

The Employment Agreement—Part 3

Compensation and contract terms need to be negotiated.

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This article is the third of three parts.

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In the beginning of this series, I compared the employment process to online dating. Like dating, there is a “getting to know you” phase of the employment search process that requires recruits and hiring organizations to evaluate each other. For the physician seeking employment, this includes conducting cultural and financial due diligence, performing an operational assessment, and eliciting input from a personal advisory group of family and peers. If this “dating” process is mutually agreeable for both parties, the final step in the employment seeking process is negotiating an employment agreement. If you are at this point in the employment process, information in this article will help you formalize your new employment prenuptial agreement.

More Than Just Salary

Many recruits remind me of Cuba Gooding Jr.’s character in “Jerry McGuire,” screaming, “Show me the money!” Dollars are great, but they cannot be your only concern. Non-monetary issues often trigger a physician to divorce him or herself from an unpleasant employment situation. A call schedule that could

destroy your personal life isn’t worth extra money. Agreeing to an extremely restrictive non-compete clause because the compensation is tasty will seem like a poor choice down the road if things do not work out. Think how popular you will be at home when you have to pull your kids out of their school because you can’t practice within 50 miles and now have to relocate for a new position.

An emergency department physician client was offered employment with a national company. The

Preliminary Principles

Before we talk specifics, there are two important principles you must follow:

1) **Get everything in writing.** Never rely on verbal offers, handshake or side deals, or assurances about past practices. The entirety of the business bargain, which sets forth all rights and obligations of each party to the agreement, must be in writing. Ancillary documents—such as billing protocols or

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non-compete agreement stated he could not practice in several specific zip codes, and “anywhere else the company chooses to do business in the future.” Essentially, this physician was being asked to agree not to compete in a location that has not yet been determined. I told my client, no deal. The clause was not in his best interest.

The point is, although salary certainly is important, don’t let it overshadow the other critical areas of the employment agreement. Eighty percent of the problems that could plague your future relationship with the practice you are considering joining are not related to the amount of money you are paid.

operational manuals—do not have to be part of the contract. But if any of their elements are part of the deal, they must be referenced in the contract.

2) **Engage the services of an experienced healthcare attorney.** What would you think if your patient said, “I think I can diagnose and treat myself. I have Google and YouTube. How hard can it be?” I have the same thoughts about young physicians who try to handle the contracting process on their own. The cost of having an attorney represent you, review terms, draft amended or supplemental language, and talk with

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the employer on your behalf may set you back a few thousand dollars. But that is nothing when compared to the fees associated with extricating yourself from the agreement in the future, should that become necessary. (Not to mention time that would take away from family and patient care.)

Compensation

Compensation is a package that includes more than salary and bonus. It also includes insurance premiums, retirement, expense accounts, professional society dues, board certification fees, subscriptions, hospital staff fees, moving costs, reimbursement for continuing medical education (CME) expense, paid time off, research stipends, and honoraria.

Salary and Bonus

It is customary for an incoming physician to be guaranteed a threshold salary for the first several years as a patient base develops. The amount is based on specialty and geography as well as supply and demand issues for the specialty, within the local market.

The Medical Group Management Association, the University Healthcare Consortium, the American Medical Group Association, and Sullivan Cotter publish benchmark surveys that compare compensation and productivity among physicians nationally. Although to some extent the salary you are offered can be based on a certain percentile within these data, or the need for your specialty in the market, industry regulations require healthcare organizations to pay fair market value compensation to physicians for their services. For the most part, gone are the days when a

practice or hospital could pay whatever it wanted to snag a hotshot physician. The salary and bonus offered must conform to benchmarks and fair market value.

Nearly all healthcare organizations calculate salary and bonus plans using relative value units (RVUs). Further, it is the work component of the RVU (one of three components that make up the total RVU, along with practice and malpractice expense) that is totaled to determine productivity targets.

According to Amy Boyer, MBA, consultant with Karen Zupko & Associates, Inc., “A typical offer is a

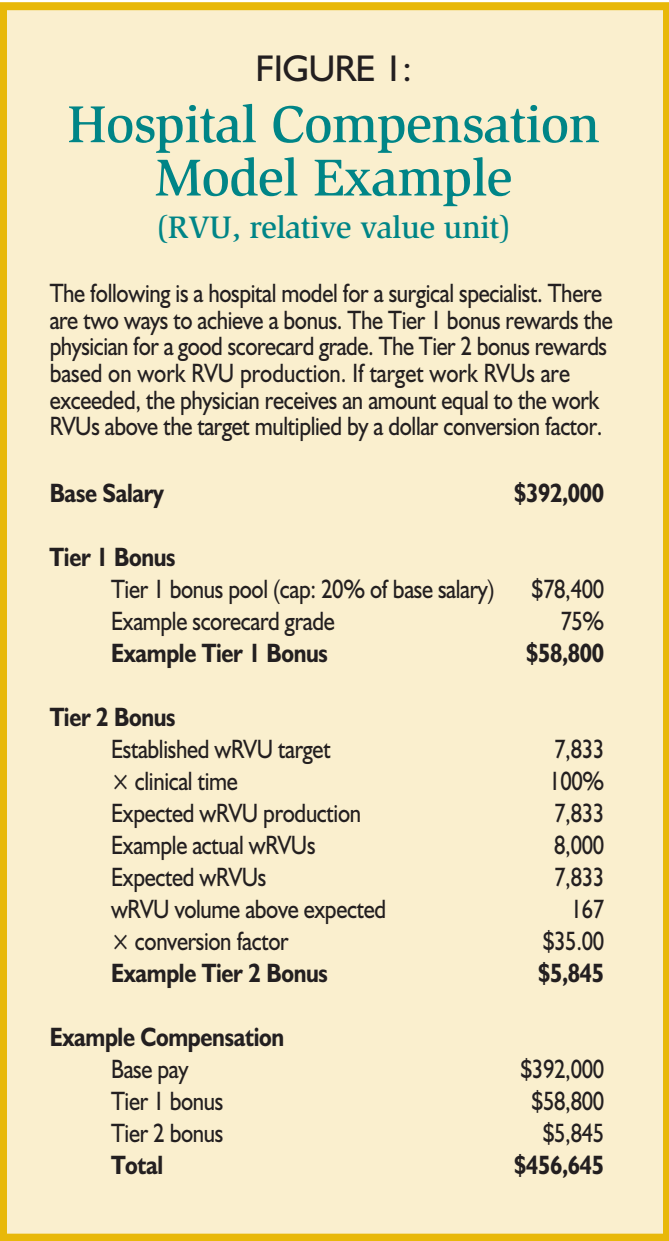
two-year guaranteed salary, with a work RVU target requirement (for example, 6,800 is a common target for surgeons), that must be produced to maintain the salary.” If the physician produces an amount of work RVUs above the target, a bonus is paid, based on a pre-determined formula. Figure 1 shows a hospital compensation model example.

Boyer points out that it is essential for physicians to understand the coding process, because coding impacts RVUs, which drive reimbursement, and, therefore, compensation. Ask whether you are expected to code your claims, whether billing staff can bundle codes or add modifiers, and how the organization calculates work RVUs.

Let’s pause here to acknowledge the complexity of these compensation formulas. As one of my clients said, “I need a calculator, three pencils, and a sober astrophysicist to verify my paycheck.” Boyer suggests negotiating a “right to audit” clause into the contract. “It mitigates the physician’s risk of the organization hiring incompetent billing staff or failing to train them—both of which have a direct impact on the physician’s paycheck.” Boyer recommends that the clause includes a requirement to provide a monthly report of the physician’s CPT code usage and the surgery schedule.

If the physician feels he or she is not receiving complete or accurate information about RVUs or reimbursements, the “right to audit” clause should state that the physician may hire an auditor of his or her choosing to conduct a claims and documentation review. “If the audit shows no errors, the physician pays for the audit,” Boyer suggests. A more aggressive position is to re-

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quire the employer to pay a penalty if the audit shows the physician has been underpaid. For example, if errors are found, the employer pays for the audit, plus pays the physician for the unpaid compensation with a penalty of 150% of the error amount.

- **Malpractice insurance:** It is common for a practice or hospital to incur the cost of malpractice premiums. If not offered, insist that it be. Something that is not commonly paid for by an employer is “tail” insurance, purchased at the time a physician leaves employment. Tail coverage can be contentious because

Expense Account

Although expense reimbursement is not technically compensation, without being reimbursed for expenses, the recruit’s take-home pay is effectively reduced. Get in writing a list of all the reimbursable expenses you may incur. For instance, if a physician is expected to serve in an outlying clinic, where substantial use of his or her personal automobile is required, the expenses of operating that vehicle should be reimbursed.

Health insurance is an essential benefit.

Ideally, you will be offered coverage for the entire family.

Professional Society Dues, Journal Subscriptions, Board Certification, and Hospital Staff Fees

Payment of society dues is a low-cost item and commonly is offered. Similarly, online or print subscriptions to relevant journals also are offered. Hospital staff fees are relatively low-cost, and typically are included in the employment offer. If the employer is a hospital, these fees are moot. Boyer advises newly minted physicians to request reimbursement for board certification study courses and test fees. Health systems and academic medical centers are often open to including payment of these costs in the offer.

Insurance Premiums

There are five types of insurance premiums that a recruit could expect an employer to include in the offer:

- **Health insurance:** Obviously, health insurance is an essential benefit. Ideally, you will be offered coverage for the entire family. Hospitals and health systems may offer the option of multiple plans from which you may choose. It is not realistic to expect the extent of coverage to exceed that made available to other physician employees; so negotiating this point is not wise.

- **Disability insurance:** It is now rare for an employer to offer disability insurance as a physician benefit. I recommend asking for disability coverage and then, if you strike out, go forth and buy your own coverage. It’s that important. Be aware there is a tax issue to consider. If the employer pays the premiums, benefits paid out are taxable as income. On the other hand, if the physician pays the premiums, benefits paid under the policy are not considered income for tax purposes.

- **Long-term care insurance:** Long-term care insurance has become a more popular benefit in the last few years, and one that is recommended for recruits. Anyone managing the affairs of aging parents will tell you about the expense. Long-term care insurance pays handsomely and will allow you and those covered in the policy to pay for assisted living or memory care. And if you need care due to an injury or illness, it can cover that as well.

it is a significant expense. It is recommended that the party that initiates the termination of an employment agreement incur the cost of tail coverage. Therefore, if the recruit quits or is terminated for cause, he or she pays for tail coverage. If the practice or hospital terminates the recruit by notice, or a practice fails to offer a partnership status at the conclusion of the employment contract, the practice or hospital pays.

- **Life insurance:** A practice often will take out life insurance for all physician employees, and the recruit will be included in that policy. Alternatively, a life insurance rider may exist on top of the health insurance policy. This is likely how life insurance will be offered by a hospital. Make sure you understand the death benefit amount; if it is low (which it may be), talk with a financial advisor about purchasing an additional policy. Life insurance is probably the least important of the insurance coverages offered, but it is a nice benefit to have.

Retirement Plans

You probably will be offered a 401K plan, and perhaps profit sharing. These plans will be qualified for tax deferral under IRS regulations. Typically, the recruit will automatically become eligible for the plan(s) according to the employer’s term. It is not reasonable to negotiate deferred compensation plans that are over and above plans made available to others. Simply accept the plans offered as part of the package.

Moving Costs

The cost of relocating can be a significant one-time cost, and is part of most hospital and private practice offers, especially in competitive markets. Interstate moves can cost \$10,000 to \$20,000 or more, depending on the size of the recruit’s family, so it’s a sizeable benefit.

Payment of moving costs can be negotiated. The principal argument is that it’s a non-recurring expense that will be realized in year one, and never thereafter. It’s not uncommon for a practice or hospital that offers to pay for moving costs to insist on reimbursement from the recruit if he or she leaves the practice in less than a certain amount of time. Your attorney should review this clause carefully and explain your financial risk.

CME Expense Reimbursement

CME expense reimbursement can be a sizeable amount. Add up the costs of specialty society and other

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meeting fees, and getting a general sense of airfare and hotel costs. Use this as a more realistic picture of the amount of CME expense reimbursement needed. Many offers include a range of \$5,000 to \$10,000 for CME expenses. In many cases, this is negotiable. So do your homework and ask.

Research Stipends and Honoraria

Research stipends and honoraria are ad hoc sources of revenue for physicians. Practices commonly permit a recruit to retain any such earned revenue and do not count the amount against guaranteed salary. Hospitals typically deal with this differently, because research is conducted primarily in academic medical centers, which are bound by specific reimbursement and regulatory guidelines.

Vacation/Sick/CME Leave or Paid Time Off

The agreement should contain policies for vacation and sick time, or paid time off, which is a time-off method

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that provides an employee with a "bank" of days off to use for vacation, sick, or personal time away. If vacation/sick/CME time is offered, a recruit normally receives two weeks of vacation, one week of CME, and six days of sick leave, with salary continuation during such periods. If the term of the contract is for more than one year, it is not uncommon for the vacation allotment to be extended for an additional week in year three. This is a matter for negotiation.

Working Conditions

Term of Contract

Term of contract is the length of time the contract stays in force before it must be renewed or automatically expires. In most physician deals, the employment agreement is for one, two, or three years. Physicians should negotiate a one-year term as a trial period. This first year is a time during which the organization's physicians and the recruit are testing one another in an operational setting to determine whether they want to be professional colleagues long-term. After the trial period has been satisfied, the recruit is eligible to formally join the organization, sharing in its expense and income distribution formula, or becoming eligible for the bonus targets referenced in the contract.

Although a one-year trial period is ideal, a two-year term is common and acceptable as well. Some doctors have successfully contracted for a one-year trial period without a non-compete clause. If the relationship is satisfactory for both parties after one year, the physician signs a longer-term agreement that includes a non-compete agreement.

Call Coverage

Call coverage is a big deal. You may not think so now, but call scheduling will directly affect you and your family in many unpleasant ways. It is particularly important to clarify it if you are joining a private practice, because these organizations are usually less clear in the agreement about what the new physician's call schedule will be. The contract may read: "Call will be divided four ways, among the practice's four physicians." Seems benign, right? Wrong. The new physician's 25% may be 100% holidays and weekends. And that ticks off the spouse, because the family will not be spending Christmas with the parents. (Admittedly, being on call might be better than Christmas with the in-laws.)

Ask about the rotation policy and how the 25% of call is truly distributed. While a new physician certainly

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will expect that he or she is going to take more call than the senior physicians, it's important to know how you will "move up" the call schedule.

Governance

Governance is not an area that normally concerns recruits. However, in a larger practice, or a multi-specialty environment, governance has some relevance due to the policy for who is accountable for clinical matters and practice management activity such as utilization review. Moreover, it is important to learn how the practice is governed, even though this does not have direct relevance to an incoming physician. As I pointed out earlier in this series, the manner in which the practice regulates itself and distributes income and expenses will have a direct bearing on the incoming recruit, almost from day one.

Permissible Outside Activities

There are a number of things that physicians can do on the side for extra income: covering in the emergency department across town on weekends; taking shifts as a telemedicine physician for a large telemedicine company; or consulting with healthcare technology start-ups. Young physicians with six-figure loans may be especially eager to take advantage of such opportunities.

Many contracts disallow moonlighting or require written permission, per project or employer. So if side work is important to you, outline this in the contract. Again, caution: never rely on a verbal agreement. Specify the acceptable forms of work you can perform outside of regular hours. This clause is not usually a deal breaker when an employer is courting you. But once the agreement is signed, employers are not as open to these arrangements. You are in the driver's seat at signing, so don't wait on this one.

Office Hours

The contract should specify office hours and expectations regarding hours worked per week. Many organizations expect new recruits to

work more than 40 hours per week. Documentation requirements in the electronic health record (EHR) may precipitate a new physician logging more than 40 hours per week. But any expectations outside the norm should be specified in the agreement.

Physical and Human Resources

The agreement should include language confirming the organization's obligation to provide office

premises and clinical and administrative staff adequate in number and quality to enable the recruit to perform his or her duties. If the organization has agreed to provide any dedicated clinical staff, or an EHR scribe, make sure those details are written into the agreement.

Equipment

"Lasers and robotic technology are not cheap," Boyer cautions. "If you need any kind of special equipment to perform the procedures you were trained for, include them in the agreement." Often, young physicians receive a verbal assurance that certain equipment will be purchased for them. But if it's not in the written agreement it's likely the person who told you that will not follow through.

Assignment

Because an employment arrangement among physicians is a personal service agreement, it is normal for such agreements to preclude assignment by either party to any other third party. This often is modified to the extent that the employer is permitted to assign the agreement in the event of merger or combination with some other medical practice.

Termination Provisions

Under what conditions can an employment contract be terminated prior to its expiration? In what way are rights and duties created or modified in the event of such a termination? The answers follow.

Termination for Cause

Every contract has a provision that authorizes the employer to terminate the employee immediately "for cause" in the event of certain enumerated circumstances. These should be only those that involve egregious shortcomings on the part of the employee, usually involving either dishonesty or moral turpitude. These commonly include things such as indictment or conviction for a fel-

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ony, theft, fraud, and so on. In addition, you should expect a list of provisions that relate to you not being able to function as a physician, such as loss of your medical license, loss of your DEA license, or impairment due to substance abuse.

It is not in the recruit's best interest to argue with most "for cause" items. The only time to clarify this clause would be if the language is vague. If the agreement states that the physician can be terminated for "behavior that is negative to the interest of the practice," I would strike or clarify it.

Termination Without Cause: Bilateral Rights to Terminate with Notice

Most contracts state that either party can terminate the agreement for no reason at all with 60 to 90 days written notice to the other. In such cases, the recruit's compensation and duties will be continued during the notice period, and he or she will have the opportunity to seek other employment.

Covenant Not to Compete

Historically, it has been common for employers to exact from an incoming recruit a commitment not to compete with the practice or hospital in the event the relationship terminates for any reason, usually either by earlier termination or by expiration of the employment agreement. This grows out of the understandable

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desire on the part of the employer to avoid having the new physician compete for patients or market share after the employer has invested time, money, and goodwill of the brand in marketing and building the physician's practice in the community.

At the same time, the recruit is most reluctant to commit to refrain from practicing in his or her chosen community the profession that he or she spent such a large amount of time preparing for. It's a classic case of legitimate interests in conflict, and, historically, it has led to a good deal of contention in the negotiation process. Several different elements to the covenant not to compete issue are discussed in the following sections.

- **Time and distance constraints:** The normal way in which one measures whether and to what extent competition is precluded by a non-compete clause is through constraints in both time and distance.

a temporary job for a year. But three years is much more onerous.

In a small-to medium-size town setting, the specified geographic area be less—more like 10 to 15 miles—with an enforcement period of 12 months. As limitations extend further, the risk of the covenant being unsustainable in a court becomes ever greater.

- **Nature of recovery for damages:** Traditionally, the employer has sought redress to violations of a covenant not to compete by resorting to injunction relief. In some cases, in lieu of such relief, the parties will agree in the contract to stipulated damages of a specific monetary amount (frequently, a full year's salary) in the event that a covenant is violated. In some cases, the availability of injunctive relief is not the exclusive remedy, and monetary damages can also be recovered.

- **Non-solicitation:** Frequently, in addition to a covenant not to com-

forceable. It is possible to reach such a compromise and satisfy both parties.

Even if you believe this is the "job of a lifetime," it is still important to protect yourself against future occurrences that you cannot predict at the time you sign the contract. Minimize the importance of this clause at your own peril. Because even though non-competes can be fought and won by a physician in court, the amount of time away from work and family, plus the hassle and cost to do so, will disrupt life considerably. I've represented clients whose contracts had non-competes I know a court would throw out. But getting all the way to that point would have caused pain and made the client financially anemic. It just didn't make sense to fight it. That's why you must ensure the non-compete clause you sign is in your best interest.

Conclusion

As the adage goes, "the devil is in the details." We have covered a wide variety of details across three articles, from assessing personal goals and organizational culture, to performing due diligence on financial data and operations, to addressing the majority of points you'll encounter in an employment contract. Following through on the advice will not make you a Homeric hero—but it will serve you well from either side of the negotiation table.

As is true for a long-term marriage, there will be ebbs and flows in the relationship between physicians and their employees. By taking the organizational assessment and contract review principles seriously, you will create the opportunity for a relationship based on transparency and trust and embark with confidence on a professionally rewarding and personally satisfying career. **PM**



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Normally, these are for a period of one to three years from the termination of the employment arrangement, and an overall radial distance of a specified number of miles from the employer's site. All of the specific facts and circumstances will determine what is reasonable in the eyes of the law.

Determinations of reasonableness can be widely disparate from state to state and from rural to urban settings. Generally speaking, in a suburban/metropolitan setting, limit the geographic area to 25 miles instead of the typically offered 50. It gives a physician more flexibility should he or she choose to terminate the agreement. Also attempt to negotiate for clients a non-compete enforcement period of 12 months instead of the typical 36 months. The rationale is that you could probably handle a long commute or

pete, the employer will also insist on a covenant not to solicit the practice's employees after a termination.

The interests of both parties in these circumstances are legitimate and deserve protection to some degree. A compromise on the same basis as that suggested earlier concerning tail coverage insurance is probably the best way to go. The enforceability of a covenant not to compete thus could be based on who instigated the separation of the relationship. If the employee quits or is terminated for cause, he or she should be bound to the covenant to the full extent of its terms. On the other hand, if the employer terminates the agreement voluntarily (other than for cause), or declines to offer the employee a stockholder or partner position at the end of the agreement, then the covenant should not be en-