

Negotiating Your Physician Employment Contract

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Because the employment at-will doctrine is so doggedly followed by Virginia courts, employment contracts are the main tool physicians have to improve upon the default rules that “public law” provides to everyone. However, they also represent opportunities for their employers to do the same for their own benefit.

There is no such thing as a “perfect” contract. Inevitably, there will be compromises, oversights, loopholes, and so on. But an employment contract can be a much stronger, more protective document if the eight items addressed below are considered.

1. Noncompetition Agreements (“Non-Competes”)
 - a. Contrary to what you may have heard, these generally are enforceable in Virginia.
 - b. The fact that your employer terminates you does not relieve you from your non-compete
 - c. It is possible, however, to fight non-competes after the fact, when they are too aggressive.
 - i. Time restriction is too aggressive (2 years is a rule of thumb)
 - ii. Geographic reach is too far
 - iii. Substantive scope is overly broad (your specialty vs. medicine generally)
 - iv. Public health concerns
 - d. If you sign an employment agreement with a non-compete in it, you should plan to abide by it, because (among other things) the legal expense of fighting one in court is considerable

2. Compensation

- a. The compensation structure must be clear and leave no room for interpretation. If it is unclear, there will be room for disagreement and battles down the road.
- b. Bonus structures, unfortunately, are frequently unclear.
 - i. You need deadlines for payment. 30-60 days after the end of a time period is reasonable.
 - ii. You want a trustworthy third party to calculate, as opposed to someone who might have a reason to fudge the numbers.
 - iii. For production-based bonuses, look for a pro-rata share if you leave before the end of a time period. Also look for credit based on collections after you leave.
 1. Remember that employment contracts are there for bad times, not good times. You do not need an employment contract when you are being treated fairly. Rather, you need an employment contract for those times when you are not being treated fairly.
- c. Do not forget the “little things,” because they add up. Have you negotiated for relocation expenses? Signing bonuses? Reimbursements for CMEs and membership dues?
- d. Changes to compensation
 - i. Do not give you employer the right to unilaterally change your compensation down the road.
 - ii. Consider negotiating for pre-determined raises.
 - iii. If your compensation will be tied to performance evaluations, make sure you know who does those performance evaluations, and how subjective/objective those evaluations are.
- e. Benefits
 - i. Beware if an employer can change them unilaterally.
 - ii. Ask for copies of the plans from HR or the office administrator.
 - iii. Health, disability, life and retirement are EXTREMELY valuable. If you have competing job offers, be sure to value them both. A good benefits package can easily be worth tens of thousands of dollars more than a mediocre benefits package.

3. Termination Provisions: Cause vs. No-Cause issues.¹

- a. Physician contracts commonly allow an employer to terminate the contract without cause upon giving some length of notice, such as 90 or 120 days. As a practical matter, this often becomes a severance package, because employers commonly pay out the notice in lieu of allowing you to work out the notice period.
- b. However, physicians typically should try to negotiate a relatively short time period to give notice of their intent to leave without cause.
- c. Pay very close attention to the definition of “cause.” Defined broadly, it can swallow the “rule” that you get a long notice period prior to being terminated.

4. Quality of Life Issues

- a. Negotiating for hours is generally wise.
 - i. Regular hours and scheduling
 - ii. Call hours
 - iii. Holidays and weekends
- b. Negotiating for the amount of vacation is important, but you need to assure a mechanism to enable yourself actually to take that vacation. Among other things, negotiate against “use it or lose it” provisions.
- c. If you will be working for a multi-location employer, look to see if your contract prevents your employer from changing your place of employment. This can be a real difficulty for two-career families and physicians with children in local schools.
- d. The contract should describe any additional duties (i.e., administrative duties, participation on panels, etc.) that the physician is required to do.

¹ A doctor and a lawyer in two cars collided on a country road. The lawyer, seeing that the doctor was a little shaken up, helped him from the car and offered him a drink from his hip flask. The doctor accepted and handed the flask back to the lawyer, who closed it and put it away.

"Aren't you going to have a drink yourself?" asked the doctor.

"Sure," replied the lawyer. "After the police leave."

5. Malpractice Insurance

- a. The contract should specify the amounts and types of malpractice insurance.
 - i. Claims made – coverage is given only if the physician had that insurance policy in effect (1) on the date of the incident giving rise to liability, and (2) on the date the claim of malpractice is actually made
 - ii. Occurrence – you are covered so long as you had the insurance policy in effect on the date of the incident giving rise to liability (much like your auto insurance)
- b. Most policies are claims made, because that is cheaper.
- c. Make sure your limits are for at least the caps, and watch for practice outside of Virginia in states without caps.
- d. You should negotiate the tail coverage issue. Do not, ever, let yourself go exposed without insurance. Buy either tail coverage from previous insurer or nose coverage from new insurer.
- e. Upon starting a new job, get a copy of the “dec page,” *i.e.*, declarations page, from your practice administrator, and keep a copy at home. You might get sued after you leave a practice.

6. Issues of Control

- a. Consider dealing with any concerns with referral practices.
- b. Consider dealing with concerns about the assignment of patients and procedures.
- c. Handle up front any staffing needs you have, and whether you will have hire/fire power.
- d. Memorialize any promises made during the recruitment about specific equipment needed for your practice.

7. Common Concerns with Boilerplate

- a. Contracts frequently ask a physician to comply with other policies of the employer that usually are not attached to the agreement. You must review these before signing the contract. If they are incorporated by reference in the agreement, they are as much a part of the contract as the language right in front of you. Beware if the employer has broad power to change them.
- b. Do not sign indemnity or hold harmless provisions in favor of the employer. There is the hazard of personal liability on the physician, and there are potential insurance issues if a malpractice insurance policy excludes contract/indemnity damages.
- c. Partnership provisions in "agreements to agree" are worthless.
- d. Watch "entire agreement" clauses. The Contract should expressly include all inducements and promises made to the physician.

8. Clarity

- a. An unclear or vague contract is a useless contract. At the end of the day, a contract is only as good as a judge's ability to understand it.
- b. Use active voice and ordinary English, and weed out inconsistencies.
- c. Beware of the employer who cobbles together forms from others.
- d. Do not forget to fill in all the blanks!²

² A lawyer questioning a doctor during a trial:

Q: "Doctor, before you performed the autopsy, did you check for a pulse?"

A: "No."

Q: "Did you check for blood pressure?"

A: "No."

Q: "Did you check for breathing?"

A: "No."

Q: "So, then, it is possible that the patient was alive when you began the autopsy?"

A: "No."

Q: "How can you be so sure, doctor?"

A: "Because his brain was sitting on my desk in a jar."

Q: "But could the patient have still been alive nevertheless?"

A: "It is possible that he could have been alive and practicing law somewhere."