Physician employment contracts are essential to the management and operations of Medical Practices and Hospitals. Complex regulatory schemes, financial issues and a changing healthcare business environment have made the days of the handshake agreements, or even the one or two page agreements a thing of the past. More and more physicians are familiar with many of the issues that affect their employment and are turning to us as their attorneys for advice. As health care attorneys we are often well equipped to answer these questions, but not everyone who is advising physicians, medical practices and sometimes even hospitals is knowledgeable about healthcare law or the needs of hospitals, practices and physicians. Therefore it is important to understand both sides of the issues to best serve your client and promote a successful and productive relationship between the Employer and physician Employee. Below are several issues that often arise in the negotiation of Physician Employment Contracts.

Most Physician employment contracts cover many standard issues in the employment relationship. However, physician employment contracts are as varied as the physicians and practices are.

Prior to negotiating an employment arrangement, both parties should be familiar with:

The Bona Fide Employment Exception under the Stark law:

- Employment is for identifiable services
- Remuneration is:
  - Consistent with fair market value of the services; and
  - Not determined in a manner that takes into account the volume or value of referrals; and
  - Remuneration is provided pursuant to an agreement, which would be commercially reasonable even if no referrals were made.
Productivity bonuses may be paid on the basis of services personally performed by the physician.\(^1\)

and the Anti-kickback Statute Safe Harbor, which provides that:

- Remuneration “does not include any amount paid by an Employer to an Employee, who has a bona fide employment relationship with the Employer, for employment in the furnishing of any item or service for which payment may be made in whole or in part under Medicare or a state healthcare program.”\(^2\)

II. Discussion of Contentious Issues from the Employer’s and Employee’s Counsels Perspective

A. Non-Competition and Non-Solicitation Provisions

Non-Competition and Non-Solicitation Provision are a common part of most physician employment contracts. The reason for this is quite simple. Physicians are practicing in a more competitive environment than ever. Declining reimbursements, increasing overhead costs, growing regulatory requirements, pressure from insurance companies, the search for added revenue and the increasing trend of health care becoming more about business and less about providing care, all have increased the desire to retain the hospital or practice patient base and Employees.

Employees generally owe a duty of loyalty to their Employers.\(^3\) A covenant not to compete may prevent physician from working in a capacity or in a location that would detract from Employer’s business. Non-competes often cover the term of the employment contract, but they also often extend beyond the actual term of the contract. Individual state laws will govern the outer limits of enforceability of a non-compete. Laws governing Non-Competition and Non-Solicitation vary from state to state, so there it is not possible to address every state here. Rather we will look at some types of provisions that we have seen.

Non-Competition agreements also known as covenants not to compete are contractual agreements whereby the Employee or contractor agree, depending on the scope, not to provide services within a certain geographic area upon the Employee’s departure from the practice or hospital.

Non-Competition Agreements:

\(^1\) 42 U.S.C. § 1395nn(e)(2).
\(^2\) 42 C.F.R. § 1001.952(i).
\(^3\) Rest. 2d, Agency §§ 387-398 (1958)
- Non-Competition in a specific area or zone. These agreements specifically prohibit caring for all patients within a specific geographical area.

- Non-Competition for a specified period of time. Typically a non-compete would contain both a geographic and temporal restriction.

Types of Non-Solicitation agreements:

- Non-Solicitation of Employees – Agreements where the departing Employee agrees not to solicit or recruit current or former Employees of the Employer to leave the Employer for a given period of time.

- Non-Solicitation of Patients – Agreements whereby the departing Employee agrees not to solicit or recruit current or former patients of the practice to leave the Employer’s practice and go to a different practice for a given period of time.

- Non-Solicitation of Referral Sources – Agreements where the departing Employee agrees not to solicit current or former referral sources of the Employer for a given period of time.

Employer Perspective on Non-Competition and Non-Solicitation agreements

- The Employer has invested resources and time to develop the practice. Training, marketing, facilities, and the addition of support staff have all been done to promote the practice and allowing Employee to simply leave and take patients and Employees is not fair to the practice.

- These Agreements encourage Employees to stay long term and be part of the practice.

- An Employer may take the position that newspaper notices or advertisements concerning a new position may violate the non-solicitation provision.

- Due to variability of enforceability under state law, Employer may wish to include a clause that provides the provision will be enforced to the fullest extent permitted by law. State law should be consulted but such a clause would keep the contract compliant in the event that the law changes during the contract term.

Physician Employee perspectives on Non-Competition and Non-Solicitation agreements.
- The Employee wants the least fettered ability to build a new medical practice. Restrictions on competition often restrict where the departing Employee can practice, making it more difficult for the Employee to leave or to establish a new practice.

- Quality of life - Physician Employees develop roots in their community and do not want to have to relocate their families or travel long distances to a new practice.

- Employees consider these unfair since the doctor patient relationship is personal to the physician.

- State medical boards often place strict obligations on physicians regarding continuing care of patients and avoiding patient abandonment.

- Restrictions on recruiting and hiring Employees or soliciting referral sources from the former Employer are restraints on trade. Employees may have only stayed with the Employer because they wanted to work for the departing Employee.

   Interestingly enough, the fact that Non-Competition and/or Non-solicitation provisions may be prohibited or restricted in a particular state does not always mean that they are not in the employment contract. Therefore, it is important to know your state’s laws relating to these types of agreements. It should also be noted that if the hospital is utilizing the recruitment exception to Stark, there are limitations on the ability to enforce a non-compete. This may also carry through to a practice that is part of the hospital recruitment agreement. Hospital and other Employer lawyers should evaluate this carefully.

B. Medical Records – Ownership, Disclosure, Appropriate Access to and Use of During and Post Employment

Ownership of Medical Records during and Post Employment

Medical records issues often go hand-in-hand with Non-Competition Agreements. An issue of significant importance is who owns the actual patient records. This is often an issue that is not clearly addressed by state law or medical boards. The patient owns the actual information in the record and generally the practice owns the record itself. The physician Employee needs appropriate authorization from the patient to remove such records from the practice. This of course does not prevent disputes over the ownership as both parties will often seek ways to obtain or keep patient medical records.

Employers have a strong incentive to retain ownership of the actual patient records. Conventional wisdom is that where the records go, so go the patients. From a
practical standpoint this is often true. Patients frequently have little understanding of medical practices or the ownership of their patient chart. Many believe the chart belongs to the patient and that the patient has exclusive power to decide who can retain originals, have access to, or receive copies of their information. Obviously the law is much more complex on this issue. But, for many patients, they simply trust what they are told by their physician or his/her office.

In many circumstances the patient may be inclined to follow their physician when they leave the Employer due to the personal nature of the doctor patient relationship. If a physician leaves a practice and the patient authorizes him or her to take his or her medical chart with them, the patient will most likely follow the physician. However, if the medical record stays with the Employer and the Employer offers to continue care with another physician, many patients will opt to stay or even believe they are required to stay with the Employer. When this is coupled with non-compete and non-solicitation agreements which prevent the physician from without a penalty continuing care for or directly contacting the patients, the practical effect is for that the patients are very likely to stay with the Employer.

Therefore, from a practical standpoint, this is a significant issue in the physician employment agreement. The parties should discuss whether a departing physician will be allowed to notify his or her patients that he is departing and encourage them to grant authorization for the departing physician to be sent a copy of the patient’s medical record.

**Employer Perspective on Medical Record Ownership**

- Where a physician is part of a practice, the medical records belong to the practice, according to the American Medical Association. The employment agreement should address how patients are to be notified in the event a physician leaves the practice and whether a physician may notify patients of his or her new address. The Employer will likely want to handle the distribution of the notice.

- Employers have obligations under state laws to retain medical records. The Centers for Medicare and Medicaid Services (CMS) requires that patient records for Medicare beneficiaries be retained for a period of 5 years (see 42 CFR 482.24 (b)). Medicaid requirements vary by state.

- The Employer has invested a large amount of time energy and money into developing the practice. They do not wish to see a large percentage of their business walk out the door when a physician Employee leaves. Employers are, thus, reluctant to allow departing physicians to notify patients of their new practice location or encourage patients to request a copy of their medical record be forwarded there.

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4 http://www.ama-assn.org/ama/pub/physician-resources/legal-topics/frequently-asked-questions.page
- Continuity of Care – The existing practice can often most easily continue care for the patients. The patients are comfortable with the practice, know its location and probably know the support staff. Therefore, it may be in the patient’s best interest to stay with the Employer.

- Patients have a right to the information although the actual record belongs to the practice. Patients may request that their medical record be forwarded to another physician; however, both the practice and the physician should be very careful to avoid a breach of privacy or patient confidentiality in accessing, copying, or taking patient records.5

Employee Perspective on Medical Record Ownership

- Patients are not a commodity, and their records should not be considered a commodity either. Patient care is tied to the doctor providing the care, not to the office where the doctor practices. The physician Employee has developed the relationship with the patient and put the time and effort into building the business. The Employer has been compensated for the care provided by the Employee and is entitled to nothing more.

- Patients should be free to make their own decisions about their doctor. It should not be dictated or influenced by contracts with the Employer.

- The patient will follow the doctor and if, given the choice, patients will likely choose that their charts go with him or her. Patients should be given the opportunity and information necessary to make that choice. They offer a great potential for revenue in a new practice or even if transferring to an existing practice.

Disclosure, Appropriate Access to and Use of Medical Records during and Post Employment

Just as with ownership of medical records, appropriate access to and use of medical records is an issue that often does not arise until much later than the negotiation of the contract. There are many reasons why a Physician Employee may need access to or use of patient medical records. These include responding to subpoenas and other court orders, medical malpractices claims, licensing board matters and governmental investigations or actions.

Court orders

5 See 45 C.F.R. §§ 164.508, 164.524 and 164.526
When a physician receives a subpoena or is otherwise ordered to provide testimony or records regarding a patient or patients, the physician is expected to comply with the order. In most cases, if a similar subpoena or order has not already been issued to the Employer, the Employer will be accommodating or may seek to quash any a subpoena or order that it feels is inappropriate.

Some contracts directly address the issue of court orders to the Employee, by requiring the Employee to provide immediate notice to the Employer allowing the Employer to take action if necessary on behalf of the Employee. Normally this process should not be contentious; however, under certain circumstances it can become quite so. An unpleasant situation surrounding a physician Employee’s departure can lead to animosity between the former Employee and the Employer. This can sometimes result in a less than cooperative atmosphere. A well-drafted employment agreement can help alleviate this.

**Employer Perspectives on Disclosure, Appropriate Access to and Use of Medical Records during and Post Employment**

- The Employer has strict duties when it comes to keeping and maintaining patient records and the Employer will be the first and maybe the only one sanctioned in the event of an improper disclosure or use. Therefore, the Employer needs to have clear and advance notice before any records are accessed, disclosed or used.6

**Employee Perspectives on Disclosure, Appropriate Access to and Use of Medical Records during and Post Employment**

- Employee interests are not always aligned with the Employer or former Employer. The Employee needs assurances that they will receive prompt and sufficient cooperation from the Employer or former Employer in the event of a court order.

**C. Licensing Board Actions and Governmental Investigations**

Another important subject in contract negotiations concerns issues relating to licensing board actions and governmental investigations. Hospitals, Medical Practices and their Employees more and more are facing these types of matters. Once again Employers and Employees may have very disparate interests.

**Licensing Board Actions**

Licensing board actions may not be considered a traditional issue in employment contracts. The normal view would be that these are related almost entirely to the specific Employee holding the license and not the Employer. However, it is important to consider how employment contracts and Employer polices may affect the handling of licensing board actions. Sprinkled throughout most physician employment contracts are provisions relating to access to patient records, disclosure of patient and practice information, policies and procedures, non-disparagement clauses and a host of other language that if taken literally, could hinder the response to or defense against complaints or licensing issues faced by the physician Employee. These situations can occur during employment relationship, but can also arise once that relationship has terminated.

There is often tight language limiting the physician Employee’s (as well as other Employees) access to and use of PHI. Clearly the Employer has an obligation to protect patient information under prevailing statutes and regulations. In addition, Employers have a strong incentive to protect their policies and procedures against possible competitors. However, Employees have legitimate interests and needs too.

When a physician receives a licensing board complaint or notice of other licensing board action they often have strict deadlines to respond and are required to produce specific information. Licensing boards are not concerned with a physician Employee’s contractual rights, they are concerned with the patient or care issue at hand.

Contract provisions can be easily modified to allow such appropriate access and accommodate this need and at the same time protect the patients of the practice and the Employer. For some reason this often becomes an issue of contention between Employers and Employees in contracts. Perhaps this is related to a lack of understanding of the employed physician’s motives.

**Governmental Investigations**

Similar to licensing board matters, physician Employees are sometimes the subject of various governmental investigations or actions. When this occurs, whether it is a current or former physician Employee, cooperation is often essential. Provisions in many physician employment contracts can inadvertently work against cooperation and cause difficulty in providing timely and thorough responses.

For example, an investigation may result in the requests for information or even interviews or depositions of physician Employees. Answering certain questions might violate confidentiality agreements as well as non-disparagement clauses and potentially subject physician Employees to lawsuits from the Employer. While it may seem these are issues that can be addressed or waived at the appropriate time, once an investigation begins, the parties may no longer have the same interests. As with so many issues in employment contracts, if they are dealt with before they arise, then the parties can calmly and objectively address these issues.
Fortunately, there are relatively simple ways to address these issues. The more important piece of the puzzle is recognizing that they need to be addressed.

**Employer Perspectives on Licensing Board Actions and Governmental Investigations**

- The Employer has very clear and important obligations to protect patient information, billings and claims data, and other important documentation. If necessary, information can be obtained by use of subpoena or other court order. Access to or disclosure of patient information should be allowed only when absolutely necessary in order to protect patients. Broader language invites abuse by former physician Employees and may result in a loss of control of the information and potentially subject the Employer to liability.

- The Employer also has strong incentives to protect its confidential information, such as practice information, company policies and procedures. Most practices have spent years and resources developing into successful provider organizations. This information is extremely valuable and can be protected under the law. A departing physician might disclose this information to others under the guise of responding to complaints or investigations, and once disclosed others might discover and use it for their own benefit.

- In the event of governmental investigations, the Employee may not have a full or complete understanding of the organizations policies or procedures and how they relate to providing care. This information should be provided by the entity itself in order to ensure accuracy and avoid confusion.

**Physician Employee Perspectives on Licensing Board Actions and Governmental Investigations**

- In the event of a licensing board issue, the physician Employee will have enough to worry about. It is best to have necessary access issues worked out long in advance so that the physician can quickly and accurately respond.

- In the case of governmental investigations, the physician Employee’s interests may or may not be the same as the Employer. The Employee should be able to speak freely and answer questions asked, etc. without worrying about whether or not they will be sued by the Employer. However, the Employee also owes a duty to his or her Employer and should keep the Employer informed, and cooperate with Employer’s counsel.
D. Overpayments

In the modern environment of strict government oversight and enforcement, Employers are more likely to ensure that their Employees aren’t so removed from the administrative piece of the practice that they do not have a sense of ownership over the documentation and billing. This is especially true given strict obligations concerning refunds of overpayments which may have resulted from billing or documentation errors. These errors may be under the control of the physician or the practice. In any event, the employment contract should address how such overpayments or other errors should be addressed. Of course, the contract should also specify who will be billing for the services. If Employer is billing, the contract should require physician to assign the right for payment to the Employer and adhere to strict documentation requirements.

Employer Perspectives on Overpayments

- Employer may want to include language which would make the physicians responsible to repay the hospital for any overpayments to payers which are required to be refunded due to the physician’s actions or inactions, such as documentation and coding deficiencies.

- Employers will want to require Employees to cooperate with any compliance and audit efforts on the front end, as well as any internal or external investigations. In addition, Employer should require Employees to participate in any training or oversight which may be required as a result.

- Employee Perspectives on Overpayments

  - The Employee will want to ensure that he or she is not liable for any actions or inactions over which he or she has not control. This may include some of the administrative/billing functions of the practice.

E. Intellectual Property

Absent an agreement to the contrary, the Employer owns the copyright on materials created by its Employees if the materials were made within the scope of his or her employment under “works-made-for-hire” doctrine. However, if an Employee is hired to do “noninventive work”, he or she will generally be entitled to patents resulting from his inventions.

7 17 USC §§ 101, 201
Rather than rely on these general legal principles (which may well be the subject of dispute), the parties should state clearly in their agreement whether the intellectual property rights arising out of the agreement belong to the Employer or to the physician. The parties may opt to negotiate a division of the percentage of the profits of any such creations or a flat fee to be paid to physician.

F. Moonlighting and other outside employment opportunities

Any concurrent employment or “moonlighting” agreed upon between the physician and the hospital should be expressly listed in the agreement, including any allowances for teaching, writing, medical directorships, etc. After the Tuomey case, there is an increased focus by Employers on the outside employment of physicians, other revenue streams, and drains on physician time which may detract from his value to Employer. These can all impact the commercial reasonableness of an arrangement with a physician.

The parties should discuss any outside employment and/or income ahead of time and consider whether such time commitments will impact commitments to Employer. The parties should set forth the expectations for days and hours that physician will be providing services.

The Employer may wish to allow work outside the scope of the agreement only upon Employer’s prior written approval. In such instances, the Employer will want to ensure that:
  - the outside work does not interfere with physician’s employment or create a conflict of interest,
  - the outside work does not involve high-risk practices that could subject physician to enforcement issues (e.g., a Methadone clinic),
  - the physician maintains separate policies of professional and general liability insurance for any outside work,
  - the Physician does not hold himself out as acting on behalf of the Employer, and that
  - Physician does not use Employer-provided resources such as staff, EHR, office space, and/or supplies.

G. Meaningful Use
The Employer will likely expect physician to comply with efforts to meet the meaningful use core measures. The employment agreement should expressly state whether the EHR Incentive Payments are being designated by physician to Employer. The incentive payments for the Medicare EHR Incentive Program are payable only to individual doctors, not practices, regardless of who owns the EHR. A physician can designate the practice to receive the funds on his or her behalf but the practice cannot claim the money or make the decision for the physician. Hospital-based physicians are not eligible.

During the transition to new EHR systems, Employers should expect some resistance from Employees and potential concerns that the learning curve will negatively impact productivity. Employers should consider ahead of any such implementation whether they will provide any kind of supplemental payment to offset any reduction in productivity. Employers may also consider implementing a bonus structure which would incentivize physicians to assist in meeting core measures. Ultimately, however, the implementation of more efficient systems should increase productivity.

H. Compensation Structures

Employers have a legal and business interest in ensuring that the physician’s compensation is closely aligned with his or her productivity and, increasingly, quality of care. Of course physician Employees have an interest in maximizing their compensation. However, both parties must understand the legal importance of Fair Market Value compensation in both employment exception to the Stark law and the Employment safe harbor of the Anti-Kickback Statute. Anticipated or actual referrals cannot be considered. A fair market value analysis will look at the entire compensation package, not just the base salary. Bonuses, benefits, time off, etc. may all be relevant considerations. It may be advisable to let the physician know ahead of time that the negotiated terms are subject to a fair market value analysis by an outside appraiser. This process can take time and letting the physician know it is just “part of the process” may help to ease his or her anxiety and frustration caused by any delay.

Fixed Base Salary

An agreement to pay an employed physician a fixed salary should set forth the amount and frequency of payments. Any approved salary deductions should be listed. Both Employees and Employers may prefer a fixed salary model as it ensures predictability in a world of increasingly unpredictable costs and reimbursement.

Percentage of Collections

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Another common compensation model aligns the Employer and Employee’s interests in generating revenue by paying physicians a percentage of collections. Because collections are often delayed 60-90 days after charges are billed, the parties may opt to set up a “draw” which would fix a monthly compensation which would be reconciled monthly/quarterly to reflect the actual collections. Employers may prefer this model as it is easy to administer and clearly incentivizes economically efficient productivity. This model may cause frustrations if there are an abundance of slow-to-pay or low-paying (e.g., Medicaid) payers

**Relative Value Units (RVU)**

It is common to compensate employed physicians a set dollar amount on a “per-RVU basis”. Such agreements are typically tied to the definition of RVU set forth by CMS at 42 CFR 414.22. To ensure FMV, both the total compensation and the per-RVU amounts should be reasonable under the circumstances.

Employers will want to carve out any RVUs which do not have a reasonable expectation of reimbursement, RVUs which are nonbillable due to Physician error or noncompliance. The Employer will also want to ensure that any reductions included in the CMS (or other payor) adjudication methodology (for, e.g., multiple procedure reduction methodology, bundling, etc.) will result in a corresponding reduction in RVUs.

Employees will want to evaluate the RVU target amounts to determine anticipated compensation and whether such target and rates are reasonable in light of their training and experience. There is often not much discussion or negotiation regarding these things; however, since they can be confusing, both the Employer and Employee should be prepared to discuss what the actual compensation amounts will be.

**Bonuses and Incentives**

To meet the Stark employment exception, productivity bonuses must be based on services personally performed by the physician. Many compensation arrangements include both a fixed base salary with production and/or collections-based bonuses triggered by meeting certain RVU or collections targets. This provides Employees with the security of a fixed income with the incentive to be productive. Employers may prefer to place a cap on the maximum achievable bonus. This limits the Employer’s financial exposure, helps mitigate the potential for physicians to sacrifice quality for quantity, and assists in the determination of whether the arrangement is FMV.

Recently, there has been a shift toward instituting quality-based bonus structures. More and more health plans moving toward P4P models measuring quality outcomes, patient satisfaction and IT implementation. In a bold move, the New York City public hospitals recently announced a plan to tie physician’s raises to their performance on
quality measures.\textsuperscript{10} Expect to see more quality-based compensation structures.\textsuperscript{11} There is no one “set” metric, as relevant indicators vary by specialty but factors may include:

- Patient safety
- HCAHPS scores
- EHR adoption
- Community Service and Member Access
- P4P enhancing practices (e.g. core measures, readmissions, wait times, etc.)

Physicians are primarily responsible for these metrics so it makes sense for Employer to incentivize performance. While still an emerging trend, quality bonuses appear to range from 5 to 20 percent of base salary.\textsuperscript{13}

**Call Coverage**

Whether call coverage is going to be compensated is a trend dictated by the particular specialty and geographic area. The Employer may choose to compensate employed physicians for call coverage provided above and beyond the coverage required under the Medical Staff Bylaws. Be cautious if using a “tiered” approach (paying a physician a variable rate for weekdays, weekends and holidays) combined with this “above and beyond” approach as it can be difficult to administer.

**Medical Directorships**

If Employee is to receive compensation for a medical directorship or other administrative duties, be sure to analyze the FMV of such compensation separately as appropriate for such non-clinical services. The parties should ensure that any time commitments for administrative duties are realistic in light of the physician’s obligations to provide clinical services to Employer.

I. Malpractice Insurance Claims, Settlement and Tail Insurance

**Malpractice Insurance, Claims, Lawsuits and Settlements**

In the current healthcare environment malpractice allegations and lawsuits are more prevalent than ever. This is caused by a variety of factors some of which are


legitimate issues and concerns, others, which are merely perceived issues concerns, and
some that are based solely on a system that can provide large monetary payouts to
patients and their counsel. Regardless of the validity or motivations for a malpractice
claim or suit, the issue still remains that Employers and Employees face the threat of
claims and lawsuits.

In most, but not all physician Employment scenarios, the Employer obtains
Malpractice insurance for its employed physicians. The Employer has a variety of
choices relating to professional liability coverage. In large organizations and hospital
systems many Employers opt to be self-funded or self-insured. Other Employers, from
the largest down to the smallest use traditional liability insurance policies with private
insurance companies. Some of these companies are traditional insurance companies and
others are insurance companies that are owned in part or in whole by the policyholders.
Another option is that some Employers and Employees may, where state law allows, opt
to have no insurance coverage or a minimal policy, a strategy that is sometimes referred
to as “going bare”. In this scenario, the Employer and/or Employee bear the risk of any
claim or judgment, and the ideal option in this case is for the physician to engage in
aggressive preventative asset protection prior to any claim or lawsuit being brought.

In some cases, the Employer requires the Employees to provide their own
professional liability insurance, either not compensating them for the cost or reimbursing
them for the cost.

Where the Employer pays for or otherwise insures the physician Employee, the
physician Employee usually retains decision-making authority on the claims and lawsuits
to which they are a party. But this is not always the case. A number of Employers
prefer to keep final decision making authority for themselves, and require the physician
Employees to waive their rights to make decisions or to object to the settlement of claims.

As in other areas the different options relating to professional liability insurance
for physician Employees can create disparate interests and incentives between Employer
and Employee.

Employer and Employee perspectives – The Employer perspective varies depending on
the way in which they obtain insurance. The Employee perspective does not vary nearly
as much.

Employer Perspectives (Self-Insured/Self-Funded)

- A hospital, system or large group practice may view itself more as a business. There
  may be profit motives or just a desire to have greater control of costs. Settlements,
  judgments and defense costs come directly out of Employer funds. An Employer may
  have concerns about its ability to weather a large judgment or may decide it is less
  expensive to settle a case regardless of its merits for a smaller amount because the
  costs associated with defending against it could be much higher than the settlement
  amount.
- Strategy – As attorneys we all know that sometimes the outcome of a case is not always directly related to the actual facts. Sometimes an otherwise strong defense can be badly harmed by other factors such as poor record keeping or missing records, depositions or other testimony that go poorly, sympathetic plaintiffs, disgruntled former Employees, or even the complexities of a case that become too difficult for a jury to understand clearly. In these cases Employers and Employees may truly want to fight a claim or lawsuit, but the realities of the litigation process make settlement a much more attractive option. However, the physician Employee may not agree. Removing the Employee’s ability to block a settlement allows the organization to make unemotional decisions based on what is best for everyone involved.

- Business/Practice Harmony – Employers know maintaining a happy workforce is best for their business no matter what type of business they are in. Physician Employees are often sensitive about malpractice claims and lawsuits and where there is disagreement between the physician and the Employer on these issues, it can have a detrimental on the work relationship not just between the Employer and the individual physician, but can overlap to affect the work relationships with other Employees who may become suspicious of the Employer’s true motives and loyalty toward them. This is a strong reason why Employers may view it in their best interest not to require Employees to give up their decision-making authority on a case.

**Employer Perspective (Privately Insured)**

- To a lesser extent, many of the same concerns that arise for the self-insured/self-funded Employer can apply where the Employer provides insurance through a private carrier. The Employer faces financial concerns about their premium costs, which may rise dramatically in the event of a large judgment or expensive defense costs.

**Physician Employee Perspectives**

The physician Employee perspective is not at all complex and remains relatively the same regardless of the type of insurance coverage.

- Physicians are ultimately professionally and personally responsible for the care they provide to patients. Aside from peer review, they do not want someone else making decisions for them about their care or to have these decisions based on a business model.

Reputation – In years past, a physician or hospital may have been able to settle a claim or lawsuit with the knowledge that the matter would remain confidential. This may no longer be true looking forward. In Colorado, the
Michael Skolnik Medical Transparency Act (C.R.S. §12-36-111.5) which took effect in 2008, required, among other things, physicians to report all settlements of claims to the Colorado Medical Board (not new) and for the Medical Board to publish on its website for the public to view all such information. The scope of this act (which has been expanded to include other healthcare professions) encompasses even patient refunds as “settlements”. It seems likely that this Act will serve as a model for other states that have not already enacted similar legislation. Therefore, the Employee may have a heightened concern about their reputation and their ability to control it.

- Licensing Issues – Often for the Employer, claims and lawsuits end with a settlement, judgment or hopefully a favorable verdict at trial. However, this is often not the case for the physician Employee. A settlement or judgment may be only the beginning (and the least damaging) of their woes. Settlements and judgments will be reported to the medical board, which normally will result in an investigation and review, which could lead to a complaint and formal discipline against the physician. The Employer may be making decisions based on what they perceive is best for the organization, but the physician needs to be able to evaluate things in light of how it might affect their career and license. The physician Employee may want or need to fight the allegations, no matter how challenging in order to protect their careers and licenses.

- Uniformity – Not all physician Employees have a realistic view of claims and lawsuits brought against them. A physician may not want to accept that the care provided is likely to be found below the standard of care and want to have their day in court. While we certainly want the Employees to have their “day in court”, it is not always fair to the Employer who may suffer greatly in the likely event of a large judgment. The Employer needs a way to protect the entity and the doctor so that it can continue to provide services.

**Tail Insurance**

One of the biggest questions that physician Employees seem to have about their contracts has to do with “Tail Insurance”. Tail insurance is the policy that comes after the physician terminates coverage with a particular insurance carrier. Due to the statute of limitations, claims may be brought against the physician after the policy has been terminated or expired. For private insurance, the carrier will determine the cost of this “mini-policy”. Typically someone needs to arrange for coverage during this period and more importantly, someone needs to pay for the coverage. The issue can arise in a few different ways. The physician Employee may retire, they may choose to change jobs or the Employer may change their insurance carrier.

- Self-Funded/Self-Insured vs. Private Insurance - For self-funded or self-insured Employers Tail Insurance is generally not an issue. Employers, at
least in my experience, almost always continue to cover former Employees for claims made against the physician Employee for matters that occurred or arose out of matters prior to the termination of the employment relationship. For Privately insured Employers; however, this is often not the case.

- Retiring Physicians - In this case the physician Employee will no longer be practicing medicine. Depending on the actual circumstances prior to the retirement Employers may handle this differently. Some Employers will have a threshold, or number of years of service after which the Employer will agree to pay for the “Tail” upon bone fide retirement of the Physician. This frequently occurs where the physician Employee is also an owner in the practice and may be part of a Shareholder Agreement or similar document relating to the exiting of a retiring owner.

- Departing Physicians (Non Retiring) – In this case the physician will be leaving the Employer for some reason and will no longer be continuing on with insurance paid for by the Employer. The issue of who will pay for the “Tail” is normally addressed in the employment contract. In private practice Employers almost always require a “Tail” policy. The Employers normally do not offer to pay the “Tail”, although occasionally some do, but rather require the Employee to pay instead. Employers frequently reserve the right to pay the premium on behalf of the Employee and to collect the premium amount from Employee either out of the final payment or upon demand, with interest accruing. In some cases, the Employee will obtain some type of continuing insurance with the same insurance carrier, thus diminishing the need for a “Tail” insurance policy. In these cases, the parties must be mindful of and address the contingency that the former Employee may elect at a later date to discontinue the policy.

- Arriving Physicians/New Employees – The issue of “Tail Insurance” is not just one relating to the physician departing from the practice. It is also an issue that can arise in employment negotiations relating to the prior employment of the physician. These are issues that should not be overlooked. Since so many Employers do not pay for “Tail Insurance” for departing Employees, more and more physicians are looking for ways to pay for it. This has led to prospective Employees requesting directly that the new Employer pay their “Tail” or for signing bonuses or additional compensation that will enable them to pay the Tail Insurance to satisfy the former Employer.

**Employer Perspectives on Tail Insurance**

- The importance of Tail insurance to the Employer cannot be underestimated. While the obvious direct affect and danger of being the subject of a claim or lawsuit while being uninsured is to the physician, there are significant risks to the Employer as well. In many lawsuits the practice or hospital are brought in as parties. Their own insurance may not cover acts related to the physician
Employee and could be left “holding the bag” for uninsured claims in the event of a judgment against them. Also, the claim may be made against more than one physician and result in a still employed physician’s policy bearing the burdens of defense and the cost of settlements or judgments where a former Employee has no insurance. In addition, the formerly employed physician’s policy may provide coverage in the event of claims brought against or arising out of conduct of supervised non-physician staff and the Employer’s own policies may or may not cover that conduct separately.

- Often the smaller the Employer, the fewer disposable funds they have to cover their expenses. Paying for a departing physician Employee’s insurance is probably relatively low on their list of priorities when budgeting. In addition, many Employers feel that they should not have to pay for physician Employee expenses once they no longer are generating revenue for the Employer.

- Physician Employees who are departing often do so under less than favorable conditions and on less than favorable terms. Employers feel they are being taken advantage of where they are expected to help fund the physician Employee’s departure.

**Physician Employee Perspectives on Tail Insurance**

- In many ways physicians are like any other Employees. Regardless of the amount they make, financial issues remain a concern. Depending on the specialty, physicians may be required to pay $10,000.00, $20,000.00, $30,000.00 or more for a “Tail”. Employers are better able to afford such large payments and may be more easily able to spread the payments out over time with the insurance carrier.

- The requirement of paying for “Tail Insurance” can act as a sort of back-door non-compete or other unfair burden or restraint on the physician Employee. Due to the expense of obtaining “Tail Insurance” the physician may experience a disincentive to leave the employment situation, it may affect where they feel they can go, or they may even feel that they simply cannot afford to leave.

**J. Recruitment Agreements, Signing Bonuses, Loan Repayment and Moving Expenses**

As we all know, the healthcare field faces a number of challenges. Healthcare Employers are seeking ways to attract more and better physician Employees. This can be done by offering higher salaries, better benefits, better working hours, and even by promises of future ownership. Hospitals and medical practices are seeking ways to provide additional compensation, or to be able to guarantee income levels for new physician Employees. Often these take the form of recruitment agreements. In addition,
when they are being recruited, Physicians are often seeking additional compensation in the form of signing bonuses, loan repayment and moving expenses.

Physician Recruitment payments have been addressed under Stark in the Physician Recruitment Exception found at 42 USC § 1395nn(e)(5). This exception permits such payments provided the “(A) the physician is not required to refer patients to the hospital, (B) the amount of the remuneration under the arrangement is not determined in a manner that takes into account (directly or indirectly) the volume or value of any referrals by the referring physician, and (C) the arrangement meets such other requirements as the Secretary may impose by regulation as needed to protect against program or patient abuse.”

**Recruitment Agreements**

Recruitment Agreements, in general, are agreements between a medical practice wishing to hire a physician and a hospital desiring to entice a physician to come to the geographic area served by the hospital. In the typical recruitment agreement, the hospital pays the medical practice money, which the practice uses to pay the new physician Employee and/or expenses associated with the physician Employee that has been recruited. Recruitment agreements typically provide payments for one year and the physician Employee must agree to certain conditions including working full-time in the given service area for a minimum period of time and enter into an agreement to repay the advanced funds if the physician does not remain in the community. Payments are sometimes made in the form of a loan, which is then forgiven over time as the physician continues to work in the service area. The idea behind the recruitment agreement is to assist the medical practice in bringing in a new physician Employee (or new practice) by providing temporary financial support to the medical practice. In the event the physician fails to work in the service area for the requisite period of time, then the physician must repay a pro-rata amount. If the physician completes service then there is no obligation to repay.

**Hospital Perspective**

- The hospital is able to assist in meeting the needs of the patients in the geographic area.

- The hospital does not need to directly hire the physician or open a hospital practice.

- There are administrative requirements that must be met.

**Employer Perspective**

- The Employer is able to receive financial support for bringing in or relocating a new physician Employee where they might otherwise not be able to afford to bring in the needed physician.
- The Employer may run the risk of creating a competitor in their midst since the most stringent of non-compete agreements are prohibited by the Stark regulations.

- The practice must meet a variety of administrative requirements.

**Physician Employee Perspective**

- The physician Employee is subject to a specific term of service in the geographical area. Often it may not be as desirable to locate their practice there; however, they will be forced to repay a pro-rata share of the loan if they do not complete the service.

- The physician Employee can get their “toe in the door” in an area and if there is no non-compete, they may have the option or ability to move to another practice or open their own practice either during or after the repayment period.

**Signing Bonuses, Moving Expenses and Loan Repayment**

Signing bonuses have become an increasingly popular and some even say standard recruitment tool for physicians to come to a practice. Prospective physician Employees have often come to expect such bonuses. The funds may be needed by the Employee for variety things, such as paying down student loans or credit cards, payment of fees and expenses related to board certification, payment of attorney’s fees, the down-payment on a new home or other expenses. The amount of bonuses varies greatly depending on the physician Employee’s specialty and the resources, needs and location of the Employer. In many cases the signing bonus is paid either upon final execution of the employment agreement or upon commencement of the employment agreement.

Signing bonuses are normally tied to a specific term of service for the Employer with varying repayment requirements if the physician Employee does not commence or complete the required term of service. Signing bonuses also carry with them a potential tax liability for the recipient. Some Employers will characterize the signing bonus as ordinary salary or wages, with the result that the Employer is responsible for withholding and payment of the Employer’s portion of payroll taxes. Other Employers will characterize the bonus as 1099 income leaving the entire tax liability and responsibility for payment to the physician Employee.

It is important that the parties clearly understand the tax consequences the signing bonus in order to prevent a situation of confusion and discord when a physician Employee suddenly discovers that they owe several thousand dollars more to the IRS at tax time. Finally, where the physician Employee does not complete the required term of service, there are a variety approaches to repayment. Some Employers require repayment in full or even add interest in the event non-completion of the term. Others have a lump-sum forgiveness amount for each year of the requirement. While still others have a pro-
rata approach decreasing the amount each month. Whichever approach is taken, it is still important to consider the tax consequences of repayment. In most cases the Employer has already taken appropriate deductions and the Employee has paid appropriate taxes. A partial or total repayment will need to be properly accounted for by both the Employer and the physician Employee.

Moving expenses have also become routine in many physician employment contracts. The Employer agrees to pay for moving expenses. These payments are often in addition to signing bonuses and loan repayment provisions. Moving expenses may be handled in different ways. Some Employers will pay the moving expenses, up to a certain dollar amount, directly. This has a certain tax advantage for the parties and administratively is much more simple between the parties. Other Employers will reimburse the physician Employee for his or her moving expenses, up to a certain amount, upon the submission of receipts by the Employee. Still others will simply provide a lump sum payment to the physician Employee, which the Employee can put toward moving expenses. The Employee keeps any amount not used to pay those expenses. These last two result in certain tax consequences to the Employee. The Employee will be taxed on the funds received, but should be able to deduct any moving expenses pursuant to the regulations.

Just as in the case of signing bonuses, moving expenses are often tied to a specific employment term of the contract. If the Employee does not complete the requisite period of time, then repayment requirements are invoked in the same way as for signing bonuses.

Loan Repayment

Student Loan Repayment or loan forgiveness is another way in which Employers can provide additional incentives to physician Employees. Federal and State funds may be available where there are Medically Underserved Areas or Populations. In addition, some hospitals or large entities offer student loan repayment plans for physician Employees who are just completing their training. Again, Employers must make sure that such plans comply with state and federal laws and regulations.

Employer Perspective

- Physician Recruitment payments are a good tool to bring in and keep a new physician Employee. The repayment penalties provide a disincentive for the Employee to leave.

- The Employer has the ability to transfer the entire tax burden on the Employee depending on how it is structured.

- The Employer may feel obligated to provide recruitment payments whether or not it is financially a good decision due to the prevalence and expectation of such payments.

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Physician Employee Perspective

- Recruitment payments are a great help to physician Employees, especially those just getting out of training. The transition from training to private practice can be very stressful financially and a signing bonus can help enormously.

- Tax concerns are important and the physician Employee needs to know what they will have to do in advance.
- Repayment provisions may not be fair to the physician Employee and may make it difficult for them to leave an employment situation that is not working out.

K. Termination Provisions – Termination for Cause

The contract termination provision is a key element of any physician employment contract. The primary issues to be negotiated regarding the termination provision include the following:

- The term of the agreement. The parties will want to make sure the term isn’t unduly long so that the compensation and practice losses, etc. can be reviewed for FMV and commercial reasonableness.

- Whether the parties may terminate without cause and if so, how much notice is required. The Employer may wish to reserve the right to “buy out” the physician’s notice period. A short no-cause termination period may assuage some discomfort with potentially contentious contract terms.

- What actions or omissions will constitute a “breach” and whether the breaching party shall be given an opportunity to cure. The Employee will likely want the opportunity to be notified of, and cure any deficiency.

- Whether liquidated damages may be imposed for breach. Again, state law will govern the outer limits of liquidated damages.

- Whether hospital privileges are coterminous with the employment contract.

III. Conclusion

Physician employment agreements are on the rise for many reasons. Lifestyle choices, malpractice premium costs, administrative burdens and declining reimbursement are all factors which may incentivize physicians to seek employment rather than private practice. Employers benefit from employment models which ensure patient access to care, call coverage, and availability of certain service lines. Understanding the Employer and Employee perspectives on the most often-negotiated contract provisions can help counsel for both parties facilitate a productive and long-lasting employment relationship.