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With the upcoming end of the academic year, residents and fellows are beginning to review and sign employment agreements with healthcare systems, and private practices, to commence this fall. In some highly-recruited specialties, the recruiting is already starting for the next academic year.

Although all contract provisions should be reviewed and understood by new physicians, even without the negotiating leverage to change anything, there are several key issues which are perhaps more important than the others:

- Compensation
- Term and Termination
- Restrictive Covenants
- Malpractice Insurance

I. Compensation

Compensation provisions typically consist of base salary, productivity arrangements, and perhaps signing and relocation bonuses. Over the years, there have been many false starts focused upon replacing objective productivity models (typically WRVUs or collection) with quality incentives. Some systems have been moving

away from productivity arrangements based upon work relative value units (WRVU) or actual collections. This has been part of the quality or pay-for-performance initiative, but it has also been defensive in nature, from a compliance perspective, to protect against perceived overutilization.

We need not debate the efficiency of either approach, but new physicians should evaluate the compensation offers from the following viewpoints:

1. Is the base compensation sufficient, regardless of whether the incentives are attainable? One cannot simply assume that productivity-based compensation is attainable simply because national data provides certain averages. The fact that any particular physician's specialty should be able to obtain those targets is both dependent upon whether the physician practices sufficiently diligently to hit those targets, and whether the volume to support those targets is available at the system of practice of which the physician is joining.

- *If the incentives, whether they be WRVUs, collections, or even quality programs, are to be a significant part of the compensation, are they attainable?*

• Will you be the new physician in a "solo practice location" for a system that has no track record?

• Will you be joining an existing practice where other physicians are hitting those numbers, and does this practice expect the volume to expand proportionately or will you just be one more physician dividing the same volume?

• Is there an established history of physician productivity for the physicians?

2. You also should not assume that quality targets are easily attainable either. Although quality incentives might once have been taken for granted, viewed as simply part of the base, their payment history is also important.

II. Term and Termination

Termination provisions seem to occupy opposite ends of the contract spectrum; the contracts either allow termination at will or without cause on relatively short notice, i.e., 60 to 90 days, or the contracts specify a certain term and do not permit, either specifically or inferentially, earlier resignation.

This question is a lifestyle question for the physician, i.e., are you more interested in some guarantee period or are you more interested in flexibility? Of course, if you are interested in the flexibility, you must also consider the restrictive covenant provisions, if any, in your planning. You will not have much flexibility if resignation requires you to relocate, unless you actually intend to relocate outside of the restricted area regardless, in which case the restrictive covenant is not all that relevant.

Those employers offering contracts with fixed terms, i.e., that do not specifically allow for earlier resignation, are typically focused upon planning their staffing needs for a certain period of time. Some contracts go so far as to actually specify a premature termination penalty that will result in some type of liquidated damages or financial penalty.

Whether you may resign when the contract is silent on the issue is a state-by-state question, because some states are employment-at-will states which provide freedom of resignation unless the contract specifies otherwise. If the contract specifies otherwise, then a premature termination is actually a breach of the agreement. Although an employer may not be able to legally compel a physician to practice at a particular location, that employer might threaten damages, and those damages would typically consist of either the loss of revenue due to the physician's departure for the replacement costs of filling that space, and the replacement cost, if filled by locums, could be significant.

III. Restrictive Covenants

Restrictive covenants are also a state-by-state issue; some states specifically restrict or prohibit restrictive covenants in general or restrictive covenants for physicians in particular. Obviously, you should consult with counsel with regard to the enforceability of the restrictive covenant in your contract in your jurisdiction. However, the concept that restrictive covenants are generally unenforceable is a myth; restrictive covenants are routinely enforced in many states.

The only general restriction is that the restrictive covenant must be designed and intended to reasonably protect the employer without unreasonably restraining the physician. It would generally be reasonable for a restrictive covenant to prohibit a physician from practicing in the immediate area of that physician's employment for a reasonable period of time. The reasonableness of the time and the area are also issues of fact. A 50-mile radius in an unpopulated western state might be reasonable, whereas a 50-mile radius in New York City for almost all specialties would obviously not be reasonable.

A negotiating consideration, with respect to restrictive covenants, is the enforceability depending upon the nature and timing of the employment termination. In those situations where both the employer and the physician have the opportunity to terminate without cause on 60 or 90 days' notice at any time, then it is the physician who is taking more-significant risk in turning down other offers, relocating

to a specific area, only to face the prospect of both premature termination and a restrictive covenant. In those situations, you would hope to negotiate either a longer-guaranteed employment period or the release of the restrictive covenant for premature termination.

The argument from the potential employer that it's equal because both parties can do it is obviously misleading. If the practice exercises that opportunity, nothing has changed in the practice itself except the physician is no longer there. On the other hand, from the physician's perspective, that physician has lost his or her position, must secure a new position, may need to relocate, may need to change a spouse's or significant other's employment, take children out of school, etc. - it's not equal.

IV. Malpractice Insurance

Malpractice insurance comes in two versions: occurrence and claims made.

Occurrence malpractice insurance covers the physician for whatever the event is if the event occurs while employed, regardless of when the claim is made. Therefore, no "reporting endorsement" or "tail" is necessary.

Conversely, claims-made insurance covers the physician only if the event occurs and the claim is made while the physician is employed. Therefore, post-employment, this reporting endorsement or tail is necessary, and the contract issue is who is responsible

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for the payment of the tail. Since claims-made insurance is typically less expensive than occurrence insurance, the general thought is, since the employer is saving money on the insurance in the first place, the employer should pay the tail. However, the contract might state otherwise. You might want to negotiate a provision that allocates payment responsibility between the parties based upon the nature of the termination. If the physician terminates prematurely, perhaps the physician is responsible for the tail. Perhaps there is also a


vesting schedule that allocates the responsibility proportioned over the first few years. Perhaps the employer should pay the tail for premature termination or failure to renew.

V. Conclusion

Regardless of whether you have the negotiating leverage to change any of these provisions, it is nevertheless critical that you understand the impact, i.e., begin with the end in mind.


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