



ENSURING FLEXIBILITY IN PHYSICIAN EMPLOYMENT CONTRACTS

How to Protect Yourself from the “3-Year-Itch”

Attorney review of physician employment contracts is critical to maintaining the flexibility to pursue a rewarding career

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CONTENT

- 04 Overview
- 05 Terminate without Cause
- 07 Physician Turnover Statistics
- 08 Benefit Repayment Clauses
- 10 Non-Compete Clauses
- 12 Key Takeaways
- 13 Contact Information

PHYSICIAN TURNOVER STATISTICS SHOW THAT A HIGH PERCENTAGE OF YOUNG PHYSICIANS LEAVE POSITIONS DURING THE TERM OF THEIR CONTRACT. IN LIGHT OF THIS, PHYSICIANS NEED TO TAKE PROACTIVE MEASURES IN THEIR CONTRACT TO ENSURE FLEXIBILITY TO PURSUE OTHER OPPORTUNITIES.



OVERVIEW

Certainly, each physician comes to the contract negotiation process with unique personal circumstances, which themselves will dictate negotiation priorities in large part. One doctor may be the primary caretaker of her children, and thus may wish to accommodate this responsibility by inserting specially tapered work hours into the contract's scheduling provisions. Another doctor may want to insert a short notice period into the termination "without cause" provision, since he has his eyes on another job, for which he would like to leave on short notice once there is an opening.

While it's true that each physician will have unique priorities that arise from their personal circumstances, it's also true that another reality applies equally to physicians: statistics show that a high percentage of them will leave their first employer after 2-3 years. Indeed, according to Cejka Search, one of the nation's leading providers of physician recruitment services, physician turnover rates recently hit an all-time high.

In light of this, when reviewing employment contracts, ALL physicians ought to ask themselves: If I want to leave this employer in the next 2-3 years, can I do so? Also, in case my employment with this employer ends in the next 2-3 years (whether due to my choice or the employer's), can I negotiate out of the contract any negative consequences that may result?

In this eBook, we discuss the most critical elements of physician employment contracts that can restrict flexibility when leaving an employer during the term of the contract.



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Dr. Albin is a practicing Emergency Medicine physician who also serves as a physician compensation and contract advisor. After working for multiple employers over his 27 years of practicing medicine, Dr. Albin has personally gone through over 10 employment contract negotiations. He works closely with the Physician Advisors team of physician contract attorneys and advises other doctors on fair compensation packages and contractual pitfalls. Dr. Albin is the head of a physician-saturated family including a brother, two sons, a sister-in-law and daughter-in-law who are physicians.



1. RIGHT TO TERMINATE WITHOUT CAUSE

Even though a contract may state that it lasts for a certain duration (for example three years), the reality is that it can be terminated for a variety of reasons, such as:

- The physician dies
- The physician becomes disabled
- The employer goes out of business
- The employer merges with, or gets bought out by, another healthcare practice or institution
- There is a change in law that makes the contract unenforceable, and as a result the parties have to re-negotiate it
- The physician does something unfortunate or irresponsible (for example, losing the license to practice, convicted of a crime, behaving in a way that threatens the health of patients, etc.) that allows the employer to terminate "for cause"
- The employer does something unfortunate or irresponsible (for example, violating some provision of the contract, not paying a bonus due, etc.) that allows the physician to terminate "for cause"

In the above situations, termination generally happens upon the occurrence of a certain event, which triggers termination automatically or within a short period of time.

A contract can also be terminated "without cause." In this type of termination, either party (the employer or the physician) may terminate the contract simply by giving a certain number of days' notice (on average, 60-90 days) to the other party. Nothing in particular has to occur to trigger this right; a party may utilize it "just because."

The right to terminate without cause is very important for a physician. No matter the insecurities, questions, doubts or risks he may feel about the employer during the negotiation stage, he can rest assured that if he ever wants to get out of the situation, he can simply exercise the right to termination without cause. Therefore, if he isn't sure whether he will like the practice location, get along with co-workers, or anything else, at the very least he can "hang his hat" on the fact that if it's not a good work situation, he can simply terminate without cause. In practice, this clause can be exercised by giving the required notice and committing to work during the notice period (again, generally 60-90 days), and then the physician can leave.

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RIGHT TO TERMINATE WITHOUT CAUSE

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In order to limit turnover, some employers delay the physician's right to terminate without cause, for example, until after the first year of the contract. This is common for employers in areas where it is hard to recruit physicians. Certainly, one can understand the employer's desire to limit turnover and have some semblance of stability. Nonetheless, this would put the physician in an awkward (and unhappy) position if s/he is discontent but unable to leave by giving notice! For sure, it's preferable to negotiate this limitation out of the contract, and to have the right to terminate without cause from day one.

While many contracts allow physicians to terminate without cause without incurring any penalty, others will contain disincentives for terminating in this way. For example, employers may encourage physicians to stick around (thereby disincentivizing termination) by delaying payment of bonuses. In this type of a scenario, consider a bonus structure in which the calendar year is the work period to which a bonus is applicable. To encourage the employee to stick around, the bonus may not be paid out until the following March or April, and only if the physician remains an employee at that time.

To limit the "penalty" for exercising termination without cause, the physician needs to watch out for these types of disincentives. By successfully negotiating removal of these clauses, a physician can limit or eliminate the negative consequences if and when he decides to leave.

TOP 10 REASONS FOR PHYSICIAN TURNOVER

1. Relocate for family reasons
2. Family responsibilities
3. Lack of cultural fit
4. More flexible work hours
5. Seeking greater compensation
6. Better call schedule
7. Practice ownership structure does not meet needs
8. Limited professional opportunity
9. Leaving the practice of medicine
10. Unappealing community for self / family

SOURCE: CEJKA SEARCH 2012 PHYSICIAN RETENTION SURVEY

PHYSICIAN TURNOVER STATISTICS

23.4%

PERCENTAGE OF PHYSICIANS THAT
LEAVE THEIR FIRST EMPLOYER
BEFORE THE THIRD YEAR

FROM THE 2012 PHYSICIAN RETENTION SURVEY

"At the other end of the spectrum, physicians in their first years with a practice have the highest turnover rates overall. The 2012 survey reinforced a key finding from previous surveys and anecdotal reports: physicians are at greatest risk for turnover during the first years in practice. In 2012, turnover between years one and two was 11.0 percent, followed by 12.4 percent between years two and three, and 8.7 percent between years three and five. Once a physician has stayed in a practice through five years, he or she is much less likely to leave, as evidenced by turnover of 5.7 percent between years 5 and 10, and 4.6 percent after 10 years."

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2. BENEFIT REPAYMENT CLAUSES

ATTEMPT TO ELIMINATE, OR LIMIT, THE APPLICATION OF BENEFIT REPAYMENT CLAUSES

This issue is really an extension of the discussion at the end of the previous section. The idea is that if the physician leaves the employer without cause, he will want as few negative ramifications as possible. One possible negative ramification is repayment of some or all of the benefits given up front (for example, signing bonus, relocation assistance, residency stipend, etc.).

To accomplish this repayment scheme, employers often structure these benefits as loans, as follows:

- The employer pays the physician the benefit amount (signing bonus, relocation assistance, residency stipend, etc.) up front
- The benefit amount is structured as a loan, to be repaid in equal, monthly installments over a term (of, say, 2-3 years)
- Each monthly installment is forgiven as long as the physician remains employed

Consider a physician who receives a signing bonus of \$25,000, subject to repayment over a term of 2 years (24 months). Each month that the physician remains employed with the employer, the employer may forgive \$1,041.67 (1/24th of the full \$25,000 loan amount). However, if the physician leaves the employer before the end of 2 years, he will owe the unpaid balance of the loan, which practically speaking means that he will have to repay a portion of the benefit received.



HOW TO RESTRUCTURE REPAYMENT CLAUSES

Many times it's preferable to eliminate or limit these repayment schemes. There are several negotiation and restructuring strategies in this regard. Consider this example - you're an early-career physician and your potential employer is offering you tuition reimbursement as a benefit. It may seem tempting to take the lump-sum amount up front - say \$100,000 - but keep in mind that money will be taxed as income. Additionally, if you decide to leave the position before the forgiveness period of your contract term, you could end up owing money. If you don't absolutely need the money up-front, the better decision is to take a payout - for example \$20,000 at the end of every 12 months of service. That way you're not taxed on a big lump sum, and if your life circumstances change you won't be expected to pay back what they've given you.

Sign-on bonuses are another popular contract benefit, but the same "forgiveness period" pitfall can happen, depending on the language in the contract. If you need the lump-sum amount up front, make sure the forgiveness period is no more than two years. If you take the sign-on bonus it turns into a retention bonus that you'll owe back if you don't stay longer than the forgiveness period.

The other place this issue frequently occurs is in moving expenses. If your potential employer is covering moving expenses - which is common - make sure there isn't a forgiveness period. This is one situation you should be able to negotiate into clause removal.

The employer's goal is to hire you and retain you. You're easier to retain if you owe them money, so watch out for benefit repayment clauses. It's one potential pitfall of contract negotiation you can avoid.

3. NON-COMPETE CLAUSES

You may not fall in love with the employer (nor it with you), but you may be in love with the city you're in, and you may want to stay there. But, if your contract has a non-compete clause, you may be prohibited from doing so, or be severely limited in the parts of the city in which you can work - conceivably for a year, two or three after leaving the original employer.

From the employers standpoint, a non-compete is an effective way for an employer to "protect their turf" and lower the likelihood that a former employee will leave them and take away patients and accompanying revenue.

Many physicians doubt the enforceability of non-compete restrictions. Others believe that even if the restrictions are enforceable, employers won't bother enforcing them. The truth is of the matter is that most non-compete restrictions are enforceable, and employers will enforce them.

Whether a non-compete clause is enforceable depends upon which state the employer is in. Non-compete clauses are governed by state law, and some states disallow these restrictions. For example, in California, non-compete restrictions are generally disallowed. On the other hand, in Texas, non-compete restrictions are allowed, but, contracts including them must be written a certain way which allow the physician to buy out the contract for a predetermined amount of money. Believe it or not, our professionals have seen contracts that were written by multi-million dollar healthcare institutions and their high-priced lawyers, which contained non-compete clauses that were totally prohibited under state law! This is just one of the reasons why you need a lawyer on your side - he or she will know the state law, and will make sure the non-compete is even allowed.

Some physicians don't worry about non-compete clauses because they don't plan on staying in the area if they leave their current employer. For example, a physician working in Minnesota may not worry about his non-compete restrictions because he plans on moving back to Florida, to be near family. (Generally, non-compete restrictions cannot extend more than 25-75 miles.) Other physicians want to negotiate as much flexibility as possible because they plan on staying in the area. This can be done by requesting one or more changes to the non-compete restrictions: shortening the time period, lessening the geographic scope, asking for a "buy out" clause as mentioned above and/or limiting the types of circumstances in which the non-compete will apply. Employment agreements can even be structured where the non-compete would apply only in situations in which termination is the physician's fault. If termination is the employer's fault, why should the employer capitalize from that further and be able to limit where the departing physician seeks new work?

Even if the non-compete is legally permissible, there are several ways to limit its scope. You can try to delete it from the contract, although the employer may be hesitant to do so. Alternatively, you could ask the employer to limit the length of time and geographic area over which the restriction applies. For example, instead of having the restriction last for two years and extend a 25 mile radius from each of the employer's offices, you could ask that the clause be more limited, and to last for only one year and to extend only a 10 mile radius from the employer's main office. These are just a few ways to limit the scope of the non-compete, and retain as much flexibility as possible.

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KEY TAKEAWAYS

Obviously, the last thing a physician wants to think about when negotiating a contract with an employer, is the possibility (let alone likelihood) that he will only remain with that employer for a relatively short time. But, as mentioned previously, statistics show that this is a strong likelihood, and a wise physician will protect himself as best he can in case it occurs.

By addressing the issues discussed in this eBook, you can go a long way toward protecting yourself. First, by having the right to terminate without cause, you can rest assured that if you don't like things, you can leave. Preferably, this right will be from day one and come with as few negative ramifications as possible if it is invoked. In regard to the latter point, try to limit the possibility that you will have to repay any benefit that you have received. Furthermore, if you

may want to stay and work in the area, eliminating or restricting the scope of the non-compete will afford maximum flexibility in that regard.

Make sure you are fully educated and informed on the terms and conditions of your contract - doing research and homework on the front end will eliminate any surprises in the situation that you want to pursue another opportunity and help you plan for any financial costs associated with leaving the employer.

WORKING WITH AN EXPERIENCED ATTORNEY

With the rapid changes in today's healthcare and the introduction of new payment models to adapt to changes in regulation, employment and partnership contract reviews have not only become a necessity, but a specialty. Ensuring that you have a full understanding of the terms and conditions of your employment and having a knowledgeable attorney review your contract is critical for securing the flexibility to pursue a rewarding career. Make sure to consult a team of physician contract attorneys that are experienced in the state of the potential employer, have a deep understanding of physician compensation models and can provide strong data to help make sure that your offer is in line with your specialty and area of the country you will be practicing in.



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