

## A Well-Crafted Physician Employment Agreement Benefits All Parties

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Disputes between health care providers and physicians are often predictable. Many of these disputes can be avoided through the use of a well-crafted employment agreement. For providers, a solid agreement can reduce the risk of bringing a new physician into a practice. It can also improve morale and motivation by clearly communicating rights and responsibilities. For physicians,

a clear agreement reduces the uncertainty involved with taking a position on blind faith, and makes it easier to give up a current position or to choose between competing offers, particularly when relocation is required. Key components of a thorough agreement include the following:

Contractor vs. Employee: A threshold issue is whether the physician will be classified as a contractor or an employee. In the health care industry, physicians commonly work as contractors, and providers and physicians often prefer a contractor relationship. Because experienced physicians can operate independently, a strong argument can often be made that the contractor relationship is legitimate, particularly when other factors are present, such as the physician having a separate corporate entity, performing work for other providers, and controlling terms of work such as scheduling. Nevertheless, the traditional tests of contractor status, all of which focus on the right of control, must be applied to ensure that contractor classification is proper. Employment status, on the

other hand, allows the provider to exert control over the physician, and, in turn, can give the physician a sense of security.

Compensation: Typically, the physician will receive a fixed base salary. Market surveys can be consulted to determine a reasonable amount based on the physician's experience level. Additional compensation may be provided in the form of productivity payments, percentage of collections, or some combination of the two, as well as discretionary and non-discretionary bonuses. The employer can consider providing a higher salary up front, which slides downward as productivity increases. The physician will likely want to receive an accounting of calculated compensation at reasonable intervals.

Disclosure of Information: Some physicians may be reluctant to join a practice without knowing whether the practice is financially sound. Providers should determine whether they will be willing to share details on financials, benefits, policies and procedures, or other matters. If so,

the physician should be required to sign a non-disclosure agreement before receiving confidential information.

Benefits: Health insurance, vacation, sick leave, expenses, and related benefits should be addressed. Vacation should be capped so that it does not accrue in unlimited fashion. Due to the high compensation of a typical physician, accrued vacation, which, in California, must be paid immediately upon termination of employment, can add up to a substantial sum.

At Will vs. Good Cause Termination: Employment in California is presumed to be at-will unless the parties specify otherwise. Under at-will employment, an employee can be terminated for any lawful reason, with or without notice, provided that the at-will status has not been modified by either an express or implied promise to terminate for cause. Many physicians will negotiate for a good cause termination standard, which typically allows termination for defined conditions such as failure to meet the employer's reasonable performance standards, failure to maintain certain hospital privileges, moral turpitude issues, and similar reasons. The agreement should also address whether there will be an initial term of guaranteed employment (e.g., one year). When a term exists, the parties will also need to specify whether the contract can be terminated sooner provided that a certain amount of notice is given, and whether it automatically renews.

Stark Law / Anti-Kickback Compliance: The Stark law prohibits physician referrals of designated

health services for Medicare and Medicaid patients if the physician (or an immediate family member) has a financial relationship with that entity. A financial relationship includes ownership, investment interest, and compensation arrangements. The federal Anti-Kickback Statute is a criminal statute that prohibits the exchange (or offer to exchange), of anything of value, in an effort to induce (or reward) the referral of federal health care program business. The statute is broadly drafted, and establishes penalties for individuals and entities on both sides of the prohibited transaction. Physician compensation arrangements must be scrutinized to ensure compliance with these and any similar legal restrictions.

Corporate Practice of Medicine: Under California's Corporate Practice of Medicine (CPM) doctrine, unlicensed persons are prohibited from interfering with or influencing a physician's professional judgment. Certain healthcare decisions can be made by a licensed physician only. In addition, certain business or management decisions and activities, resulting in control over the physician's practice of medicine, must be made by a licensed physician. Finally, certain medical practice ownership and operating structures are prohibited. For example, a business offering spa treatments that include medical procedures such as Botox injections, laser hair removal, and medical microdermabrasion, that contracts with or hires a physician as its "medical director," where that physician does not own the practice, would be unlawful.

Duties: The agreement should

address the physician's specialty, whether administrative or marketing tasks will be expected, required licenses or board certification, location, required hospital privileges, whether a certain number of hours is guaranteed or required, and call responsibilities. A job description attached to the agreement can be beneficial as well. For example, if the physician seeks a reasonable accommodation for a disability, it will be important to know the essential functions of the position.

Buy-In: Some healthcare providers may want to give the physician the ability to eventually buy in to the practice, provided that certain conditions are met. Factors to consider include whether the ability to buy in will be tied to longevity, performance, or a combination of the two, the maximum amount of shares, and how to handle issues such as simultaneous withdrawal of physicians from the practice.

Liability Insurance: Tail coverage from the physician's prior employment must be addressed. In addition, the amount of insurance, and whether it will be on an occurrence or claims made basis is critical. Claims made policies typically require tail coverage, so the agreement should also address which party pays for tail coverage following termination.

Arbitration: Arbitration agreements allow the parties to take legal disputes to a neutral, private arbitrator. Both civil trials and arbitrations have pros and cons. For example, arbitration is generally perceived as faster and more cost-effective than civil court, but this is not guaranteed, and it also has limited appeal rights.

Arbitration is perceived as generally preventing the runaway jury factor, but arbitrators have a reputation for splitting the baby. Many other competing considerations must be considered in consultation with legal counsel prior to proposing or signing an arbitration agreement.

Confidential Information, Non-Competition, and Intellectual Property: Subject to very limited statutory exceptions, California law prohibits employers from restricting the ability of the employee to compete. Employers can, however, prevent misuse of confidential, trade secret information. Any information which the health care provider seeks to protect as trade secret, such as patient contact information, financial data, and contracts, should be designated as trade secret. And the agreement should make it clear that any competition using trade secret information is

prohibited. Moreover, intellectual property developed during the course and scope of the physician's employment should be designated as property of the employer. The agreement should also address how patient records may be accessed by the physician post-employment, such as for licensing issues or continuity of care.

Miscellaneous Provisions: The agreement should indicate that it is integrated and cannot be modified except in a writing signed by all parties. It should also consider issues such as return of property, prevailing party attorneys' fees, whether it can be assigned (the employer will usually want the right to assign to a successor), and whether severance will be provided in exchange for a release of claims, among other things.

Many disputes over the terms and

conditions of employment arise because the parties do not take the time at the beginning of their relationship to plan for what might happen when that relationship ends. Employers and physicians alike should recognize the importance of formalizing the terms of their relationship, and should seek trusted counsel before entering into an employment agreement.

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