Contract Considerations Beyond Compensation

PAC Pearls from the Women's Dermatologic Society

Practicing dermatologists seeking to hire or be hired must consider many factors beyond compensation when creating or signing a contract. With the help of Personal Attorney Martha Crenshaw, we assembled a list of legal and practical considerations for the potential employer and employee. Please note, the information and views provided are for general informational purposes only and are not intended to constitute legal advice.

In general, it is best to think through and agree upon legal and practical issues ahead of time as terminations and break-ups will inevitably happen – and when they do, it is too late to re-write contractual terms. Ultimately, it is cheaper and easier to have the post-termination path plotted from the beginning.

The employer typically has the bargaining power at the beginning of the relationship, especially given that most employees are primarily focused upon compensation and benefits at the time of hire. Therefore, an employer must remember that bringing a new physician (and personality) into an established work culture can be risky and it is wise to go into a contract thinking about the breakup.

What is a Contract?

The three main components of a contract are as follows:
(1) An ***offer and acceptance*** *(*demonstrating the parties mutual intent to be bound by the contract terms);
(2) The ***cause*** or ***consideration*** (what each party will do for or give to the other party); and
(3) The ***legal capacity*** of the parties to enter into the contract.

Both the employer and employee should consult with an attorney in their jurisdiction to assist in the creation and negotiation of an employment contract to assure all legal elements are satisfied and the specific provisions of the contract comply with controlling law in that jurisdiction.

"You sign an agreement, you make a contract, you live up to it. You never get what you deserve. You get what you negotiate. You got a right to say yay or nay."
- Don King

Legal and Practical Considerations

The employee-employer relationship is a contractual relationship. As such, an employer and employee may negotiate the terms of an employment contract and agree to any terms not prohibited by law or public policy. That said, what is up for negotiation?

1. **Employment Status:** Is the position being offered for an employee or independent contractor? There are pros and cons to both parties for either status. State laws vary as to the legal requirement to

establish a valid independent contractor arrangement. If you are considering going the "independent contractor" route, you should discuss with legal counsel to assure it is done correctly.

2. **Calculation of Compensation**: How will compensation be determined? Will it be a salary, an hourly rate, a percentage of collections, or a rate based on RVUs? Will there be an incentive bonus and how will it be calculated? Many employees may prefer a guarantee. However, a small practice may not be able to afford a large guarantee for an untested, new member of the team and may prefer a smaller guarantee with a larger incentive bonus or just a flat percentage of collections.

3. **The Schedule/Work Hours**: A contract may include the general working hours of the practice. For example, it is safe to include language requiring employee/physician to devote his/her full attention and provide services to patients within the operating hours of the clinic/practice which are _____. If "on call" coverage is expected of the employee/physician, this requirement must be included in the schedule clause or a separate section of the contract.

4. **Benefits**: In general, the physician employee should receive the same benefits (health insurance, retirement plan, etc.) as all other employees. It is important to note that If the practice has a cafeteria plan (pre-tax benefits) in place, an employer cannot discriminate in favor of highly compensated employees. Stated similarly, if an employer offers pre-tax benefits to its employees, they should be the same for *all* employees. That said, an employer can give additional benefits (i.e., a gym membership) to a physician employee or midlevel– but its value will be taxable income.

5. **Paid Leave**: This element should be specifically delineated in the contract to eliminate argument over it down the road. As noted above, the employer has more bargaining power at outset of the contractual relationship and should use that opportunity to make clear what paid leave (if any) is provided. Paid leave is more of an economic than a legal consideration. Questions for the employer to consider include: How many paid leave days do you want to give? Will they carry over from year to year or is it "use it or lose it" arrangement? Can the employee "cash out" unused leave? If paid leave contractual provisions are ambiguous, courts in some states will construe them to allow a "cash out" of un-used paid leave. Therefore, it is essential for an employer to make their intentions with regard to paid leave very clear. The *amount* of paid leave offered will vary. In large markets, the amount of paid leave may depend on what competitors are offering as incentive. In the smaller market, this issue may have less bearing. Also, if an employee's compensation is tied to collections, he/she may elect not to use paid leave at all – and just "cash out" if permitted by the contract. Again, if an employer wants to prevent that strategy, it will need to be made clear in the contract.

6. **CME and Licensure**: Should an employer choose to offer to cover CME expenses, a specified number of paid days for CME meetings or a flat fee to cover the cost of CME should be noted in the contract. An employer may also offer to cover the costs of medical licenses and/or society dues. Any desired limitations on the amount to be covered should be clearly noted in the contract.

7. **Path to Partnership/Membership**: An employment contract can generally outline the expectations about becoming a partner/member/shareholder in a certain time period. This can be good so that

everyone knows what to expect, but you do want to be careful that you do not create an enforceable contract right to be considered for partnership.

8. **Notice Period for Termination**: Most contracts allow a non-renewal or termination without cause for situations where it is just not working out. How much notice is required should be specified in the contract. But remember, you do not want a period that is too long so that you are stuck with a bad colleague for six months after you have given notice of termination or too short where a physician can leave you with too little time to find a suitable replacement.

9. **Cause for Termination**: Important considerations for "cause" termination include: What are the grounds for termination for cause? Does it have to be a concrete offense such as suspension or revocation of license? If it is a professional competence problem, who gets to judge? Usually it makes sense to include as "cause" professional competence issues (malpractice, physician substance abuse, disability), non-medical liability issues (sexual harassment of staff or other staff mistreatment issues, defamation or breach of confidentiality), and also less clear-cut "bad colleague" issues (failure to cooperate in scheduling, failure to follow the practice's rules and regulations, billing problems, medical record problems). Everyone can likely think of examples of a colleague's behavior that did not quite violate the practice rules or the law but was not tolerable over the long term. Many contracts try to deal with this unfortunate scenario in the "for cause" termination section with a general "failure to cooperate" clause. However, most of the time, in practice, such a termination is without cause, so the required notice period discussed above is critical.

10. **Malpractice and Tail Coverage**: Often the employer pays for malpractice coverage during the term of employment. This is not always the case and can go either way in independent contractor agreements. It is arguably easier for an employer to provide the coverage so that he/she knows the professional is covered. For the same reason, it may make sense to provide the tail coverage as well. However, contracts often require the professional to provide his or her own tail coverage or to reimburse the employer for tail coverage, depending upon what the cause for termination was. In other words, this can be used to disincentivize an abrupt departure while also having a termination without cause provision. For example, if the employment contract requires the practice to pay for tail coverage if the practice terminates without cause, and the physician to pay for it if he/she terminates without cause, this gives the practice flexibility to terminate before the contract expires while disincentivizing the physician from doing so. If the former employee is responsible for his/her own tail coverage, the practice will need to have the right to request proof of coverage and to purchase coverage if the physician does not with the cost to be billed to that professional.

11. **Non-Competition Clauses:** Non-competition clauses are generally not favored in the law, but are included in the majority of professional contracts. Every state has unique and specific requirements for a valid non- compete clause, so you must consult with your attorney. Notwithstanding, what should an employer consider in a non-compete clause: (1) Do you want to prevent the employee from competing when she leaves? (2) Should this apply even if the practice terminates without cause? (3) What geographical area should be limited? (4) For how long of a time period? (5) Will there a buy-out option for the non-compete? Ultimately, the scope of the non-compete is going to depend upon what is

enforceable in each state and what you can negotiate with the employer or employee. A lawyer's advice is highly encouraged with regard to non-competes!

12. **Midlevel Providers Collaboration Terms**: If you are hiring a midlevel, he/she will typically also need a collaboration or supervision agreement with the physician. Violation of the collaboration agreement would probably be grounds for terminating the employment contract and should be noted. If you are hiring a physician to help supervise or collaborate with a midlevel, you will need to specify those terms and any compensation for such work.

13. **Medical Records/Patients**: The employment contract should specify who owns the medical records -- and that is the practice. Therefore, an employed physician who leaves the practice does not get to take the patient records with her, especially if the contract specifies that medical records belong to the practice. Upon request of the patient, however, the practice should transfer records.

14. **Assignability**: This provision will depend upon your vantage point, but in this era of private equity sales "assignability" deserves significant attention. From the employer standpoint, the employer may want to include such a clause, but must be aware of state laws in regard to this issue. A savvy employee would presumably not want such a clause. Interestingly, while your employment contract could be assigned through this clause to a new entity, some states will not allow the assignment of **non-compete clauses** to other entities. Please consult an attorney to review the laws governing this issue in your state.

This list is intended to assist interested in parties in understanding many of the key provisions in an employment contract. It is not a substitute for seeking an attorney's advice in your local area. In fact, it is highly recommended (perhaps essential) that you seek counsel and advice from an attorney who understands you and your needs and can help you negotiate the best contract for you depending upon your vantage point.

"It is impossible to unsign a contract, so do all of your thinking before you sign."
- Warren Buffet

The **Women's Dermatologic Society (WDS) Practice Advisory Committee** supports Dermatologists at any stage of their career looking to manage or start their own practice by offering resources on navigating the practice environment. Visit the **WDS Blog** for more tips and advice.