation for all nearby physicians practicing in your specialty;
- b) the payor mix;
- c) Compensation methodology;
- d) the employer's turnover rate for physicians and staff;
- e) whether there has been a sale or affiliation of the practice;
- f) whether there is a planned or contemplated merger;
- g) description of any pending litigation and contingent liabilities;
- h) whether the employer has recently been or is being investigated for any inappropriate act(s);
- i) the employer's "compliance plan" to ensure compliance with fraud and abuse laws;
- j) the nature of any relationship with HMO's, including ownership; and
- k) the nature of any symbiotic relationship with area hospitals.

1. Evaluating the Offer of Employment. Consider the total compensation package. Do not compare contracts based solely on salary. Factors such as benefits, malpractice coverage, and the time-frame for and conditions of partnership can dramatically affect earnings over several years. Never act on only a verbal offer or move based solely on a letter of intent. Do not commit to any relocation or reject any other offer of employment before signing an actual contract, unless you would do so notwithstanding any alternate employment opportunities.

2. Negotiation. Understand that the contract negotiation is all a part of a business transaction and ultimately, the employer wants to make as much money as possible from it. What you agree to in the contract sets the tone for the future relationship.

Always have a view of the big picture. Negotiation is all about being flexible; identify the most important provisions of your contract and focus on them. You will be seen as more reasonable and, in turn, your requests more feasible. Always ask for more than you expect the employer to pay. Never accept the first offer; it is generally always the low number, i.e. the least sum the employer is willing to pay. Be polite, yet firm. No one wants to deal with an arrogant know-it-all, especially when that know-it-all has yet to actually prove an ability to generate revenue. It is much easier to arrive at a favorable agreement when a rapport has been established and the contact knows you, likes you, and trusts you have good intentions.

With this Guide, you may be prepared to do your own negotiating. Many physicians do their own negotiating, arrive at agreeable terms, and then consult privately with their respective attorneys. When negotiating, remember, you can always say: “my attorney thinks” or “my attorney says,” as a way to diffuse any hostility. The employer will not hold it against you for having an aggressive attorney. I have found that when the physician and the employer cannot come close to an agreement, it is best that I deal directly with the employer. The advantage in this situation is that my aggressive negotiating is not held against my client, the physician. A word of caution, always “go with your gut” and if you feel uncomfortable negotiating, do not do so and consult an experienced attorney before proposing alternate terms of employment.

3. Specificity. Non-specific, vaguely worded provisions can create problems down the road. The details of your contract are what matters. Remember, “the devil is in the details.”

3.1. Employment Contract References to Other Incorporated Documents. If the contract refers to another document, such as corporate bylaws, a health plan, policy, or a retirement plan, obtain a copy and be sure it is dated. Ask for copies of any referenced documents that may affect your future relationship with the employer.

4. Duration/Term of the Contract. Although the usual term is two or three years, the employer will sometimes set the term to be equal to the number of years it will take the employee to be offered an opportunity to become an owner of the practice. Note that in some states the initial term of the contract cannot exceed a specific number of years. In any event, make sure the start date and end date are clearly noted in the contract. All employment contracts contain a provision that allows either party to terminate the employment without cause by giving the other party a certain number of days notice, usually thirty to ninety days.

4.1 Extension of Term. A roll over clause or automatic renewal may be included in your contract and serves to bind the parties to another lengthy term (not less than twelve months) and should not be used in place of renegotiating a new contract. Unless your salary is productivity based or highly incentivized it would be in your best interests to negotiate for increased compensation, provided that the market warrants the same. In a climate of decreased reimbursements, and in turn decreasing compensation, before you request the employer revisit your compensation make sure a market analysis would yield an increase in your compensation (i.e. if you are overpaid, do not call attention to it).

5. Compensation.

5.1 Base Salary. If there is a base salary it needs to be stated clearly, including the amount and frequency with which payment will be made (usually monthly, semi-monthly, or biweekly). To avoid any misunderstanding, it should be clear that unless employment is terminated, the base salary is guaranteed and is not subject to any deductions other than ordinary payroll deductions, such as federal and state income tax. Make sure the guaranteed compensation is adequate.

5.2 Incentive Based Compensation. I do not recommend that early on in your medical career you enter into any employment relationship where your salary is based on production, but you should be aware of the nature of such arrangements. These arrangements are not recommended because the relationship can become complicated in defining what constitutes “income” and “expenses” potentially leaving the physician unpaid for rendering valuable services on behalf of the employer.

If you wish to enter into an incentive based arrangement, clearly define the terms used in calculating your compensation. Below are common incentive-based compensation structures:

5.2.a Production/Collections Based Compensation. These compensation structures are ordinarily a bad deal for physicians new to practice because it takes time to build a patient base and start collecting receivables. If you work in shifts, emergency medicine or urgent care for example, the contract should guarantee enough work, stated in your contract in sufficient numeric detail, to pay your bills.

5.2.b Percentage of Productivity. Under this arrangement, you would be paid a set amount of your prior month’s net income (charges, minus adjustments for expenses). Most groups paying employed physicians based on gross charges will adjust those gross charges in accordance with the medical group’s ability to collect reimbursement.

5.3.c Draw against wRVU measured Productivity. Under this arrangement you would be paid against anticipated reimbursements. The sum you would receive would be determined by multiplying the wRVUs you generate by what is known as a conversion factor. Because of the lag in reimbursements, you should not enter into this type of arrangement within your first year post training unless there is a minimum base salary guarantee.

5.3 Review and Salary Adjustment. The contract should provide that the salary provisions will be periodically reviewed and adjusted on an annual basis. The review should be memorialized in a written memorandum prepared by the employer and signed by both parties. Any promises regarding salary adjustments or other terms of the contract should be stated within the memorandum and treated in the same fashion. If no review is provided, an automatic remedy should be offered, such as an automatic salary increase. In no event should the entire contract be jeopardized by the failure to grant a timely review.

## 6. Bonuses

6.1 Productivity Bonus: Be crystal clear on how this is calculated. The productivity bonus usually comes into play when you have rendered between two and three times the value of your base salary, this allows the group to cover your salary, overhead, and requisite profit. After “expenses” are covered, the group then shares excess revenue with you.

Request that a sample productivity bonus calculation be attached as an Exhibit to the contract so that the definitions and methodology for calculating the bonus are clear. The contract should specify whether bonuses are based upon collections or other measures. It is imperative that you know your chances of achieving the bonus. You should know whether the revenue calculation is

pooled together then divided among members of your practice group or division (like tips for a busboy), or based on separate, individual revenue generation, or both. Can you buy call or request more call to get the best shot at obtaining your bonus? It is worth repeating, you should insist on language in the contract describing the bonus system and an Exhibit showing by example the methodology of calculating it.

The most common method for calculating a bonus is to pay a percentage of the physician's collections over a targeted quarterly or annual goal. Sometimes the salary bonus or the percentage increases on an escalating basis the more the physician exceeds the production goal, the more he/she earns. In any event, it is best to ensure that the calculation of your bonus is based upon generally accepted accounting principles by including a provision such as:

Employer will maintain true and accurate financial records in accordance with generally accepted accounting procedures ("GAAP"). Physician shall have the right to inspect and copy the financial records used in or pertaining to the calculation of his/her compensation at any reasonable time.

Below are excerpts of sample contracts illustrating different bonus calculations:

Bonus Based on Percentage of Salary. Within fifteen (15) days of the close of each [quarter, year], Employer [shall or in its sole discretion may]<sup>1</sup> pay Physician bonus compensation of [up to]<sup>2</sup> \_\_\_\_% of Physician's salary in addition to the base salary paid to the Physician, if Physician has [produced or generated] \$ \_\_\_\_\_ in the preceding [quarter or year]. If the contract is terminated or expires between bonus payments, Physician has no vested interest whatsoever in any bonus compensation that may have accrued in that bonus period. A sample bonus calculation using the foregoing formula is attached as Exhibit \_\_\_\_.

Collections Based Bonus. If Physician's [quarter or annual] gross collections exceed \$\_\_\_\_\_, Physician shall be paid as a bonus an additional [\$\_\_\_\_\_ or \_\_\_\_% of Physician's collections above \$\_\_\_\_\_], [and an additional bonus \_\_\_\_% of his/her collections that exceed \$ (a higher number)]. If this contract terminates, Physician has [a or no]<sup>3</sup> vested interest in any collection made after the date of termination. An example of bonus calculation is attached as Exhibit \_\_\_\_.

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<sup>1</sup> Note, the "in its sole discretion." You would negotiate to remove this language and make the bonus mandatory. Specifically, the paragraph should read "... Employer shall pay Physician bonus compensation...."

<sup>2</sup> You want clear terms, "up to" is uncertain as it notes only a compensation ceiling, but not a floor; however "at least" works.

<sup>3</sup> \* You want the "a." Commonly, young physicians do not negotiate this point and simply gloss over it. However, as you know, many young physicians regularly change employers. They should therefore include in their contract that post-termination collections be factored into the bonus calculation.

Monthly Production Bonus Paid as Percentage. On or before the 15th of each month, Employer shall pay Physician \_\_\_\_% of his/her prior months' "production" as a bonus, if Physician's production exceeds \$\_\_\_\_\_. For the purposes of calculating compensation, Physician's "production" shall include all charges in a given month for services rendered by Physician to patients as evidenced by Physician's entries on the [patient log/schedule] regularly used by Employer, adjusted by any contractual allowances. "Contractual allowances" are those adjustments to charges made to reduce fees, such as discounted-fee-for-service, Medicare allowances, managed care arrangements or any other differential between billed charges on the [patient log/schedule] and those charges actually charged to the patient or the patient's payor.

6.2 Sign on Bonus: Depending on how badly the practice is in need of your services, you may be able to negotiate a sign on bonus, especially if you bring with you an already established client base. Straight out of fellowship it is difficult to have such a client base, but a great start to acquiring one is to brand and market yourself via local media and the Internet. Creating a website will demonstrate your knowledge of the business of medicine and your initiative. If as a young physician you demonstrate such an appreciation for business development, it stands to reason you will develop a long list of patients or "book of business."

In any event, a sign on bonus should be addressed as the last compensation issue as it is of the least monetary significance. A good way to bargain for a sign-on bonus is to note the value you bring to the practice in the form of an already established client base.

*Practical Advice:* A great way to improve the likelihood of getting a sign on bonus is to create a website. Then attend community events where you hand out and acquire business cards as you encourage people to stay in touch. On your website, monitor the traffic and post pictures of you out serving the community. In a matter of months, you will have added credibility to your brand and drastically improved the likelihood of receiving a sign-on bonus. It has worked in the past.

7. Supplemental Earnings. Although your employer will want all or a portion of the revenue you receive from outside professional activities (e.g. speaking engagements, published articles, moonlighting, consulting, etc.) to be forwarded to the practice, resist this. I suggest negotiating for a clause similar to the following:

Physician is expected to devote his/her full time and attention to the activities contemplated by this contract and shall not engage in any other employment which will interfere with Physician's ability to perform Physician's duties under this contract.

The benefit of the above language is that employer can feel secure that its interests will be protected meanwhile, due to the absence of an explicit exclusion, offering you the flexibility to moonlight or engage in other activities.

8. Vacation. Employers are moving away from the traditional “paid vacation” towards a hybrid of paid time-off for vacation, continuing medical education (CME) and illness (i.e. sick days). Expect any potential employer to require that any vacation or other planned time away be approved to ensure that the practice is adequately staffed.

Your contract should specify the number of paid vacation days and whether such days may be carried over if not used. If they are treated separately, the same should be stated for the number of CME days. As a matter of due diligence, you should learn to what extent physicians already with the practice take vacation days, this may give you some insight into the culture of the practice. If you find that the employer will not permit accrued but unused vacation to carry over from year to year, you should inquire about the possibility of having your accrued but unused vacation time purchased.

9. Sick Leave/Short Term Disability. Sick leave should be paid. Ideally, unused sick leave would accrue and roll over every year, however this is uncommon. The contract should state how such sick leave is calculated (e.g. based on months or years worked, or based on calendar or employment year). The cap on the number of sick days varies by location and even practice. Finally, the contract should specify how sick days are treated when employment ends. Employers’ sick leave/short term disability programs vary widely and you should learn what is common in your area.

10. Paternity/Maternity Leave. Under the federal Family and Medical Leave Act 1993 (FMLA), an employee is eligible for up to twelve weeks of unpaid leave during a twelve month period for the birth or adoption of a child, the care for a child, spouse or parent who is ill, and to recover from a personal illness or the effects of a medical treatment. FMLA applies to employers with fifty or more employees and to employees who have worked at least twelve months and 1250 hours during the previous twelve month period. State laws on this vary. In any event, federal law mandates compliance with whichever law, state or federal, provides greater employee benefits. Consult with your attorney or conduct the necessary research to determine the laws in your State.

If your employer is not subject to FMLA and your State’s laws are unfavorable, negotiate for three months leave. If your employer does not agree to three months, request six to eight weeks. The best way to negotiate leave, and any other point for that matter, is to find out what other employers in the area do and use that as leverage. Be careful not to allow your employer to mix your paternity/maternity leave with some of your vacation time. You will have to negotiate this point. Again, do your research.

10.1 Leave of Absence. Your employment contract should specify the circumstances (if any) under which a leave of absence may be granted, such as whether and under what circumstances such leave will be paid or unpaid and any time limitations. The procedure for requesting leave should also be addressed.

11. Reimbursable Expenses. You should strongly consider requesting that your employment related expenses, as noted below, be reimbursed by your employer. The rationale is that because, per IRS regulations, all of an employee’s non-reimbursed expenses, including travel and

entertainment, must be lumped together **and** can be deducted only as an itemized deduction **if** they exceed a certain percentage of your adjusted gross income.

11.1. Studying for Boards. You must ask for time off to study for Boards in addition to your vacation days. It is in the employer's best interests that you pass your boards, and every reasonable accommodation should be made to enable you to have time to study. Do not forget to request that your employer pay for your board review course. If your employer says no, no harm done; in fact you benefit either way because psychologically, the more one says no to someone's reasonable requests, the better the person will feel about saying yes. As such, the provisions that really matter may be more readily agreed to by the employer as a result of denying those that do not matter to you so much. The key here is to ask. For you, it is a win-win proposition.

*Practical Advice:* The timing and order of your negotiations are important. It is often beneficial to discuss then reserve a certain topic for later discussion pending the outcome of other negotiations.

11.2. License/Dues. Ask that your employer reimburse you for these expenses. In order to do your job, you must have a license. Also, hospital privileges are often necessary, and therefore important to most practices. Some contracts condition the employment on obtaining privileges at a particular hospital, and certainly on your having a license to practice.

*Practical advice:* get your State license before you finish fellowship. In some States, the process can take six months or more and you cannot afford that delay, it will limit your ability to practice, and in turn limit your ability to earn a living. Your employer will condition the start of your employment on your having a license to practice in the State. In the same vein, get your hospital privileges as soon as possible.

11.3. Relocation/Moving Expenses. Request that the employer reimburse you for relocation expenses and that such reimbursement occur within a specified period of time. Your contract should state the maximum amount payable and specify what expenses are covered, e.g., expense of packing, moving, and unpacking household items, transporting you and your family to the new location, cost of insurance premium for full replacement, value of household items, and storage of household items. In addition, your contract may specify that the employer will pay for living expenses up to a certain period of time as you find suitable living arrangements, provided of course that you submit appropriate receipts. If you are moving a great distance to join the employer, you may be able use that to your advantage by negotiating a contractual guarantee that you will not be dismissed without cause for the duration of your contract.

11.4. Automobile Allowances. Employers typically supplement physician use of his/her own vehicle when such use is associated with call. The supplement may come in the form of a monthly fixed sum "added on" to the physician's salary, or as a per-mile reimbursement. Keep in mind that mileage above the IRS's per mile allowance is taxable income.

11.5. Travel and Entertainment Expenses. Travel expenses (transportation, lodging and meals) incurred while away from home on business, including CMEs, can be reimbursed by employers and, if not reimbursed, are deductible by employees. There are strict record keeping

requirements for entertainment expenses. The employer must determine if your entertainment/meal expenses are business related, whether they are subject to the 50% limitation and whether a business discussion occurred during or immediately preceding or following the meal. Adequate records, therefore, must be maintained, usually in the form of a log, expense statement or similar record detailing each of the items for the deduction. The record should set forth the amount, date, place and the essential character of the expenditure.

12. Benefits. Many employers may want to leave the description of your benefits package fairly vague, do not let them. If the employer is paying health and/or dental insurance premiums, the contract should state whether coverage will include family members. Life and/or disability insurance may also be provided, and the specifics regarding these types of insurance should also be stated. If the Employer is paying less than the full premium on any of the policies, your share should be noted. Be sure to learn whether there are any qualifications or requirements for insurance benefits. Specifically, determine whether there any risk classifications or preexisting conditions that would either deny the coverage or become so costly as to cause you to incur surcharges or increased fees.

12.1. Health Insurance. Most employers will provide health insurance for you, and should provide coverage for your family as well. If your spouse has insurance through his or her job, do not decline family insurance from your employer. I suggest that both spouses obtain coverage for themselves and the family from their respective employers. Life is full of surprises and you never know what the future holds. One spouse may lose his or her job, and with it the health insurance. It would be added comfort to know that in such an instance health insurance is still provided.

12.2. Life Insurance. If the employer purchases the policy, the employer will likely be named the beneficiary. Ask that your family be listed as a beneficiary. If not permitted, and this should be done in any event, purchase a supplemental life insurance policy.

12.3. Disability Insurance. Even though your employer will likely provide this form of insurance, it is to your advantage to purchase disability insurance while still in training. As a “Physician-In-Training” you are able to purchase disability insurance and reserve the right to purchase additional coverage, that option will not be available to you after your training.

13. Malpractice Insurance. It is standard practice for the employer to decide upon the type of coverage. The contract should specify your policy limits, who is required to pay deductibles, if there are any, either before or after contract termination, and legal expenses incurred in defending claims. Additionally, per your contract you should have the right to review the malpractice policy on a periodic basis. It would be wise to periodically review the policy to be sure it is current and that its provisions have not changed. If the employer does select your medical malpractice insurance, but offers to pay the premium on any policy you acquire on your own, ask why and that you be added as an additional insured on the employer’s policy just in case there is an inadvertent lapse in coverage.

Generally, there are two types of malpractice insurance typically available, “Occurrence” and “Claims Made.” Occurrence Coverage is preferred.

13.1. Occurrence Coverage. This type of malpractice insurance covers physicians for acts or omissions committed during the term of the Employment Contract, regardless of when a claim is brought.

13.2. Claims Made Coverage. This type of malpractice insurance is usually far less expensive.

Under this type of policy, the relevant date is not when the act occurred but when the harm was claimed and if it is claimed after you leave the group you are not covered by the employer's liability insurance.

In sum, under a Claims Made policy, your coverage terminates when your employment terminates. To maintain insurance for claims made after employment is terminated, you should have additional insurance known as "Tail Coverage". Under an Occurrence Policy you would not need Tail Coverage because claims stemming from your employment alleging professional negligence are covered, even if brought after your employment has ended.

13.3. Tail Coverage. You need to negotiate hard for tail coverage, it is an expensive and critically necessary protection. If your employer is not willing to pay for tail coverage, you should inquire into the cost of such coverage before signing the contract. Tail coverage is very expensive. You should also find out if there will be any limitations on your ability to obtain tail coverage at a later date.

13.4 Nose Coverage. Nearly the opposite of tail coverage, nose coverage operates to protect against claims arising against a physician for acts committed while under a former employer but arise while with the current employer. In sum, it overlaps with tail coverage. Rather than being provided by a former employer, nose coverage is provided by a current employer.

13.5 Umbrella Policy. Consider this an excess policy, in sum it picks up where your other primary medical malpractice policy or policies leave off to add additional coverage. It is highly recommended that you purchase this form of coverage as a safeguard should the limits of your malpractice insurance be exceeded.

14. Physician Duties/Responsibilities. Your contract should note the employer's normal business hours, days and hours you will be required to work each week, number of patients which must be seen or the number of patient contact hours, your primary and, if applicable, secondary practice location(s), under what conditions you may be reassigned, your expected weekly hourly commitment, defined call schedule, schedule of hospital rounds and admissions, schedule of nursing home rounds, and weekend rounds. Lastly, the contract should specify that you are being hired as an employee and not an independent contractor because employees enjoy rights and privileges not available to independent contractors.

14.1 Call Coverage. An employer will generally want the scheduling provisions to be vague or undefined, leaving room for flexible call coverage assignments. The general times during which you may be required to provide services and call coverage, such as, nights, weekends and/or holidays should be outlined. The contract should specify how call will be

assigned (e.g. on a seniority, equal, or substantially equal basis). Also, there should be language in the contract that prescribes what will occur should if one of the physicians scheduled to share call leaves the practice.

14.2 Oversight of Non-Physician Staff. Physician employment contracts generally provide that the employer will furnish all equipment and supplies necessary for the physician to provide the medical services called for by the contract (e.g. medical equipment and supplies, and possibly cell phones/pagers). More common than in years past, equipment and supply services are being provided by MSOs, PPMs, hospitals or others. Your contract should therefore specify who is providing such equipment, supplies, and/or services. If it is a third party, the employer's contract with that third party should be attached as an addendum or exhibit to your employment contract and your employment contract should note that you may enforce the terms of the employer's attached contract. This provision assures that you will have access to the means and services necessary to practice medicine. Your contract should specify whether you have any authority or input regarding hiring, firing or disciplining non-physician staff.

14.3 Professional Standards. The contract should be carefully worded so that nowhere does it obligate you to act in accordance with a standard of care that is higher than that required by law, which is merely that of a reasonable physician in similar circumstances. Do not agree to be bound by undefined, laudatory standards of care. For example, agreeing to provide services "according to the highest standards of competence," "of optimum quality" or "exceeding the prevailing community standards" may create undue liability by holding you to a standard of care which is higher than that normally imposed.

*Practical Advice:* Plaintiffs' attorneys always subpoena employment agreements, in part in an attempt to establish the physician's contractually agreed upon level of care. It is therefore in your best interest not to have your contract reference any level of care that exceeds the "reasonable standard of care" required by law and applied in malpractice actions.

14.4 Additional Duties and Responsibilities (private practice). In addition to treating patients, you may be expected to perform some administrative duties. Generally, these duties include oversight of those non-physician medical staff. Anything beyond the normal scope of duties, performing the function of a human relations manager for example, should be specified in the contract.

14.5 Additional Duties and Responsibilities (institutional employer). Institutional employers generally require participation on committees, teaching, and community service activities, which should be included in the job description, with clarification regarding whether such activities are in addition to the required number of weekly patient contact hours.

15. Stark Law. While not usually addressed in employment agreements, it is something you should have a general knowledge of in case your employer has a financial relationship with an entity to which it makes referrals for designated health services ("DHS") for which payment may be made under Medicare. Under Stark, a physician may not present a claim or bill to the government, a patient, or any other entity for DHS furnished pursuant to a prohibited referral. DHS includes:

- Clinical laboratory services;
- Physical therapy, occupational therapy, and speech-language pathology services;
- Radiology and certain other imaging services (now includes nuclear medicine);
- Radiation therapy services and supplies;
- Durable medical equipment and supplies;
- Parenteral and enteral nutrients, equipment, and supplies;
- Prosthetics, orthotics, and prosthetic devices and supplies;
- Home health services;
- Outpatient prescription drugs; and
- Inpatient and outpatient hospital services.

There is a laundry list of exceptions to Stark, it would require many pages to list and even more to explain. In sum, below are practical points to consider so as not to run afoul of Stark (and be subject to its crippling financial penalties):

- Make sure financial relationships are within exceptions – having good intentions is largely ignored under this law.
- Examine referrals to subsidiaries and whether physicians have ownership in hospital and exercise caution with departmental or service line equity or debt arrangements. Examine security interest and guaranty deals so that they meet a compensation exception.
- Make sure arrangements with physician groups are documented in a contract under a direct exception – simply relying upon a premise that any payments between a DHS entity (e.g., hospital) and physician group are fair market value and, thus, no more action is really necessary may no longer be sufficient.

*Practical Advice:* Stark Law, because of its stiff penalties, has substantially impacted the health care industry. Your employer is likely very familiar with its requirements. In sum, just know that you should not blindly make referrals, but should consider the existence of any relationship that would, if exploited, give the appearance of impropriety.

16. Partnership. The subject of partnership is sensitive and your employer will likely rely on exceedingly vague language to describe partnership prospects, if the subject is addressed at all. Vague language hinting at the possibility of partnership consideration at some future time is too vague to have any real meaning. If you are interested in exploring partnership, or at least having the option later, request a provision, similar to the example below, which stipulates that before the end of the employment term the employer will evaluate and consider certain agreed upon criteria to determine your partnership prospects.

The parties agree that it is their current intent that upon the successful completion of \_\_\_\_\_ years of continuous employment pursuant to the terms of this contract, Physician shall be given the opportunity to become a [shareholder] [partner] of Employer.]

*Practical Advice:* The above sample is unlikely to fly. Employer's covet partnership and generally will not bind themselves to a stated intent to make an employee a partner.

In the event the above clause fails, consider the following:

Physician's progress toward equity status shall be reviewed in writing every six (6) months. The criteria for such evaluation shall be the quality of medical services provided, nature and frequency of patient complaints, productivity of the Physician in terms of number of patients seen per day, and contribution of the Physician to the Employer's operations, such as committee work, teaching duties and/or community activities. Employee's equity interest, if offered, shall be \_\_\_\_\_% of the [corporation or partnership]. Employee will [work-in or pay a buy-in] based on [the book or fair market] value of the practice assets excluding good will [or a predetermined value of \$\_\_\_\_\_.]

If applicable, Employer will finance the buy-in by extending a promissory note for \_\_\_\_\_% of the purchase price for \_\_\_\_\_ years at \_\_\_\_\_% interest.

For hospitals, institutional or other non-physician employers, an ownership or equity interest is typically not an option for an employee. However, adjustment of salary or benefits may serve to compensate the employee for his/ her professional investment.

*Practical Advice:* You should investigate how many other doctors have rotated through the physician-owned practice without becoming a partner, and the reasons. Also, try to learn whether the other partners had a work-in, or a buy-in. Find out the details; as much as possible. The "goodwill" of the practice, coupled with market conditions, usually account for the bulk of the buy-in or work-in figure. Be very cognizant your group's reputation and good-will, it is not fixed and could depreciate with negative publicity just as it could increase through good word of mouth.

16.1 Performance Evaluations. Performance evaluations should be written and should contain a provision for signature and comment by the Physician to make the process as fair as possible. An oral discussion should follow the written evaluation.

17. Termination. Termination may be "for cause" (i.e. based upon a reason or justification related to job qualification or performance by either party) or it may be "without cause" (no reason needed.) It may not be for "bad cause" (based on racial or gender, or retaliatory, for example).

17.1. For Cause Termination. Cause or material breach means a substantial or legally sufficient reason for terminating the contract. Termination may be immediate or with notice, and either party may or may not be given an opportunity to "cure" any problems. A provision commonly found in many contracts states that either party may terminate, without cause, after giving a certain number of days prior written notice, such as ninety, one hundred twenty or one hundred eighty days. You should consider whether you can afford to be subject to termination without cause upon short notice. In any event, negotiate a notice period of at least ninety days.

Common “for cause” reasons to terminate are:

- any action or inaction which would jeopardize patient care or patient safety.
- loss, limitation, or suspension of Physician’s clinical privileges at an assigned health care institution at or for which the Physician engages in private practice.
- any other disciplinary action against Physician which is taken by any board or government agency having any privilege or right to pass upon the conduct of Physician, including the conviction of a crime.
- loss, limitation, or suspension of Physician’s professional license, DEA number, Medicare or Medicaid eligibility, or right to practice medicine.
- Physician’s commission of an intentional or grossly negligent act which materially injures, or which may injure, the reputation or interests of the employer or the Hospital.
- Physician ceasing to be insurable under the malpractice policy maintained by Employer covering the Physician at a premium rate that is reasonably commensurate with that offered to other Physicians in the community.
- Illness/Inability to perform duties. Make sure the number of days missed are noted as consecutive, otherwise non-continuous sick days will count.
- Death of Physician. (Make sure monies owed to you go to your estate. If you are with a solo, make sure your employment agreement provides that you are able to buy the practice from the deceased’s estate.)

Make sure the conditions precedent of “for cause” termination are spelled out in detail and do not contain vague descriptions like “unprofessional conduct.” If you are with a solo, make your employment agreement provides that you are able to buy the practice from the Estate.

If the contract is terminated for reasons relating to professional competence or conduct, and the employer is a health care entity, HMO or group medical practice that conducts formal peer review, Federal Law requires that in order for the employer to be protected from liability under the antitrust laws, the employer must offer the physician a fair hearing. Generally, State law also requires that a fair hearing be afforded in such instances. The contract should state whether there is any guaranteed wage continuation if the contract is terminated by the employer.

17.2 Post-Termination Compensation. The conditions precedent to receive severance pay should be clearly stated. The contract should specify whether you are entitled to a bonus based on services rendered while employed but which are recovered after termination. Also, severance payment should be discussed. I suggest a minimum of nine months compensation for immediate “no cause” termination.

*Practical Advice:* Unless your employer believes you did something that makes your mere presence undesirable (e.g. you pose a risk to the safety of the staff and patients due to fear of violence) you will likely not be awarded severance pay, but given notice of intention to terminate your employment. This is because severance pay is usually paid to make the physician go away and never come back. If the employer does not view you with such disdain, it makes more sense to keep you around and allow you to earn the money they would pay you in severance pay. As part of your severance package, be sure to negotiate for a favorable reference if the termination was without cause.

18. Restrictive Covenants. Negotiate both the geographic area and the time restriction, both are almost always negotiable in your contract. Covenants-not-to-compete are generally enforceable if the competition restriction is reasonable as to the geographical area, the time period and the activity covered by the restriction. The governing standard used by courts in validating or invalidating restrictive covenants is “reasonableness.” The reasonableness of geographic limitations varies greatly between metropolitan and rural areas, and is determined on a case-by-case basis. Covenants-not-to-compete which prevent an employee from competing with his or her former employer after leaving that employment are unenforceable in many states.

Your employer may require that you pay a certain amount of money as a penalty if the employment contract is terminated and you practice within the employer’s area of competition. The law will not enforce penalties. It will, however, enforce a “liquidated damages” provision, and it will only be enforceable if the underlying covenant-not-to-compete is enforceable.

If a clause in your contract reads “Physician agrees that a breach of the restrictive covenant found in paragraph \_\_\_\_ would cause Employer incalculable harm and Physician agrees that should Employer seek and obtain injunctive relief, Physician will be liable to Employer for the value of Physician’s annual salary” do not sign the contract, unless you have negotiated this provision out of the contract, or made the penalty minimal.

*Practical Advice:* Never voluntarily relinquish hospital privileges as part of any restrictive covenant. The employer cannot force you to give up your privileges at the hospital. It would deprive you of the ability to earn a living and support your family. Further, if you did not acquire the privileges as a result of an affiliation with the employer, you should not lose them by virtue of a disassociation with the employer

19. Liquidated Damages for Employer’s Rescission. You have invested a great deal in securing employment, and stand to lose a great deal should your employer rescind your offer of employment. Your contract should offer protection in the unfortunate event your employer is no longer able to extend the offer of employment. Consider incorporating the following language in your employment contract:

The Employer acknowledges that the Physician is relying on the Employer’s commitment to commence employment on the Starting Date set forth above. In the event that the Employer breaches this Employment Contract by rescinding the Offer of Employment, the Physician will suffer substantial damages as a result of the Employer rescinding this Employment Contract. These damages include, but are not limited to, the costs of

searching for another place of employment, the agreed upon compensation including benefits up until the Physician finds suitable employment, but in any event not less than the value of six months compensation and benefits, the costs of relocation (if applicable), and certain opportunity costs insofar as the Physician declined other offers of employment in reliance upon this Employment Contract. Both the Physician and the Employer agree that these damages are difficult to predict and to determine; they have therefore agreed to the amount of U.S. \$125,000 as the amount of liquidated damages (not a penalty) to be paid by the Employer to the Physician in the event that the Employer fails to commence employment as required by this contract.

20. Managed Care Contracts. Managed care contracts will likely provide a significant portion of your employer's patient base. In turn, your days will likely be spent seeing a number of managed care patients. It is important for any physician accepting an employment offer from a medical group or solo practitioner to ascertain what managed care contracts the employer has in place and will expect to have in place through the term of your employment contract.

Although HMO contracts do not readily present a problem, IPA contracts may. The IPA may have closed the IPA panel to new physicians, this often occurs in specialty IPAs. It is incumbent on you and the employer to determine whether IPAs are accepting new panel members. The contract should obligate the employer to make reasonable efforts to obtain membership on your behalf.

For example:

Employer shall make all reasonable efforts to obtain membership for Physician in all health maintenance organizations, preferred provider organizations, independent practice associations, and any other managed care organizations with whom Employer contracts. Employer shall make its best efforts to assure that Physician is eligible to participate in all managed care contracts in which Employer participates. If, within six (6) months, Employer is unsuccessful in obtaining eligibility for Physician to participate in any contract covering more than \_\_\_\_\_% of the patients in the practice Physician may terminate this contract with sixty (60) days written notice.

Your contract should also address the number of managed care patients you are expected to see per week.

For example:

Physician shall, as directed by Employer, observe the provisions of all managed care contracts which Employer may enter into on behalf of Physician for health care services with, managed care organizations e.g., Health Maintenance Organizations (HMOs), Independent Practice Associations (IPAs), Preferred Provider Organizations (PPOs), Medical Service Organizations (MSOs), Integrated Delivery Systems (IDSs) and Physician-Hospital Organizations (PHOs). Employer may obligate Physician to accept a certain number of patients; Physician agrees to accept at least the required numbers of patients, whether capitated or not. Physician and Employer agree that Physician shall

have the goal of conducting at least three patient office visits per day, when consistent with appropriate professional standards.

21. Trade Secrets. If your employer requires you to sign a “Non-disclosure,” “trade secrets” or “confidentiality” clause, make sure it is not vague and precisely describes the confidential information. If the vague clause remains in the contract, you become vulnerable to a claim that you breached the agreement by violating an undefined clause that, due to its ambiguity, can be conveniently interpreted by your employer to be the basis of your “for cause” termination.

22. Intellectual Property. The employment contract should state clearly whether the intellectual property rights arising out of the employment relationship belong to you or the Employer. Depending on the nature of your practice, invasive vs. non-invasive for example, you may be in a position to invent or design something that is patentable or copyrightable. Your contract should therefore address who would own the intellectual property and whether any remuneration would be offered. If you agree that the Employer would own the intellectual property, as commonly written into employment contracts, your employment contract should detail your remuneration and whether it would be considered income from the practice of medicine.

According to federal law, the Employer owns the copyright on materials you create within the scope of your employment, unless there is an agreement to the contrary. As for patents, “unless otherwise agreed, a person employed by another to do non-inventive work is entitled to patents which are the result of his invention.” In sum, absent an agreement to the contrary, you would own patent rights and the Employer would own copyrights.

23. Indemnification. Your employer may want the contract to contain a “hold harmless” clause. Generally, this type of clause requires you to hold the Employer harmless from any liability that the employer may incur as a result of your acts or omissions associated with your employment. By agreeing to an indemnity clause that serves to indemnify the employer, you agree that if a patient sues you both, you will pay any of the employer's liability damages. **Be very careful in signing contract that has such a clause in it**, in doing so you could be assuming employer liabilities that your insurance will not likely cover.

24. Physician-Patient Relationship and Your Former Employer. The physician-patient relationship extends beyond a physician's employment relationship. Any physician leaving a practice has the ethical right and obligation to inform his or her patients that he/she is leaving. The patients in turn have the right to choose whether to remain with the employer or go with the individual physician. Upon contract termination, be sure that your patients are notified that you will no longer be working with the employer, and that they may continue to be seen by you at your new office. The manner in which patients should be notified of your departure should be spelled out in your employment contract. Attempting to negotiate proper notice after the decision to terminate employment will lead to needless bickering because of the competing interest involved (you want the patients and so does your former employer). If your patients move with you, your former employer must provide you with relevant patient files and records – the delivery method should also be spelled out in your employment contract. This is a sensitive issue however, and should be broached delicately as it amounts to entering marriage discussing divorce.

25. Conclusion. Keep in mind that equally as important as the actual wording of the contract language is the intent behind such wording. Indeed, deciphering intent is a skill acquired over time and with experience garnered through the negotiation of similar contracts. Understand that contract negotiation is an art, a delicate dance of give and take between you and the employer. Ultimately, you both want to secure your employment, albeit on different terms (as you of course seek the most favorable terms to protect your interests, and the employer seeks the terms most favorable to its interest). If you are inexperienced in negotiating employment terms, you would be wise to enlist the assistance of a skilled attorney to review your contract and negotiate its terms on your behalf, or at a minimum advise you on how to structure your arguments (i.e. reasons in support of the employer accepting the revisions you propose).

I hope this Guide will be a valuable resource for you as you consider your employment opportunities. Please feel free to contact me with any comments, questions, or suggestions of how this Guide can be improved, or if I can be of any assistance to you. I can be reached by phone at 202.572.1004 or via email at [rjholloman@hollomanlawgroup.com](mailto:rjholloman@hollomanlawgroup.com).

Sincerely,

*Roderick J. Holloman*

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