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Physician's Employment Contract Guide Summary

The purpose of this Guide is to provide an overview of a few key considerations to keep in mind when evaluating an employment contract.

1. Evaluating the Offer of Employment. Consider the employment opportunity as a whole; do not focus exclusively on your compensation package. Factors such as the practice's reputation, benefits offered, malpractice coverage, your day to day duties, and shareholder eligibility should be considered as well.

2. Specificity. Ambiguous or vaguely worded provisions can create problems down the road. Pay particular attention to provisions such as "in the employer's sole discretion" or "in the employer's sole judgment." Remember, "the devil is in the details." If the contract refers to another document, such as corporate bylaws, practice policy, or a retirement plan, obtain a copy and be sure it is dated.

3. Core Elements of Your Employment Contract

a. Compensation:

i. Base Salary. If there is a base salary it needs to be stated clearly, including the frequency with which disbursements will be made (e.g. monthly or biweekly). To avoid any misunderstanding, it should be clear that unless employment ends, the base salary is guaranteed and is not subject to any reduction and only specified deduction (e.g. ordinary payroll deductions, such as federal and state wage tax).

ii. Productivity Based Salary. For young physicians, these arrangements are not recommended. This is because the level of proficiency required to generate reimbursements at levels necessary to make this model financially rewarding is rarely acquired fresh out of fellowship or residency. Further, if you are employed to establish a new practice or staff a new satellite office, your compensation may suffer as the practice's patient volume is established.

iii. Productivity Bonus. Be crystal clear on how your productivity bonus will be calculated. Eligibility for a productivity bonus usually begins when you have

generated between two and three times the value of your base salary, this allows the employer to cover your salary, expenses, share of overhead, and realize a degree of profit from your practice before sharing surplus profits with you.

iv. Pre-employment Compensation. Pre-employment compensation, such as sign-on bonuses, payment immigration and associated fees, and relocation expense reimbursements are common, particularly with sub-specialists. Beware that an increasing trend is to structure these payments as forgivable loans, such that if your employment ends before a specified date (e.g. the second anniversary of your employment) the sum(s) paid to you or on your behalf are reimbursable to the employer.

v. Post-Termination Compensation. The contract should specify whether you are entitled to a bonus based on services rendered while employed but the reimbursements for which are recovered after termination.

b. Restrictive Covenants. Covenants-not-to-compete are generally enforceable, except in States which commonly prohibit their enforcement (e.g. Alabama, California, Colorado, Delaware, Montana, Nebraska, North Dakota, and Oklahoma), if the restriction is reasonable as to the geographical area, duration, and the restricted activity. The governing standard used by most courts in validating or invalidating restrictive covenants is "reasonableness," which varies greatly between metropolitan and rural areas, and is determined on a case-by-case basis.

Practical Advice: If your employer terminates your employment "without cause," the effect should not the same as if terminated "with cause." As such, you should negotiate mattes such as the applicability of the non-compete and post employment reimbursement obligations from this premise.

c. Physician Duties/Responsibilities. Your contract should describe your duties, your professional schedule, and if applicable, additional practice location(s). Additionally, if the success of your practice is contingent upon ancillary support and/or equipment, your contract should specify that the employer will provide such support (i.e. personnel and equipment).

d. Professional Liability Insurance. It is standard practice for the employer to decide upon the type of coverage. The contract should specify the type of coverage and your policy limits. Generally, there are two types of malpractice insurance available, "Occurrence" and "Claims Made."

i. Occurrence Coverage. This type of malpractice insurance covers physicians for services rendered or actions committed both during and after the term of the employment contract.

ii. Claims Made Coverage. This type of malpractice insurance is usually far less expensive than occurrence coverage. Under this type of policy, the relevant date is not when the act or omission occurred, but when the harm was claimed, and if it is

claimed after your employment ends you are not covered by the insurance policy. In sum, under a Claims Made policy, your coverage terminates when your employment terminates. To maintain insurance for claims made after employment is terminated, you should have additional insurance known as "Tail Coverage".

iii. Tail Coverage. This type of insurance covers claims based on actions committed while under the employment of a former employer whose malpractice insurance will not cover the physician. You need to negotiate hard for tail coverage; it is an expensive and critically necessary protection. Tail coverage is very expensive. For this reason, it is often a "deal breaker" for many physicians. There are several ways to negotiate responsibility for tail coverage, and all allocation models should be presented, one by one, until the employer agrees to one model or you ultimately decide to walk away and explore other opportunities.

iv. Nose Coverage. Nearly the opposite of tail coverage, nose coverage operates to protect against claims arising against a physician for acts committed while under a former employer but arise while with the current employer. In sum, it overlaps with tail coverage. Rather than being provided by a former employer, nose coverage is provided by a current or future employer. Nose coverage is very rarely provided, and if an employer states that a subsequent employer will offer nose coverage, please do not accept this statement as true. If the prospective employer is unwilling to pay for tail, why would a subsequent employer assume such cost for unrelated employment?

e. Termination. Termination may be "for cause" (i.e. based upon a reason or justification related to job qualification or performance by either party) or it may be "without cause" (no reason needed.) It may not be for "bad cause" (race, gender, or retaliatory, for example). Make sure the conditions precedent of "for cause" termination are spelled out in detail and do not contain vague descriptions like "unprofessional conduct."

4. Conclusion. Keep in mind that equally as important as the actual wording of the contract language is the intent behind such wording. Indeed, deciphering intent is a skill acquired over time and with experience garnered through the negotiation of similar contracts. Understand that contract negotiation is an art, a delicate dance of give and take between you and the employer. Ultimately, you both want to secure your employment, albeit on different terms (as you of course seek the most favorable terms to protect your interests, and the employer seeks the terms most favorable to its interest). If you are inexperienced in negotiating employment terms, you would be wise to enlist the assistance of a skilled attorney to review your contract and negotiate its terms on your behalf, or at a minimum advise you on how to structure your arguments (i.e. reasons in support of the employer accepting the revisions you propose).

Please do not hesitate to contact me if I can be of any assistance as you consider your next employment contract. I can be reached by phone at 202.572.1004 or via email at rjholloman@hollomanlawgroup.com.

Sincerely,

Roderick J. Holloman