



# Employment Contracts and Insurance Audits

There is much more to the employment contract than the bottom line.

BY LAWRENCE F. KOBAK, DPM, JD

**A**t first blush, you might ask what an employment contract has to do with an insurance audit. One of the dirty little secrets of some large practices is that it has everything to do with it!

First, let's differentiate between an independent contractor and an employee. While there is more to it, the employee will have their Social Security and Medicare withheld by the employer. The independent contractor is responsible to do that on his/her own. The employee can be paid on a percentage basis of money they produce for the practice based upon what is earned from the patients they treat. An independent contractor may not be paid on a percentage basis. It is considered illegal.

This is a federal law so it pertains to all of the states.

Additionally, it is important to note that a part-time employee is an employee nonetheless and may be

working for another podiatrist or group of podiatrists. In most states, a podiatrist cannot be a partner or own a professional corporation in a "medical" practice with a non-podi-

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paid a percentage of what they produce. You may be a part-time employee in several practices and the law is the same. Again, not so for an independent contractor who works in one or multiple practices. To be sure, I am talking about a podiatrist

working for another podiatrist or group of podiatrists. The reason is that, in effect, they would be expanding the scope of their license to include their partner/co-owner's licensure scope.

It is amazing how many podiatrists are independent contractors

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but get paid by a percentage. This is illegal! Consult with a competent healthcare attorney at once if you are one of these people.

Back to the subject at hand: insurance audits and the employed podiatrist. Many young podiatrists upon completion of residency are desperate to obtain well-paying positions. Their debts are often well into the “6 figures”. They obtain a job offer and the first and often only thing they look at is the bottom line—what they will get paid. If they like the number, the analysis stops there. That is where the analysis should first start.

### **Restrictive Covenant**

Is there a restrictive covenant? How many miles or counties are you restricted from practicing if you leave? For how many years? Remember, when you sign a contract, you are on a sort of honeymoon; all is right with the world and you will never have to worry about any restrictions. This is shortsighted reasoning. Too many healthcare providers painfully find out where the

vided by the practice or is it your responsibility? If you do not know the difference, that is reason enough to look beyond the bottom line and consult with a healthcare attorney.

What about the call schedule? How much do you value your sleep?

skipped down to read. Will you receive a straight salary if you work a certain number of hours, or is it pegged to a measure of productivity, such as RVUs? Are you being paid on a percentage of what is received? Are you being paid a base salary with a

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## **Will you receive a straight salary if you work a certain number of hours, or is it pegged to a measure of productivity, such as RVUs?**

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What is the requirement re: the hours you must be present in the practice? Did you bother to look? Too busy admiring the bottom line?

### **Benefits**

Another important item is the benefits. Do you get health insurance? Is it only for you? Can your family buy in? What type of health insurance is being offered? Do you have to pay for a part of your policy? Does it include eye glasses, dental? How about a life insurance policy or disability insurance?

bonus based upon certain RVU (productivity) milestones?

Many employment contracts reference other documents, such as an employee manual. It is of the utmost importance to obtain any and all documents referenced. The terms in the employee manual are usually incorporated into the employment agreement by reference. That is where you will usually find out more about their holiday policies, religious observance, pregnancy contingencies, and the like. The devil is in the details. Do not think for a second that certain requirements do not apply to you. Famous last words from employers eager to sign you up generally start with: “Don’t worry about it.” That is when it is time to start to worry.

What about termination? There are generally two different sections on this topic. One is termination with cause. That is generally for events such as losing your DEA license, being suspended from Medicare, being disciplined by your state licensing board, being convicted of a crime, acting in an “altered” way, being responsible for a podiatric malpractice, and even a failure to pay child support. It might also include not filling out your medical charts in a timely fashion, including not dictating operative reports on schedule. It often includes the warning that you must do what needs to be done in order to get the bills out in a timely fashion. This is where it might get tricky. Who has the final say in what CPT codes are billed for? Is it you, your boss, the billing company, the

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extent and legality of the restrictive provisions come into play.

Something that some practices with multiple locations like to slip into the Employment Contract involves restrictions from EACH office in the practice at which you have worked. If you have covered an alternate location for a sick colleague on occasion, why should you be penalized because of it? Perhaps the contract should have a clause that states that the restriction is only for the locations in which you spend a certain amount of time, not just where you have worked for any length of time.

Is the practice providing malpractice insurance? Is it claims-made coverage or occurrence? Is a tail pro-

If you are ill, how much sick leave do you get? Vacation time? Can you take it all at once? What about time to attend CPME events and seminars? Do you have an allowance for your CPME? Who is paying your national, state, and county podiatry society dues? Your fees for state licensure?

Does your employment contract state that you must have admitting privileges at a certain hospital? Must you be on the panel of certain insurances as well as Medicare and Medicaid? Are you excluded from the practice if you have a prior history of being sued for podiatric malpractice, even as a resident?

There may even be more to that bottom-line provision that you

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front desk person, someone else? Remember, if it goes out with you as the treating podiatrist, it is, at least in part, your responsibility.

Do you have the final say on how to treat patients? Can you be forced to give a treatment that you, in good conscience, disagree with? We are now zeroing in on the

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title of this article—insurance audits and the employment contract. One word before we do. If you are terminated without cause, restrictive covenants are often unenforceable. For termination without cause, contracts usually require each party to give a certain amount of time as notice. A select few contracts require a much longer amount of time for you the employee to leave without notice than

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for employers to terminate you without notice. When you see this, be immediately suspicious about the fairness of the rest of the contract.

The odds are that you will eventually be audited by an insurance company and/or Medicare and Medicaid. When you are an employee of a practice, how will it be handled if the insurance company asks for the return of \$100,000? What are the reasons? Did the level of documentation not support the CPT codes used? Were treatments considered experimental and therefore not covered? Did someone change the codes you wanted to be billed? Did you forget to document your charts in a timely fashion?

As you can see, some of the aforementioned reasons may be due to your employer. Some of the reasons fall on you and your lack of proper practice. Depending on how the employment contract is worded, it may cost you a lot of money you can ill afford to give back. Some contracts require you to pay back all the money from your pocket when it is due to your lack of timely documentation. The problem with that is: you, the employee, were not paid all the money in the first place. Why should you have to return money that was never paid to you? An experienced healthcare attorney should not let you accept that wording.

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You are going to hear a lot of nice words and wonderful thoughts from the people who are trying to hire you. They can promise you an equity position in the practice within three years, but are they willing to put it in writing? They might even guarantee you a raise after one year if all goes well, but are they willing to put that in your employment agreement? Words are cheap. If it is not in the four corners of the written contract, do not count on whatever it is that is being promised. Yes, having your offered contract reviewed by a healthcare attorney might cost a bit of money, but the consequences of making a mistake could affect the rest of your podiatric career. **PM**

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**Dr. Kobak** is Senior Counsel in Frier Levitt's Healthcare Department in the Uniondale, New York. Larry has extensive experience representing physicians in connection with licensure issues, as well as successfully defending physicians before Medical Boards, OPMC, OPD investigations, as well as Medicare Fraud, Fraud & Abuse, Hospital Actions, RAC Audits, Medicare Audits, OIG Fraud, Health Care Fraud, Medical Audits, and Health Plan Billing Audits. As a licensed podiatrist

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