Understanding Physician Employment Agreements

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Whether you are a new or experienced physician considering joining a medical practice or a physician seeking to expand your medical practice by hiring another physician, it is imperative that you have a working knowledge of the principal issues typically addressed in physician employment agreements, and the competing interests underlying such issues, so that you can understand and effectively negotiate the terms of any employment arrangement you ultimately decide to pursue. While physician employment agreements may also address certain discrete issues unique to the specific employment arrangement under consideration, the following issues are typically—or should be—addressed in any physician employment agreement:

1. **Compensation.** A physician employee has an obvious interest in maximizing his compensation. An employer, in turn, has a substantial business interest in aligning a physician employee’s compensation with his productivity and the quality of care he provides. Both have an interest in complying with applicable fraud, abuse and self-referral laws, including federal Stark and Anti-Kickback laws and corresponding Louisiana laws, when implementing a compensation model. In an effort to satisfy each of these interests, various compensation models have been developed, including models that pay a physician employee a fixed base salary, a percentage of collections, an amount based on relative value units, certain bonuses and other incentives, or, more likely, a combination of two or more of these models. To ensure compliance with applicable healthcare laws, each of these models, with limited exception, is typically structured such that the compensation provided thereunder is consistent with fair market value, does not take into consideration the volume or value of any referrals for designated health services the physician employee may make to his employer, and is commercially reasonable. Whichever model is utilized, the parties should clearly and accurately describe the model in the employment agreement—and ensure that they fully understand how the model operates—before agreeing to the model. Such clarity will help avoid any misunderstandings once employment begins (e.g., consideration should be given to the benchmarks that must be met before a bonus or other incentive payment is due a physician employee). Likewise, the parties should ensure that the employment agreement details the duties the physician employee is expected to perform (including any administrative duties and professional development activities) and the number of hours the physician employee is expected to work in return for the agreed upon compensation. Any other significant obligations of the physician employee and the compensation associated with such obligations, if any, should also be documented, for example, any applicable call coverage requirements and the additional compensation, if any, to which the physician employee will be entitled for such coverage.

2. **Term and Termination.** Louisiana is an employment “at will” state meaning that, unless a term of employment is specified, either party can terminate the employment relationship at any time, with or without cause. In an effort to provide stability to both the physician and the employer, physician employment agreements often specify a fixed term typically no less than one year; however, this seeming stability may be illusory depending on the termination provisions also included in the agreement. For example, if the agreement specifies a one-year term, but can be terminated without cause upon either party providing the other party with thirty days written notice, the agreement is not actually for a one-year term but rather for a thirty-day rolling term and the parties should decide before signing the agreement whether this provides sufficient security. The parties should also fully understand the bases on which the agreement can be terminated: (1) with cause (e.g., if the physician employee becomes disqualified to practice
medicine) or for good reason (e.g., if the employer fails to pay the physician for work performed),
and whether notice and/or an opportunity to cure must be provided in these circumstances; or (2)
immediately without notice or an opportunity to cure (e.g., if the physician employee is convicted
of a felony or the employer is excluded from participating in federal healthcare programs).
Likewise, the agreement should detail the consequences of each type of termination (e.g., if the
physician employee resigns does he forfeit any annual bonus? If the physician employee is
terminated without cause is he still bound by any restrictive covenants included in the agreement?
If the physician employee is terminated for cause will he receive a severance payment?).

3. **Restrictive Covenants.** Restrictive covenants include covenants not to compete, i.e., covenants
prohibiting a physician employee from competing with his employer during the term of his
employment and for some period thereafter in a specified geographical area, and covenants not to
solicit patients, staff and referral sources of his employer for some period following termination
of employment. Restrictive covenants that are broadly written make it difficult for a physician
employee to establish a new practice, should he desire to do so in the future, and to continue to
provide care to those patients the physician employee treated while employed. Restrictive
covenants that are narrowly written make it difficult for an employer to retain a physician
employee long enough to meaningfully contribute to the development of the employer’s practice.
In any event, although employment agreements governed by Louisiana law can only forbid
competition or solicitation in those parishes in which the employer conducts business and cannot
exceed two (2) years from the date employment terminates, restrictive covenants included in
physician employment agreements are currently enforceable in Louisiana. See La. R.S. 23:921;
and *Cardiovascular Institute of the South v. Abel*, 2014-1268 (La. App. 1 Cir. 3/9/15); 2015 WL
1019500. Accordingly, it is imperative that the terms of any restrictive covenants included in
physician employment agreements are carefully reviewed and that adequate consideration is
given to the scope of such covenants (from a geographical area and length of time perspective),
the events that trigger such covenants (e.g., are the restrictive covenants triggered if the physician
employee is terminated without cause?), and the remedies available if such covenants are
breached (e.g., can the physician employee be enjoined from competing or soliciting, are
monetary damages recoverable, or both?).

4. **Malpractice Insurance.** Most employers purchase and maintain malpractice (professional
liability) insurance for their physician employees. However, some employers may require their
physician employees to purchase their own malpractice insurance and reimburse them for the cost
(or increase their compensation to account for the cost). Others may require physician employees
to purchase and maintain their own malpractice insurance. Whatever the arrangement, it should
be clearly reflected in the agreement. Likewise, and perhaps more importantly, the employment
agreement should also specify whether the employer or the physician employee will be
responsible for purchasing and maintaining “tail” coverage after the physician employee leaves
the practice. Malpractice insurance can be purchased on either an “occurrence” or a “claims
made” basis. An “occurrence” malpractice policy covers malpractice claims arising out of
treatment provided by a physician employee during the policy period, regardless of when the
claim is made (e.g., even if the claim is made after the policy period ends). In contrast, a “claims
made” malpractice policy covers malpractice claims arising out of treatment provided by the
physician employee during the policy period, but only if the claim is also made during the policy
period. As most employers provide their physician employees with “claims made”—rather than
“occurrence”—coverage, and delete a physician employee from the “claims made” policy once
the physician employee leaves the practice, it is critical that “tail” malpractice coverage is
obtained and it is clear which party is responsible for purchasing such coverage (e.g., the
employer might pay for “tail” coverage for an employee physician unless he is terminated for
cause). A “tail” malpractice policy covers malpractice claims that arise out of treatment provided
by a physician employee during the policy period (or, more specifically, while he was employed and thus an insured under the “claims made” policy), but that are made after the policy period ends (or, more specifically, after the physician employee leaves employment and is thus deleted as an insured under the “claims made” policy).

5. **Work Schedule and Resources.** Though often overlooked in the negotiation of physician employment agreements, it is strongly recommended that the physician employee and employer reasonably detail their expectations and understandings concerning the physician employee’s day-to-day work schedule as well as the resources the employer will provide the physician employee to satisfy this schedule. For example, rather than generally indicating that a physician employee will be employed “full time” (a term that is often subject to various interpretations), the agreement might set forth, with reasonable specificity, a breakdown of the clinical and administrative hours the physician employee is expected to work per week or month as well as the office hours within which, and the locations where, the physician employee is expected to satisfy these hourly requirements. Further, in addition to setting forth the call requirements for the physician employee, the agreement should also indicate how the call schedule will be divided among all physician employees. Likewise, the agreement should address, in reasonable detail, the employer’s primary duties in addition to paying compensation, such as the employer’s obligation to handle billing and provide office space, equipment and supplies, and appropriate staffing.

In addition to these five bellwether issues, other issues that might be addressed in physician employment agreements include ownership of medical records, quality reporting requirements and incentives, peer review procedures, indemnification obligations, and dispute resolution methods. Which leads to a final point: the parties do not need to negotiate every provision that is included, or that could be included, in a physician employment agreement. Indeed, depending on the circumstances surrounding the negotiation, one of the parties may not have sufficient leverage to do so (e.g., an employer seeking to employ a physician in an urban area that includes many physicians across many specialties will likely maintain the principal leverage in any physician employment negotiation whereas a physician seeking employment in a rural area with limited access to physicians in certain specialties will likely maintain the principal leverage in any such negotiation). Rather, the parties must simply ensure that they fully understand the key issues that may or could be raised in the physician employment agreement in order that they can meaningfully weigh the pros and cons of each such issue and decide whether and how each such issue should be further negotiated. And, obviously, the only thing that a party should never do is sign off on a physician employment agreement that it has not read or does not understand.