

PHYSICIAN EMPLOYMENT CONTRACTS

What Are The Main Issues

**Roger W. Calton
Attorney At Law**

**Amy J. Augustine
Attorney At Law**

**Calton & Burns, LLP
30131 Town Center Drive
Suite 177
Laguna Niguel, CA 92677
(949) 495-3350**

PHYSICIAN EMPLOYMENT CONTRACTS

WHAT ARE THE MAIN ISSUES

Why have a written contract?

Have you heard the expression that oral contracts are not worth the paper they are not written on? It's not that an oral contract can't be binding. In fact, oral contracts can be just as binding as written contracts. The problem is that with an oral contract there will almost always be at least two versions of what the contract was supposed to say, and they may be very different. If the deal goes south, you may be endlessly chasing the truth.

Make it easy on yourself and everyone involved. Putting the contract in writing does two things. First, it forces people to flesh out and more thoroughly consider the issues which are important to the contract. Secondly, it creates a written record of the terms of the contract, which are much less subject to manipulation or distortion at a later date.

As health care attorneys we have written and reviewed hundreds of physician employment contracts. There are certain issues which seem to be the most critical and a few which are the most controversial.

Compensation and Benefits

This is typically the most important provision of the contract. Physicians may be paid in a variety of ways. These may include a fixed salary, hourly compensation, a percentage of production or a percentage of collections. Bonuses may also be added to the employee's compensation. The bonuses may be guaranteed (based on a formula) or discretionary. The most common bonus provision gives the employee a percentage of his or her collections if those collections exceed a certain threshold.

Both Federal and California laws impact the way in which physicians can be paid. Here, the basic premise is that physicians cannot be compensated based upon referrals, whether within the group or outside of the group. Therefore, most bonuses will be calculated based upon services performed personally by the physician or by staff who are directly supervised by the physician.

If compensation is paid on a percentage of collections basis, then a secondary issue arises concerning the effects of termination of employment. Most contracts will provide for continued payments based upon accounts receivables collected after the date of termination, for a period of time.

The contract should also set forth all of the benefits which the employer has agreed to pay. Benefits may include malpractice insurance, professional dues, license fees, continuing education expenses, paid holidays, health and/or dental insurance premiums, pension, profit sharing, retirement plans, sick leave, and vacation leave.

Changes in compensation and benefits should be memorialized in writing to avoid later disputes.

Call Coverage

The contract should specify the general times during which the employee is required to work. It should state if the employee is required to cover call and should state how the call schedules will be decided (for example, on an equal and rotating basis with all other physicians).

Term of Employment

The term of a contract can either be set for a specified length (one year, two years, etc.) or can provide that it continues until terminated according to the termination provisions of the contract. Using a fixed term as a minimum length of the employment is most often used when the physician is relocating in order to accept the job. Here, both parties want to be sure that the agreement will continue at least for a specified and agreed upon term.

The more common arrangement today is to use a contract which continues until terminated by agreement or by either of the parties pursuant to a notice provision.

Termination

Termination provisions are critical to both parties and should be carefully considered.

Termination of a contract may occur "with cause" or "without cause". "Cause" generally includes events such as loss or suspension of license, loss or suspension of hospital privileges, loss of malpractice insurance or hospital privileges, abuse of drugs or alcohol, conviction of a felony, or theft or other dishonesty. If the termination is "for cause", the notice period is typically very short (10-15 days being common), but also may include a "right to cure".

Employees will obviously want such a provision to be as limited as possible. Employers, on the other hand will bargain for broader causes for termination.

Many contracts, however, also allow the contract to be terminated without cause, by either party, upon a certain number of days with prior written notice (for example 30, 60, or 90 days). "Without cause" means for any lawful reason, or no reason. Employees should consider whether they can afford to be subject to termination without cause upon short notice. Employers should similarly consider the potential that they will be left finding a replacement physician quickly.

As a practical matter, most employers are reluctant to terminate a physician "for cause". The more normal route would be to use the "not-for-cause" termination provision because it carries less risk of litigation for the employer.

Non-Compete Provisions

Covenants-not-to-compete during the term of the agreement are generally enforceable because an employee has a duty of loyalty to his or her employer.

On the other hand, covenants-not-to-compete after employment, have been the subject of substantial litigation in California. The non-competition language typically would prevent the employee from practicing within a specified geographical radius of the Employer's clinic for a certain period of time. This provision is often referred to as a "time and distance clause".

Such covenants are not enforceable in California, except in certain circumstances. California Business and Professions Code §16600 provides specifically "every contract by which anyone is restrained from engaging in a lawful profession, trade, or business of any kind is to that extent void." Case law has held that these types of non-compete provisions are unenforceable.¹

The exceptions which allow "time and distance clauses" to be enforceable typically involve the sale of a practice or the departure of an employee who was also a shareholder of the business and is selling his shares and his good will in the business to the remaining shareholders.

Non-Solicitation Clauses

As contrasted to Non-Compete clauses, Non-Solicitation clauses do not prevent a doctor from opening an office close by, but instead prohibit the departing doctor from soliciting patients or employees to come with him to a new practice location. This type of clause is much more likely to be enforceable, particularly if it is tied to an agreement regarding ownership of the patient records, and an agreement to protect the confidential and trade secret information of the practice.

Often, an acceptable solution is to require that when a doctor departs, the patients who are or have been under the care of that doctor will be notified of the doctor's departure and of his or her contact information. The format of the notice can even be agreed upon in advance.

Moonlighting

If the employee anticipates that he or she will be moonlighting, it will need to be stated in the contract. One approach is to permit outside work only after hours, or outside the service area. Another approach is to permit activities that do not interfere with the services of the employer. If it is anticipated that the employee will engage in outside medical activities, such as teaching, lecturing, writing and directorships, the parties should work out whether compensation from such activities belongs to the employer or the physician.

¹ Bosley Medical Group v. Abramson (1984) 161 Cal.App.3d 284. Hill Medical Corp. v. Wycoff (2001) 103 Cal.Rptr. 2d 779.

Professional Liability Insurance

Generally, the employer pays for professional liability insurance during the term of employment. The contract should, however, specify which party is obligated to pay for tail coverage if a tail (extended reporting endorsement) is needed. There are no set rules regarding which party pays tail coverage. Many contracts provide for the cost of tail coverage to be shared.

Some contracts specify that the employee will pay for tail coverage if the employee resigns voluntarily, or is terminated with cause, and the employer will pay for the coverage if the employee is terminated involuntarily and without cause. We typically do not favor this kind of a clause because it adds a financial incentive to determining whether the employee should be terminated with cause or without cause.

Practice Location

The location where the employee will be practicing should be stated in the contract, particularly when the employer has more than one location.

Patient records

Typically, the contract will provide that patient records are the property of the employer. However, if a patient requests that a copy of his or her records be released to a new doctor, both Federal and State law mandate that the practice release such records, and prescribe short time limits for this to occur.

A Word About Negotiation

The contract should be negotiated and signed before employment begins. At this moment, each party is the most motivated to negotiate in good faith, because each needs to fill a need. Almost all successful negotiations are based upon needs and desires, but once those needs have been filled, the motivation to negotiate quickly disappears.

In our experience, almost all physician employment agreements are negotiable. This, however, does diminish as the size of the employer increases. There, however, is no “standard agreement” and there are significant differences in contract forms and terms. It’s worth the time to do it correctly from the start, and with the right professional advice and guidance.

Roger W. Calton
Attorney at Law

Amy J. Augustine
Attorney at Law

THIS ARTICLE CONTAINS A GENERAL DISCUSSION OF LEGAL PRINCIPLES APPLICABLE IN CALIFORNIA AS OF JANUARY 1, 2007. IT SHOULD NOT BE TAKEN AS SPECIFIC LEGAL ADVICE. PRACTICE STRUCTURE, CONTRACT, AND OPERATIONAL ISSUES HAVE BECOME LEGALLY COMPLEX DUE TO SIGNIFICANT AMOUNTS OF GOVERNMENTAL REGULATION. WE URGE EACH DOCTOR TO CONSULT WITH A COMPETENT HEALTH CARE ATTORNEY ON THESE AND OTHER ISSUES AFFECTING THE PRACTICE OF THE HEALTH PROFESSIONS.

Copyright Calton & Burns, LLP 2007