CONTRACT REVIEW: EXITING AN EMPLOYMENT AGREEMENT

PHYSICIANS THRIVE

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Congratulations—you've been offered the position!

Now you're looking at your new employer's "standard contract" and it all seems normal. But there are a few things you're not sure about or not quite happy with. Can you negotiate? Should you negotiate?

Yes and Yes.

You're also not sure how to handle leaving your current employer. How much notice do you need to give? What happens with your malpractice insurance? Do you have any vacation time accrued or bonuses coming up?

Your employment contract lays out the ground rules: How you'll be compensated, your duties, the employer's expectations. It literally puts both parties on the same page. More importantly, it is the go-to document for when things don't work out.

According to Cejka Search, a healthcare recruiting firm, 25% of physicians leave within the first three years of working in a practice. That number is even higher—up to 70%—for physicians in their first two years of employment.

You want to make sure your employment agreement protects you in case things do not work out. It is crucial that you understand what is in your contract and what particular terms and conditions you should be aware of. The time to understand your contract is before you sign.

Physicians Thrive has identified five key areas in employment contracts that deserve special attention.

- Repayment of Bonuses
- Tail Insurance
- Non-Compete and Restrictive Covenants
- Right to Terminate
- Intellectual Property

At Physicians Thrive, we truly believe that "an ounce of prevention is worth a pound of cure." It is so much easier and less expensive to prevent problems than to fix them. The first step is understanding how these key clauses can affect you, your career, and your life.

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REPAYMENT OF BONUSES

Physician agreements often include bonuses or reimbursements of some type. Your contract may include one or more of these: signing bonus, educational stipend/bonus, retention bonus, and relocation reimbursements. While these contract enhancements are very attractive, they are usually accompanied by repayment obligations if the agreement is terminated early for any reason.

Do not just accept these repayment stipulations as "standard." While repayment is fairly standard if the physician breaks the contract, you should always request exceptions to repayment if the early termination is not caused by you. For example:

- Your employer terminates without cause
- You terminate for an uncured breach of the agreement by your employer

Always request any repayments be prorated based on the months of service provided, not a repayment of an entire amount or an annual amount.

Signing Bonuses:

Signing bonuses should have a repayment schedule that is prorated over a two to three year term. Basically, every month you stay, the less you will have to repay versus an all or nothing scenario.

Occasionally we see very large signing bonuses, in the $75,000 to $100,000 range. Sign-on bonuses in that range are sometimes offered by practices in areas that are hard to recruit to or the physician practices a much-needed specialty. These will have a longer repayment period, generally four or five years. Still, it would normally be prorated if the physician were to leave.

Relocation Bonuses:

Relocation assistance is offered by just about every level of employer, from private practices up through large hospital networks. If you're moving from one metropolitan area to another, you can negotiate a relocation bonus. However, relocation assistance is subject to repayment if you don't stay. Normally that commitment period is shorter, usually a one-year period. Because it is such a short term, if you leave before the year is up, you are obligated to repay the entire amount. If you

only have a few months until your one year anniversary, you can likely save thousands of dollars by sticking it out.

Repayment of the entire relocation bonus amount is not standard practice, but it's pretty close. It's exceedingly common and you can understand the rationale: An employer doesn't want to give you money and then have you leave within a few months. Again, the required time to stay in the position without having to pay back the bonus is relatively short. If the term for relocation pay back is two or more years and the relocation bonus is not out of the ordinary, you will want to have the reimbursement terms changed to a prorated amount.

Residency Stipends and Student Loan Payments:

Both of these are less common as part of a bonus package. Residency stipends are included about ten to fifteen percent of the time. Stipends range anywhere from around $1,000 to $2,000 a month between the time of signing until you finish your residency and they are typically subject to repayment if you leave early.

CASE STUDY:

Dr. Moran was offered an enticing agreement with a $45,000 signing bonus payable upon execution of her employment agreement. This financial incentive was going to help Dr. Moran transition to her new position and begin paying off student loans. There was only one catch: It had to be fully repaid if she failed to serve the entire two years of her contract, regardless of the reasons for her termination or departure.*

Upon the advice of her attorney, she successfully negotiated for the inclusion of two exceptions: if the employer terminated her without cause or if there were an uncured breach of contract by the employer. She secured a monthly prorated repayment obligation and signed the contract.

**Names have been changed to protect physicians' privacy.*

Paying off student loan bonuses occur about as frequently as residency stipend bonuses and they are usually offered in the same manner as a retention bonus: "Each year you stay with us, we'll pay back $15,000 or $20,000 against your student loans." There's generally not a repayment trigger because it's more of a retention structure—the payment isn't made until you've worked the required time.

What to look out for:

- "All or nothing" reimbursement schedules.
- Longer than average payback periods (two years instead of one; four years instead of two).
- Required reimbursement even if you are terminated without cause or if the employer breaches the contract.

Bonuses are an important part of your compensation package. Talk to your Physicians Thrive advisor to ensure that you are being treated fairly and will not be in for any unpleasant (and costly) surprises if your situation doesn't work out.

TAIL INSURANCE

There are predominantly two different kinds of malpractice insurance. The first is called occurrence- based coverage which is fully comprehensive: It will cover you against lawsuits no matter when they're filed—you have coverage for events that occurred while you were insured under that policy.

The second type of malpractice insurance is the one most employers provide: a claims-made or claims-based policy. This only covers you for lawsuits that are filed while you are employed. If a claim is filed after you leave the employer, you are not protected.

In order to protect yourself from any future lawsuits, you need an extension to that policy, a type of continuing coverage known as "tail insurance." Tail insurance is professional liability insurance designed to protect you if a claim is filed after you leave an employer, but it relates to your service provided during the period you were with that employer. Without it, you're left exposed to lawsuits that may be filed years after you leave a practice. There is also "Nose

Coverage" which provides protection similar to tail insurance. It covers prior acts but is purchased through a new insurer, usually when you enter a new position.

Most specialties have a Statute of Limitations, an expiration period: Someone can't file a claim against you 36 years later. The limitations period is the period that tail insurance should cover. There is no real industry standard on this as far as employers covering their employees. It is, for the most part, whatever you can negotiate—and that's important for you to know. You want to be very clear on how tail coverage will be handled at the beginning of your contract period, when you are hired.

In general, specialties like hospitalists, would normally get tail coverage as part of their contract. They may not make the most money compared to other physicians, but they normally have pretty good benefits, and tail coverage would be one of those.

Tail insurance is a one-time fee, but at anywhere from one to two times the cost of your yearly malpractice insurance, it can be expensive, sometimes prohibitively so. We've seen premiums as high as $200,000 to $250,000 for OB-GYNs. If your malpractice insurance runs $10,000 per year, your tail insurance could be anywhere from $10,000 to $20,000, depending on your specialty, how litigious

CASE STUDY:

Dr. Armstrong was stunned when his partners insisted that he convert exclusively to a productivity-based compensation model from a salary-based model prior to the end of his initial contract term. He objected, reminding his partners of their contractual obligations and reiterated his commitment to honor the terms of his contract as written. Nevertheless, he was terminated early.*

His contract was poorly written and silent on tail insurance other than to impose its cost on him "upon termination... prior to the term." With the help of his attorney, he successfully secured tail insurance, arguing it was not his choice to terminate the agreement prior to the term and threatened legal action for breach of the contract.

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your geographical area is, and how many suits have been filed against the practice. (If you would like to see how many malpractice suits have been filed against a future employer, as of this date, you can find the information, on a state by state basis here: Check Malpractice Claims

Protect yourself by insisting on full tail insurance paid for by your employer. Resist any pressure to allow exceptions to tail insurance coverage or to your employer contributions. If you cannot negotiate full coverage, press your employer to contribute to tail insurance premiums based on years of service (e.g., 33% for each year served).

That being said, there may be exceptions to your employer paying for full coverage of your tail insurance. One scenario might be if you terminate the employment agreement without cause within the first year or two, or if you are terminated for an uncured breach of the agreement.

Tail insurance is critically important. Ensure that it is unambiguously addressed. Consult your Physicians Thrive adviser for referrals if you need to secure tail insurance.

CASE STUDY:

One of our attorneys has a client who is an obstetrician. Malpractice insurance for OBs is one of the most expensive coverages out there, so it's important to negotiate not just malpractice while you're employed, but the tail coverage also.

As sometimes happens, her employer was bought out and she was given a new contract, which she did not have reviewed by her lawyer. The new contract changed things so that not only was her tail insurance wiped out, it also wiped out tail coverage for the seven or eight years she'd already worked. When she wanted to leave a few years later, she was stuck with the bill for tail insurance, at a cost exceeding $100,000.

This is one of the worst situations a physician can get into because it left her totally exposed to any lawsuits with no coverage.

What to look out for:

- Tail coverage does NOT protect you for the appropriate length of time after leaving the practice.
- Employer wants you to pay all or part of the tail insurance coverage; at the very least , negotiate the pro rata approach based on time.
- If you do get into a bind with tail insurance, see if your next employer will provide nose coverage to replace the lack of tail.

NON COMPETE OR RESTRICTIVE COVENANTS

One of the biggest fears any employer has is that they will bring an employee into the business who will build up a client base, only to leave and take that business with him. It doesn't matter whether you're in the insurance, legal, medical or any field: Employers worry that an employee may "steal" their book of business, or at least a good chunk of it. There is also the fear that the employee may have a competitive advantage due to their knowledge of the inner workings of their former employer. That's why non-compete clauses exist.

So what's fair and regular in terms of a physician leaving a practice as far as non-competes and restrictive covenants?

First of all, non-competes are governed by state law, so they will differ from state to state. Whether you practice in a "right to work" state or not, most attorneys don't really speak in terms of right to work. They look at what is in your specific contract and what is allowed under the non-compete clause.

For example, California, by and large, does not allow non-compete restrictions. Texas does allow non-competes, but the laws in Texas require certain boxes to be checked. One of those boxes is a buyout provision. The contract has to have language that states, "For x thousand dollars, the physician can buy himself out of this restriction." If the contract doesn't have a buyout provision in there, the non-compete isn't valid.

Medical societies have adopted policy statements opposing non compete clauses. Of particular note: some states that otherwise permit non-compete clauses, prohibit them to be included in an employment agreement of a physician practicing under a J-1 visa.

The personal and professional hardships these restrictions can impose warrant the retention of an attorney to advise you. Your Physicians Thrive advisor can go over the regulations in your state with you.

All that being said, you're generally looking at three things with a non-compete:

- Timeframe
- Geography
- Scope of Services the non-compete covers

Renegotiating a Non Compete:

First off, please know that it is difficult to negotiate a provision that is going to be harmful to the employer. We all make decisions based on our own best interests and employers are no different.

However, if there's a situation that is covered by the non-compete technically, but in practice is not harmful to the employer, you may be able to amend the non-compete clause.

CASE STUDY:

Dr. Amherst was offered a very attractive contract with a large, multi-specialty health-care provider. Nevertheless, there were several points he wished to change, including an extremely onerous restrictive covenant. He was told the covenant was "non-negotiable."*

After consulting with his attorney, he focused his response exclusively on the restrictive covenant, indicating he was prepared to sign the contract immediately if it could be eliminated or softened. The employer relented and significantly narrowed the covenant—allowing the employer to secure a terrific young physician, end any additional recruiting efforts and expenses, and save face in the process.

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For example, a pediatrician may have signed an agreement that said she couldn't practice medicine within ten miles of the employer for two years after leaving the practice. Not pediatrics, her specialty, but medicine, which is very broad. She may be able to negotiate working at an urgent care facility or working part time rather than full time. There is wiggle room and there's also being realistic and fair. In smaller practices, employers are usually reasonable, especially if the relationship has been good.

Sometimes, when you are working with a large employer and dealing with a legal department, they may have a practice of not changing anything, of not making any exceptions. The issue is cutting through the bureaucracy; being seen as an individual asset and not the same as every other employee. Depending on the employer, you may or may not be able to negotiate any exceptions.

If you can't negotiate an exception and the next position you take technically violates your contract but doesn't cause your former employer any real harm, you need to consider the likelihood of whether the employer will sue you or not. In most cases, there's a legal side, there's a technical side, and there's the practical side. If there is no real harm to your former employer, then the likelihood of a suit is low, but no one can guarantee that you won't be sued for breach of contract. It's up to you to decide whether or not you want to take that risk.

Additional Restrictive Covenants:

Non-competes are one type of restrictive covenant. Related covenants can include non-disclosure agreements (agree not to disclose any confidential information), non-solicitation agreements (the employee agrees not to solicit or accept any of their former employer's patients), and antipiracy (the employee agrees not to solicit or hire any of the former employer's employees).

Some contracts may have a forfeiture agreement where an employee forfeits any benefits when he leaves, regardless of whether or not he engages in competitive practice. There may also be a Forfeiture for Competition Agreement or a Compensation for Competition Agreement where the exiting employee agrees to either forfeit certain benefits or can pay a negotiated amount of money to the employer as compensation for competing.

What to look out for:

- The scope of work is too broad. Does the contract limit your ability to practice all medicine or just your specialty?
- The geographical area is too large. In the case of an employer with multiple locations, they may have an exclusion radius around all of their locations. In some cases, an employer has locations spread over several counties or even all over the state. Limit the non-compete area to the physical facility where you work.
- The length of time is prohibitive. One to two years is a reasonable period of time for a non-compete agreement. There should be sound reasons behind needing any term longer than that.

RIGHT TO TERMINATE

The Right to Terminate is built into every contract and a 90 day notice period, on both the part of the physician and the employer, is fairly standard. In areas where it is harder to recruit physicians, employers will probably want a longer termination period, but anything over 180 days is extremely rare. In places where it is easy to recruit physicians, for example, Kaiser Permanente in Los Angeles, the Right to Terminate Without Cause provision can be shorter, sometimes as few as 14 days. Practically speaking, when those terminations happen, employers normally give some sort of severance package, so sudden termination is not as brutal as it sounds.

On the other side of the coin, you may have signed a contract and now have a situation come up and you cannot serve out your contract. If it's something unforeseen, for example, a family member has become gravely ill and you need to move back to take care of him, an employer is likely to understand the situation and work out a smooth exit for you both.

If you want to leave because you got a better offer somewhere else, then the employer might play hard ball; they may demand repayment of the upfront bonuses or threaten a lawsuit for non-performance of the contract. Sometimes they are bluffing, sometimes not. It's an attorney's job to sniff out how serious the situation is. In reality, lawsuits are expensive and after the dust settles, an equitable solution can usually be worked out.

Sometimes the physician needs to give a shorter than agreed upon notice, for example, 30 days rather than 90 days. In most cases, an employer can hire a locum tenens physician for days 31 through 90, until they can find a replacement. While that might be a little more expensive, the employer was planning on paying a physician anyway. When everything shakes out, they're not losing as much money as they may have initially feared. Is it worth spending legal expenses to hold the physician to the letter of the contract? Again, most employers are going to say no and let it go.

Termination for Cause and Cure Period:

The Right to Terminate clause lays out the terms and conditions where an employer has the right to terminate the physician: Termination for Cause.

There are some things that are automatic terminations: conviction of a felony, loss of medical license or loss of enrollment in Medicare/Medicaid and popular insurance panels. Those will not have a cure period; it's a non-negotiable termination.

A Cure Period is a specified amount of time that allows a physician to correct any problems that may arise. For example, if for some reason the state medical board sends a notice that your license is subject to suspension, the employer needs to allow you the time to cure the problem, usually 10 days to two weeks.

CASE STUDY:

Dr. Petersen moved across the country to join a thriving medical practice. His contract, however, contained little detail on his expected hours, call coverage, and productivity-based compensation. In stark contrast to what he had been told during his recruitment, he soon was overwhelmed by unreasonable patient loads, continuous call coverage, and a compensation model that significantly reduced his take-home pay by the allocation of unexpected overhead expenses.*

His contract did not contain a right to terminate for uncured material breach. After his complaints fell on deaf ears, his only recourse was to invoke his right to terminate without cause and 90 days' notice. He left the practice and remains mired in an ongoing legal dispute with his former employer over back pay.

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You want to be careful that the employer doesn't have too much sole discretion in deciding what constitutes cause. Make sure that "cause" cannot be based on the employer's latest whim. Typical legitimate reasons for termination are excessive absences, the practice isn't satisfied with the physician's performance, or there is a dispute between the physician and the practice.

Beware of ambiguous or broad language: violation of any provision of the contract; inability to work in a collegial manner; any behavior that could cause embarrassment to the employer. While you want to be a good employee, this leaves too much room for the employer to find an excuse to terminate you.

Termination for cause can cut both ways. If the employer does not hold to agreements they have made, for example, the employer requires substantially more hours than were contracted or the physician was to have been offered a partnership after a certain period of time and that is not forthcoming, then the physician can terminate the contract.

Your Physicians Thrive advisor can review your contract to ensure that you do not place yourself in an untenable position. Your advisor is well versed in uncovering and tactfully clarifying vague language as well as ensuring you have options should your employer not deliver as promised.

What to look out for:

- Unduly long notice periods.
- Unreasonable or vague language giving your employer broad discretion in the Termination for Cause.
- No right to terminate your agreement upon the uncured, material breach by your employer.
- No standard right to terminate without cause with written notice (usually 90 days).

INTELLECTUAL PROPERTY

Many physicians feel that an intellectual property clause will not affect them, that it only affects those physicians doing research or working on medical devices. While you cannot patent a medical or surgical procedure, you can patent a new business procedure or process. You may develop an innovative app for patients, training materials, or write a patient guide. These come under the heading of intellectual property and you may want to protect those assets.

Some employment contracts claim broad ownership rights to innovations developed by employed physicians. Beware over-reaching language which may claim complete or partial ownership rights to inventions, new medical devices, break-through treatments, or procedures that you develop on your own time with little or no reliance on the personnel or resources of your employer.

The intellectual property provisions of a typical agreement can be dense and, quite frankly, boring. But, you need to read them closely—you don't want to inadvertently forfeit ownership rights to any innovations and procedures you develop when it's possible to protect them.

Make sure your employer may only claim a co-ownership right if your intellectual property was developed with the use of the employer's personnel, facilities, laboratories, funding, or other resources. Any intellectual property that you develop independently should be excluded from the agreement.

Intellectual property has expanded over the past decades with new technologies and applications being developed in both large and small ways. A simple "app" can bring in millions of dollars. Combining several patient intake steps could result in saving a practice both time and money. When it comes to intellectual property, it is sometimes hard to know what is just a routine helpful suggestion and what is a valuable innovation. Because we work with so many physicians, we are experienced in spotting the potential for intellectual property as well as

CASE STUDY:

Dr. Kersting received a very attractive offer with a large health care provider. She was comfortable with nearly all key aspects of the offer—except for the extensive reach of its intellectual property provisions.*

As an inventor and co-owner of a small medical device company, she was resistant to the employer's claim to ownership of the company's intellectual property if any aspect of it was enhanced based on Dr. Kersting's experience or tenure with her employer. After negotiations, and with the assistance of her attorney, she was able to exempt all intellectual property of her company from the reach of her employer, including nearly all enhancements.

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protecting it. A talk with your Physicians Thrive advisor could expand your idea of what intellectual property is and help protect a very valuable asset.

What to look out for:

- Co-ownership claims on intellectual property developed before or after leaving the company.
- Vague or broad language that includes co-ownership based on the physician's "experience" at the practice rather than actual work on the intellectual property conducted at the practice or with the practice's resources.
- Intellectual property developed as a result of work performed outside the scope of the practice. The physician may have performed work on the side that is related or unrelated to the practice.
- Complete ownership of any intellectual property developed during physician's tenure with the company.

NEXT STEPS

The best time to plant a tree was 20 years ago. The second best time is today.

This proverb can certainly be applied to contract review. The best time to have a contract reviewed by your attorney is before you sign. An experienced attorney can identify areas that could become problems and take care of them before they do so.

The second best time to review your agreement is before you give notice to leave your current position. If you are thinking about changing employers, you need to plan your exit to create a smooth transition for both you and your employer. Having a full understanding of what both you and you employer have agreed to will help you fulfill the terms of your contract and prevent any costly misunderstandings.

Third, if your employer is bought out or the company changes hands, you may be presented with a new contract. Don't assume it is the same as your previous agreement. You should always have the new contract reviewed before signing to ensure you don't lose any important benefits or coverage.

Too often, physicians believe that a contract is set in stone. If we could leave you with one piece of advice, it is this:

Just about every employer is willing to hear you out at least once. Don't feel shy about engaging in—at minimum—one solid back and forth negotiation. Too often, physicians feel like they are going to upset the apple cart by negotiating. There's nothing wrong with going back to the employer and talking about things that are reasonable to talk about.

No matter where you are in your employment cycle, it is vital to know exactly where you stand. If you did not have an attorney review your employment contract before you signed, if you are thinking about changing employers, or you just have questions about your contractual obligations, please contact us at Physicians Thrive.
We are happy to help.

https://www.ama-assn.org/residents-students/transition-practice/so-you-re-employed-physician-what-you-ought-know June 30, 2017

https://www.todayshospitalist.com/leaving-so-soon/ October 2011