

# If you wouldn't perform your own surgery, don't draft your own employment contracts

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**M**y husband's coffee mug says, "Don't Confuse Your Google Search with My Nursing License." Mine says, "Don't Confuse Your Google Search with My Law Degree." Many of my physician clients dread treating patients who spend the night before surfing Google and WebMD. Yet, those same physicians will negotiate their employment agreements armed with web searches and anecdotes about a friend's contract.

Many contract provisions can — and should — be heavily negotiated at the onset of the employment relationship. Failure to do so can leave a physician with limited rights upon termination of the agreement, creating serious long-term consequences.

Following are some common mistakes physicians make when entering into employment agreements:

## Hiring counsel too late—or hiring the wrong counsel

Many physicians fail to take the same care in reviewing an employment agreement as they do with a patient's medical history. Physicians regularly call me when they are leaving their employer and are shocked to find out what their contract obligates them to do. Effective negotiation strategy requires proactive contract review long before the ink is dry and thoughtful consideration of exit strategies.

Consulting with an employment attorney early on presents your best opportunity to obtain more attractive contract terms. Make sure to contact the right kind of lawyer. Just as you wouldn't refer a patient to a podiatrist for brain surgery, don't use your brother's divorce lawyer to negotiate a physician employment agreement. Consult a board-certified employment lawyer who has experience in health care and physician employment agreements.

## Ignoring due diligence

Although salary, call schedule and other economic terms are important, physicians may fail to perform sufficient due diligence on the hospital or practice group. Before contract negotiations, physicians should research employee turnover, litigation history, past years' financial performance, malpractice claims, and the reputation of the practice in the community.

Similarly, an employer's conduct during negotiations may raise red flags — a "take it or leave it" approach rarely is conducive to a long-term collaborative working relationship. Experienced healthcare employment counsel can help address such issues early in the process.

## Accepting unreasonable conditions of employment

By the very nature of your job, you may be expected to work unusual hours and under stressful conditions. Physicians often overlook whether their employment contract specifically describes their job duties. What the physician will be required to do, where, and how he

or she will be expected to perform these duties are crucial aspects of any physician employment agreement and should be negotiated prior to discussing compensation.

A list of specific proposed duties should be clearly spelled out in any physician employment contract, including:

- Office or clinic hours
- Hospital rounds
- Call schedules
- Charting and documentation
- Availability of nurses and support staff
- Administrative obligations
- Permitted outside activities (e.g., speaking, writing, teaching)

If a practice has multiple locations, then clarify the location of your specific clinical practice, as well as the hospitals or clinics you will be expected to cover. If a practice uses metrics or algorithms to measure clinical performance, ensure that you know what they are and how they are used.

## Overlooking key contract terms

Physicians often overlook the number of years (the "Term") their contract will run, whether the contract is renewable, by whom it is renewable, and the required notice for termination. New physicians may sign lengthy contracts with inadequate consideration of salary increases and escape clauses. Some contracts are self-renewing, renewable by mutual agreement, or renewable only as the employer's option.

Contract ambiguities frequently lead to litigation. For example, clauses stating that a physician must "reside locally" or follow "all policies of the practice in effect from time to time" are ambiguous. What precisely does "reside locally" mean? What are the "current and past policies of the practice"? It is much better to describe a geographic radius where a physician must reside and identify the precise policy documents a physician is bound to follow.

## Not understanding defined terms

Your employment agreement likely will contain a number of defined terms that appear in quotes, boldface or underlined. When a defined term is used, a court likely will interpret it according to its definition in the contract rather than its common dictionary definition. Contract definitions can vary widely from a layman's understanding of a word.

For example, a contract may state that a physician "may be terminated immediately for Cause." Because "Cause" is capitalized, it is a defined term. Recognizing and defining terms in a contract is crucial. In the case of "Cause," the term usually is followed by a series of examples. Often the components of "Cause" permit an employer to label almost any action or omission as "Cause." Negotiating reasonable defined terms is a key part of contract negotiations.

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### Not understanding compensation formulas

Many contracts contain complex incentive formulas based on relative value units (RVUs) that may have minimum income guarantees. In many instances, incentive or bonus plans are written to protect the employer and not the physician. Clauses that require careful attention include:

- The ability of the practice to cancel or revise the incentive plan
- The precise calculation of the physician incentives
- Revenue thresholds for incentive eligibility
- The definition of key terms (e.g., positive net income, negative variance, percentage, gross revenue)
- Availability and terms of equity ownership

Prospective employees should review the proposed incentive plan with their employment lawyer to make sure it includes objective and understandable metrics.

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### Overlooking benefits

Although salary is a key contract term, benefits should be negotiated to maximize the economic value of the contract. Common benefits include:

- Tuition and CME reimbursement
- Health, life and disability insurance
- Malpractice coverage
- PTO or vacation/sick leave, maternity leave
- Professional dues and journal subscriptions
- Relocation expenses
- Profit sharing
- 401(k) and other retirement plans

Some “benefits,” such as relocation reimbursement, may come with repayment obligations if a physician leaves the practice group before the contract expires. This is a key provision that your counsel should negotiate.

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### Agreeing to unreasonable covenants not to compete or not to solicit

Most physician employment agreements contain a covenant “not to compete.” This restricts you from practicing in your specialty in a certain geographic location for a certain period of time after termination of the employment agreement.

You should be concerned with:

- Length of the restriction (in years or months)
- Restricted area (radius from practice location or specified cities/counties)
- Exceptions or excluded activities (e.g., different practice areas, teaching, corporate or insurance positions, or working as a medical director of a noncompeting company)

Texas law generally requires that noncompete covenants be “reasonable” and include a provision permitting a physician to buy out the noncompete agreement. Experienced counsel can identify unreasonable restrictions and negotiate provisions that protect the goodwill of the practice but allow you to continue earning a living.

Contracts may prohibit solicitation of patients upon termination. However, Texas Medical Board rules require physicians to notify patients when they leave a practice. Nonsolicitation provisions must be carefully negotiated to comply with TMB rules. A board-certified employment law specialist—with healthcare expertise—can help you avoid the crosshairs between conflicting contract provisions and statutory requirements.

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### Agreeing to onerous termination provisions

Physicians must understand the financial implications of the termination provisions in a proposed contract. Although a contract may state it has a two-year term, the fine print may permit termination at will with only a few weeks’ notice. Even when a contract states it can be terminated immediately only for “Cause,” the term may be defined to include “unbecoming conduct” or “inadequate performance,” which allows the employer to terminate for almost any (or no) reason.

Physicians should pay attention to the contract events that can trigger a termination, including:

- Length of notice required for termination
- Broad definitions of “Cause”
- Suspension of privileges, including license suspension
- “Material” breach of contract
- Illness or disability

Voluntary resignation generally requires a physician to work through completion of the notice period. Attempted early departure may result in the employer’s demand for payment of interim staffing costs. Some contracts explicitly require this payment, in the event *locum tenens* rates exceed the physician’s contracted rate.

Physicians and their counsel should carefully analyze the termination provisions of the proposed contract to ensure they are fair and reasonable. Provisions that are too one-sided or vague could be red flags of a difficult employer.

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### Not understanding confidentiality obligations

Most physicians understand HIPAA confidentiality obligations; however, other confidentiality provisions are included in TMB rules, the Texas Uniform Trade Secret Act, employment agreements, and common law. All physician employment agreements require protection of confidential information and compliance with HIPAA. Make sure you understand the legal definition of “confidential information,” which can include far more than patient records.

Additional obligations are included when a physician leaves his or her practice. Although a physician cannot simply walk out with patient records that belong to the practice, TMB rules and Texas law require that physicians cannot be denied a list of patients they have seen or treated within one year of termination of employment, as well as access to medical records upon patient authorization. It is vital to ensure that the confidentiality provisions of the employment agreement comply with Texas law and TMB rules.

These are just a few reasons it is so important to be fully prepared and backed by an experienced employment attorney before negotiating your next contract. Doing so will improve the terms for you, and help avoid problems down the road. **DMJ**

*Alyson Brown practices employment law with Clouse Brown, PLLC. She is board certified in labor and employment law. Clouse Brown represents physicians, healthcare executives and practice groups with employment law issues, including physician employment contracts and covenants not to compete. [www.clousebrown.com](http://www.clousebrown.com).*

