

CONTRACTS: FIRST EMPLOYMENT CONTRACT

6.6 The 10 Biggest Legal Mistakes Physicians Make in Their First Employment Contracts

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Executive Summary

For their first job after residency, physicians will almost certainly join an existing practice group, which will ask them to sign an employment contract. The provisions of that contract, and the exact language in which it is expressed, will control their obligations, responsibilities, and rights in their new job, as well as their employer's obligations and responsibilities to them. Many new physicians make the fundamental mistake of thinking they can negotiate and review the employment contract on their own, without the assistance of an experienced lawyer to help them both understand the significance of the document they are presented with and negotiate any necessary changes.

Mistake 1 Not Consulting Legal Counsel

Physicians are highly intelligent people who are used to making critically important decisions. Thus, it is often difficult for them to admit that they may need help in looking out for their own and their family's interests as they enter into a legally binding agreement that may affect their professional and personal life for many years to come. A lawyer who is experienced with physician contracts knows the pitfalls, the loopholes, and the special legal meaning that courts or legislation has given to what seems to the layperson to be ordinary English words. Such a lawyer is trained to spot ambiguities and knows what contract terms should be there but are not. Just as physicians would not rely on lawyers to diagnose an ailment, they should not rely on their own ability to review or draft an important contract.

Action Step Physicians should find a lawyer who has experience with physician contracts early in their job search process, so that when they get to the point of putting things in writing with a specific employer, they will be able to move quickly.

Mistake 2 Failing to Ask Questions and Research the Prospective Employer and Employment Situation

A lot is happening when physicians are looking for their first professional position: They are finishing a residency, taking the boards, and trying to decide where they may be spending the rest of their life. It is natural in such circumstances to focus on what the job promises, where it is located, and how much it pays—and easy to overlook the fact that they should be spending just as much effort in checking out a potential employer's "credentials" as the employer is in checking out theirs. Physicians should remember that what employers have done in the past may be a far better predictor of what to expect from them than any promises they make.

Physicians should ask a lot of questions about the proposed job: What would the duties be, including nonpatient care duties? When would the physician be expected to take call, and what would that involve? How are call duties determined and assigned? If pay is based partly on productivity, how would that be measured? How are patients assigned? Would the physician be

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replacing someone who has left the practice? (If so, the physician should try to get that person's name and ask why he or she left. Then the physician should follow up with a call to that person to hear what he or she has to say.)

Physicians should find out everything they can about what the practice is truly like. How much physician and support staff turnover has there been? How profitable is the practice? Does the practice have or will soon have heavy buy-out or deferred compensation obligations to retired partners? What is its malpractice history? Are there any lawsuits pending against the practice? Are the physicians trained in proper documentation and billing? Does the practice have a commitment to regulatory compliance?

In meeting other physicians in the practice, a physician should find out how long they have been there, what the patients are like, how physician extenders are used, how often the physicians are on call, what the volume of work is, and anything else he or she can think of that will affect day-to-day life in the practice. They should be sensitive to the "feel" of the place. Do the doctors and staff seem happy or tense? What is the reputation in the community of the physicians in the practice?

Action Step Physicians should find out everything they can about a practice as soon as they start to consider employment there.

Mistake 3 Waiting Too Long to Consult Legal Counsel

The time for physicians to consult a lawyer is before they have agreed to anything in writing, in any form. This includes a bulleted list of employment terms or the letter of intent that they are asked to cosign or otherwise agree to (such as by sending a letter back accepting the terms). Saying that he or she would like to think about such an informal proposal for a couple of days and get back to the potential employer gives the physician an opportunity—before the basic deal is finalized—to consult a lawyer and then to raise points that he or she may have overlooked. When the physician has decided to accept a job and has received a proposed employment agreement, the physician should send a copy of that agreement to his or her lawyer without delay. Physicians who don't have a lawyer should find one now.

Action Step Physicians should consult with experienced counsel *before* they start to negotiate an employment contract.

Mistake 4 Relying on Oral Promises Not Reflected in the Written Contract

It is not uncommon in employment situations for various matters to be discussed that do not end up in the written employment agreement. For example, a physician may have been told that he or she will have to take weekend call one weekend per month, but the contract states: "Physician's professional obligations shall include night and weekend call in accordance with the rotation established by the practice." Or the physician was told that all employed physicians receive an annual cost-of-living increase, but the contract is silent on that point. Since it is the written contract that controls, if the number of call obligations or the cost-of-living adjustment is important to the physician, these matters should be clarified as precisely as possible in the agreement.

Action Step Physicians should make sure that all oral promises that they are relying on are clearly reflected in the written employment agreement.

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Mistake 5 Overlooking Fuzzy Contract Language

Having to read something twice in a contract to figure out what it means may be a good indication that the language is ambiguous. Even if it seems clear, there may be another way to read a provision that can lead to difficulties. Physicians don't want to be in a position in which they think they are obligated to do one thing but their boss thinks they have promised to do something else, or in which their view of their time commitments is different from that of their boss. This is an area in which a lawyer's counsel is needed, since lawyers are trained to be sensitive to possible alternative meanings in language.

New physicians often get into trouble by paying insufficient attention to the term of the contract (i.e., the number of years it will run), the conditions for its renewal, and how and when it can be terminated. They do not want to be locked into a long-term contract with no provision for salary increases and promotion, and no way to get out of it. Nor do they want to be fired under a clause that allows the employer to terminate without cause on 30 days of notice, when they thought they had a two-year commitment and were expecting to be at that job for the full two years.

Action Step Physicians should make sure that the terms of the contract are both clear and something they can live with before they sign it.

Mistake 6 Not Paying Attention to Covenants Not to Compete

Historically, many physician employment contracts have contained promises stating that if the newly hired doctor leaves the practice, he or she will not compete with the former employer by practicing medicine within a specified geographic area for a particular period of time. In 2004, the federal government adopted regulations that make such restrictions impermissible in situations in which a hospital (or other entity from which the physician may order ancillary services) provides an income guarantee or other financial incentive in order to attract the physician to practice in its community. Under these regulations, if a physician agrees to such a contractual provision and then admits a Medicare patient to the hospital or orders lab tests, x-rays, or other services from it, the physician (as well as the hospital) will be in violation of the Stark anti-referral law.

When there is no such income guarantee or hospital financial incentive involved, a physician still needs to be wary of these noncompetition clauses, since they can prevent the physician from making a living in the community if his or her employment ends for any reason. In other words, physicians who leave their current employer, voluntarily or involuntarily, and try to set up a new practice on their own or to join another practice can be sued by their former employer to prevent them from doing so. These physicians would be much better off negotiating, before the employment agreement is signed, a reasonable noncompetition clause they can live with. A lawyer will know whether their state's law permits such covenants not to compete, or (in the majority of states where they are permitted) what noncompetes will be deemed reasonable and thus enforceable by the courts.

Action Step Physicians should review the language and implications of any noncompetition clause with their lawyer before signing the agreement, and do their best to negotiate something they can live with if they leave the new job for any reason.

Mistake 7 Failing to Understand the Full Implications of Malpractice Insurance Provisions

In these days of rising malpractice insurance costs, physicians need to make sure that the employment agreement states clearly the employer's obligation to provide malpractice insurance for them, at the employer's expense. The contract should specify the amount of insurance to be

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provided, and it should be adequate both to protect a physician's personal resources and to meet any applicable requirements of state law. If the law in the state where the physician will be practicing requires an additional payment to a state reinsurance fund or similar entity, the employer's obligation to pay that should be specified as well. A lawyer can advise the physician on other key issues relating to malpractice insurance, such as scope of coverage and provisions on how a legal defense will be handled by the insurance company if the physician is sued.

Action Step Physicians should make sure the contract specifies that their employer will pay for their malpractice insurance.

Mistake 8 Failing to Make Sure the Contract Specifies Terms and Conditions of Employment

Physicians may neglect to make sure that their employment agreement specifically describes their actual conditions of employment: what they are expected to do, where and when they are expected to do it, and what human and other resources will be made available to help them. If possible, physicians should nail down these details before they discuss compensation, otherwise how will they be able to gauge whether they are being offered fair pay for their work?

Action Step Physicians should reach agreement with their new employer about their specific duties and responsibilities before negotiating compensation issues. They should make sure that their duties and responsibilities are clearly spelled out in the employment agreement.

Mistake 9 Signing a Contract Containing One-sided Termination Provisions

A physician may have the best contract in the world, but if his or her employer can terminate it at will, it is not worth much. The time to make sure the contract is worth the paper it's written on is before a physician packs up and moves to a new city. Physicians should look closely at what events can trigger a termination, including

- 90 days of notice by employer (or by either party)
- Loss of medical staff privileges
- Accusation of improper actions (e.g., fraudulent billing) by the any party
- Any event deemed by the employer to be detrimental to the employer
- "Material" breach of contract (a lawyer can explain what this means)
- Illness or disability

Action Step Physicians should review the language and implications of the contract term and termination provisions with their lawyer, and make sure the terms and provisions are fair and reasonable. Vague provisions should be clarified. If the new employer will not agree to changes to achieve these results, a physician should seriously reconsider whether to accept the position.

Mistake 10 Failing to Fully Understand Compensation and Bonus Terms

The compensation of employed physicians is often based at least in part on a mathematical formula that takes into account such factors as number of patients seen, revenue the practice receives for those patients, new patients the physician employee attracts to the practice, and the practice's profitability. If the physician's income will be wholly or partly based on anything other than straight salary, it is up to the physician to make sure that he or she understands the formula and that it is fully and fairly set forth in the employment agreement (or in a separate document attached to the agreement as an exhibit and incorporated into it by reference).

Physicians should be aware that the "physician incentive plan" or "bonus" provisions in many

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physician employment contracts are written to protect the employers and not the physician employee. Factors that may negatively affect the flexible portion of the physician's compensation include the following:

- Provisions that allow the employer unilaterally to revise, or even cancel, the incentive plan
- The precise method by which the incentive portion of the physician's compensation is calculated
- How key terms (e.g., positive net income, negative variance, percentage, gross revenue, etc.) are defined
- Whether compensation depends on factors controllable by the employer and outside the physician's control (e.g., assignment of patients with inadequate insurance coverage to the physician, when a key element in the payment formula is actual dollars the practice receives for patients the physician sees; compensation based on net rather than gross income, which an employer can manipulate by paying the partners a higher salary so as to increase costs and thus reduce net revenue)
- How practice expenses are factored against practice revenue in making the calculation
- Conditions that must be met before the incentive plan goes into effect (e.g., practice site must meet certain net revenue or patient volume targets)

Action Step Physicians should review the proposed physician incentive plan carefully with a lawyer and seek necessary clarifications, so that they fully understand how it works. They should try to make sure that the part of the agreement describing the flexible portion of their compensation is clearly written and relies on objective measures that cannot be manipulated by the employer to affect the outcome.

Conclusion

To avoid being burned by their first employment contract, physicians should follow three basic rules: Know what they're getting into, consult a knowledgeable attorney, and get the details down in writing, clearly stated.

About the Author

Jennifer A. Stiller, Esq., has concentrated her practice in health law since 1975. Now in solo private practice in suburban Philadelphia, she was for many years chair of the Healthcare Practice Group at Montgomery, McCracken, Walker & Rhoads, LLP. In 1999, she was named one of the best lawyers in Philadelphia by *Philadelphia Magazine*. Stiller lectures frequently on health law topics, and has held leadership positions in the American Health Lawyers Association, the Pennsylvania Society of Healthcare Attorneys, and the American Bar Association's Forum on Health Law. She can be contacted by telephone at 610-642-3366 or by e-mail at stiller@healthregs.com. Her website is www.healthregs.com.

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