

The Physician's First Employment Contract

**A Guide to Understanding
and Negotiating
a Physician Employment
Contract
... From the Employee
Physician's Perspective**

© *Michael L. Kreager 2007*

About the Author



Mike Kreager

The Kreager Law Firm
7373 Broadway, Suite 500
San Antonio, Texas 78209
(210) 829-7722 (p)
(210) 821-6672 (f)
www.kreagerlaw.com

Mike Kreager has practiced business and tax law in San Antonio, Texas, for nearly 30 years. He founded The Kreager Law Firm to address the unique business, corporate, tax, and regulatory legal needs of physicians and physician practices. The firm serves as counsel for numerous solo-physician practices and group-physician practices in San Antonio, Austin, and South Texas. Mr. Kreager's thoughts on physician employment contracts were quoted extensively in the American Society of Clinical Oncology's *Journal of Oncology Practice*, vol. 2, pages 308-09 (November 2006) in the article "Employment Contracts: What to Look For."

The firm's practice areas encompass the legal formation of medical practices; tax planning; contracts; employment agreements; admission of new partners; buy-sell agreements among owners; joint ventures; and the sale, merger, and purchase of medical practices. Lawyers in the firm advise physicians on compliance with federal and state laws unique to health care, including the Stark law, the Anti-Kickback law, fraud and abuse, and HIPAA. The firm also addresses the personal legal needs of the physician in the areas of wills, estate planning, trusts, family limited partnerships, and asset protection.

Mr. Kreager has a long history of community involvement. He served 12 years on the board of directors of the South Texas Blood & Tissue Center, including eight years as chair. The firm currently serves as the blood bank's general counsel. Mr. Kreager also served as chair of the San Antonio Area Red Cross on two separate occasions in connection with his 12 years of board service. Currently, he is the chair-elect of the South Texas Medical Foundation, serves on the Institutional Review Board of The University of Texas Health Science Center in San Antonio, and is a board member of the Bexar County Medical Society Foundation. He also has served on the board of directors of the Sunshine Cottage School for Deaf Children and the San Antonio Lighthouse for the Blind.

The firm was named the outstanding small business philanthropist for 2004.

Mr. Kreager is licensed to practice law in the state of Texas and has been board certified in tax law for more than 10 years by the Texas Board of Legal Specialization. In addition to being admitted to practice in all Texas state courts, he is admitted to practice before the United States Supreme Court and the United States Tax Court.

* * * * *



Table of Contents

PART I INTRODUCTION AND OVERVIEW	1
Purpose.....	1
Types of Employment Contracts	1
Advisors.....	2
Overview	2
Before You Get Your Contract	2
PART II THE EMPLOYMENT CONTRACT	3
The Parties to the Contract	3
Start Date	3
Duties	4
Ownership and Setting of Fees.....	5
Honoraria	5
Call Coverage	5
Compensation	5
Formula Compensation	6
Term of Contract.....	7
Termination.....	7
Death and Disability	7
For Cause	8
Cure.....	8
Without Cause.....	8
Payments after Termination.....	9
Vacation and Other Leave.....	9
Continuing Medical Education.....	10
A Word About Professional Liability	10
Professional Liability Insurance	11
Prior Acts	11
"Claims Made" vs. "Occurrence" Policies	11
Self-insured Coverage.....	12
Disclosure in Application.....	12
Notice of Claims	12
Tail Insurance	13
Extended Reporting Endorsement	13
Who Pays the Tail Premium	14
Alternatives to a Tail	14
Benefits.....	14
Summary Plan Descriptions.....	15

Health Insurance	15
Cafeteria or 125 Plans.....	15
Disability Insurance	15
Retirement Plans.....	16
Other Employment Benefits.....	16
Mandatory Expenditures.....	17
Mandatory Reimbursement.....	17
Indemnification.....	17
Restricted Activities	17
Covenant Not to Compete.....	18
Minimum Requirements.....	18
Geographic Scope.....	18
Length of Time	19
Activity Restricted.....	19
Unique Texas Requirements	19
Buy-Out Amount.....	20
Negotiations.....	20
Caution on Noncompete Covenants.....	21
Confidentiality Covenants.....	21
Non-Solicitation	22
Consequences of Violating Restrictions.....	22
Ownership of Medical Records.....	23
Inventions; Intellectual Property.....	23
Equity Ownership	24
Specifics	24
Ancillary Services and Entities	24
Related Investment Opportunities	25
Dispute Resolution	25
Governing Law and Location	25
Arbitration.....	26
Which is Better	26
PART III HOSPITAL INCOME GUARANTY AND RELOCATION AGREEMENTS	27
Introduction to Hospital Agreements	27
Hospital Assistance Agreements.....	27
Limited Benefit; Limited Term	28
Contract Names; Technical Language	28
Retention Provisions.....	28
Regulatory Issues.....	29

Elements Common to Most Hospital Assistance	
Agreements	29
Guaranteed Financial Assistance	30
Procedure — How Do You Get Paid	30
Example	30
What the Guarantee Really Means	31
Excess Collections	31
"True Up" at the End of the Guarantee Period	32
Repayment	32
Performance Conditions; Breach of the Agreement	33
Examples	33
Remaining in the Hospital's Patient Community	33
Special Issues of Concern	34
Restrictions on Investments in Competing Enterprises	34
Other Financial Assistance	35
Examples of Other Assistance	35
Repayment of Other Assistance	36
Loan Forgiveness	36
Tax Consequences of Loan Forgiveness	36
Coordination with Group Employment	37
Only the Incremental Cost	37
Responsible Parties	37
Collateral for Repayment	38
Contracting Challenges	38
Stark Law Provisions	39
Safe-Harbor Regulations	39
Fair Market Value	39
Relocation	39
Noncompete Covenant Prohibited	40
Staff Privileges	40
IRS Requirements	40
Public Benefit	40
Community Need	41
PART IV OTHER AGREEMENTS	41
Independent Contractor Agreements	41
Letter Agreements	42

**The Physician's First Employment
Contract A Guide to Understanding and
Negotiating a Physician
Employment Contract
... From the Employee Physician's
Perspective**

Part I Introduction and Overview

Purpose. When you join a medical practice, you almost certainly will be given an employment contract to sign, perhaps more than one contract. After advising physicians for years on employment contracts, I wrote this brochure to give you practical information about them. Obviously, this brochure must be general in its coverage and cannot offer specific legal, accounting, or tax advice. At the end of this brochure is a checklist that should be helpful in reviewing your specific contract.

Types of Employment Contracts. There are several types of contracts that may be presented to you in connection with your entry into private practice. First, and most common, is an employment contract. Part II of this brochure will discuss the "typical" employment contract. It will guide you through the provisions common to employment contracts and give you suggestions on terms that merit special attention and perhaps further negotiation. Part III will guide you on hospital income guaranty and relocation agreements that are becoming much more common for growing practices. These agreements are in addition to your employment contract, but are very specialized, unique contracts that can have very dramatic consequences for you. Part IV will discuss other types of contracts

that might be presented in lieu of or in addition to the typical employment contract.

Advisors. While there can be no substitute for a careful review of the contract, you may find it helpful to ask for professional advice from your personal attorney and/or accountant. In particular, each state has differing laws that affect physician employment. Remember, your employer's attorney probably wrote the contract.

Overview. This brochure discusses the most common provisions found in a physician contract. Of course you might encounter a provision that is not discussed here. If that happens, as suggested above, seek professional advice. Where possible, this brochure suggests negotiating options to consider. Although this brochure principally addresses employment contracts, much of it also will apply to independent contractor agreements. The distinction between these types of contracts is discussed in Part IV of the brochure.

Before You Get Your Contract. Before the contract stage, carefully vet the group you plan to join. When you interview, learn as much as you can about the way the physicians interact. It is supremely important that you feel you will be a good fit in the practice and mesh with the various personalities and the overall practice culture. Try to talk separately with support staff and with the more recently hired physicians. If at all possible, talk to physicians who have left the group — they can provide valuable insight. Ask a variety of questions. What is the workload of the physicians? How many daily patient encounters are expected on average? What mentoring does the group provide? How will you be expected to grow your individual practice? Will you be expected to develop your own

referral sources? Will you work primarily in one office location or from several locations? How does the group make decisions? Which physician “manages” the group?

Caution: Be sensitive to information that might warrant steering clear of the practice. For example, we have received calls, thankfully only on rare occasions, from newly employed physicians who realize to their horror that the practice engages in unlawful “up coding” (billing a higher level of service than rendered; level 4 instead of a level 3) or other fraudulent practices. It is rare, but it can occur, and when it does, your professional reputation, your livelihood, and your participation in Medicare and government-sponsored programs can be at risk.

Part II The Employment Contract

The Parties to the Contract. At the outset, the contract will state who is making the agreement. You will be one party, usually designated as the employee or the physician. The employer will be the other party, to whom this brochure refers as the “group,” the “practice,” or the “employer.”

Start Date. When the group and you sign the agreement, it will be a binding legal contract. Usually the contract is dated in the first paragraph as of the date it is signed. The contract will also state a date when your duties will start. Be realistic about the start date, keeping in mind whether you need to obtain a medical license from the state where the group is located, or equally important, how long it will take to become credentialed with the group’s insurance plans and obtain hospital staff privileges.

Caution: The practice may not bill you under another's physician's name while your credentialing is being completed. That billing practice is illegal and sometimes occurs in a practice's zeal to begin billing for a new physician's services.

Duties. This section of the contract describes your responsibilities. Typically, the physician is expected to work full time. The group must approve any exceptions. If you plan to have an outside professional activity, you should ask that the activity be added to the contract as an exception. If you want to practice only part-time, discuss your needs with the group. Fortunately, groups are becoming more sensitive to a physician's desire to balance work and family. As far as patients, the group almost always reserves the right to assign patients to its employee physicians.

Usually, the contract will provide that passive activities, such as investments, will not violate the exclusivity provision if they do not interfere with your full-time duties. If the practice has more than one location, consider requesting that you be assigned to a particular location and hospitals in its vicinity. Some contracts, particularly for primary care physicians, will indicate the number of patients you are expected to see in a day or week.

Caution: If your contract has a stated workload, ask the group if it has had problems with physicians not meeting its expectations of productivity. A statement of a minimum number of encounters is indicative that the group has had problems with new physicians previously. An open discussion with the group about its expectations could avoid future problems in your relationship.

Ownership and Setting of Fees. When you are employed, the group owns all fees generated by you and all accounts receivable. Frequently, you will see language stating that you reassign your right to Medicare and other reimbursements to the group. Practices also reserve the right to set the fee schedule.

Honoraria. Many contracts require that any payments for your related medical services, such as honoraria, medical director fees, or expert witness fees, belong to the group. You may want to ask that some minimum amount, such as the first \$5,000 of these activities, will be retained by you, and amounts above that threshold will belong to the group. The group is paying you a salary and is interested in capturing all related revenue from your services.

Call Coverage. Your contract will likely say that you will be assigned call as the group dictates. You may want to request that the contract be clarified to say that you will take call on an equal basis with the other physicians and on a mutually agreed rotation. Discuss call in your interviews, as call schedules vary widely among practices and specialties. Make sure that your contract talks about call consistent with what was discussed with you in your interviews.

Compensation. The contract should specifically state how much and how often you will be paid. Your compensation will most commonly be expressed as an annual or monthly base salary, (e.g., \$125,000 per year or \$10,416.66 per month.) With a few phone calls you should be able to determine the starting salary for your specialty. A good source of salary information is the Medical Group Management Association (www.mgma.com), as well as salary

surveys that may be conducted periodically in your specialty.

Remember, your base salary is always negotiable. Most physician contracts provide that the base salary is paid twice monthly or monthly. The stated salary amounts are always gross amounts, meaning that the employer will withhold from the gross amount income, Social Security, Medicare, and other employment taxes. Your actual payment will be net of the taxes.

Formula Compensation. Some contracts will state your salary and/or your bonus as a formula. Be sure to get information from the practice on how the formula works. Ask the practice to run a sample calculation making certain assumptions in applying the formula. A sample will help you better understand the allocation of the practice's expenses to you. Remember that virtually all compensation formulas are based on actual collections for your services. Moreover, the practice will not begin billing for your patient encounters until you have been credentialed with the various plans, and then the practice will begin receiving payments 60 to 90 days after the practice begins billing the insurance plans or government payors, such as Medicare.

The lag in payment could affect the amount paid to you. After you establish a steady stream of collections, the lag will cease to have an effect on your compensation. Be sure to ask whether you will be given credit for ancillary services, such as labs or x-rays, billed by the practice. If your compensation is based on a formula, make sure that you don't have to repay any draws (advance payments) caused by a shortage in your production. A productivity formula can be a beneficial compensation model for the

physician; however, it is usually better to start with a base salary during your first year, while you are establishing your practice. While you have received great training during your residency or fellowship, transition to private practice can still be daunting.

Term of Contract. Most contracts are for a specified period of time, such as one or two years. Some contracts will be for an indefinite period; in other words, the contract runs until terminated by one of the parties. Frequently, a contract will contain an “evergreen” or automatic renewal provision. This provision states that the term will renew for a like period if neither party terminates the agreement within a stated time before the expiration of the contract, such as 90 days before the end of the contract. If your contract has a stated term, note in your calendar the expiration date. It is not uncommon for the group to forget that your contract has expired. Similarly, you may want to note the automatic renewal date, in case you have second thoughts about remaining with the practice.

Termination. One or more sections of the contract will discuss how the contract may be ended before its scheduled end date.

Death and Disability. Your contract will end on your death or disability. Disability will require definition in the contract. Usually disability will be defined as your inability to perform the essential functions of your job for a set period of time. The period of time will range from 60 to 180 days, sometimes referred to as the “qualifying period.” At the end of that period, your contract will end. You will want to make sure that your salary will continue during the qualifying period. You may find that your salary only continues for a portion of the qualifying period. Sometimes, the employer

adds the right to have you examined by a physician selected by the employer to determine your disability. Personal disability insurance, which is a must, is discussed later. If the employer only pays your salary for a portion of the qualifying period, make sure your disability insurance will begin benefits when your salary stops.

For Cause. “For cause” means that one of the parties has a reason to terminate the contract. Typically, the contract will contain a list of “for cause” items that allows the employer to terminate the contract with little or no notice. These items include loss or suspension of your medical license, loss of hospital privileges, exclusion from the Medicare program, uninsurability for malpractice, or conviction of a crime. Sometimes the laundry list will include a generic catch all, such as unbecoming conduct. Try to limit the “for cause” list to truly egregious acts, such as the loss of license, and delete the subjective items. Usually the right to terminate for cause is reserved exclusively to the employer. Rarely, it will be extended to the physician, and in that case, cause is limited to nonpayment of your salary.

Cure. Sometimes “for cause” includes the failure to observe one of the employer’s policies. In this instance, make sure you have the right to “cure.” The right to cure means that the employer must notify you that you are violating a “for cause” provision and give you some time, such as 10 days, to rectify the situation. If you cure the default, the contract cannot be terminated and it will continue in effect.

Without Cause. Your physician contract should also have a provision that will allow either party to end the contract without having a formal reason. The notice period for a “without cause”

termination will range from 30 to 120 days. You will want the notice period to be the same for the employer and you; infrequently, the contract will require less notice from the group than from you, which is unfair.

Caution: If you become unhappy and end the contract without cause, you must stay for the required notice period. First, it is only fair that you give the group that time to find your replacement. Second, if you don't give the minimum notice, the group may have a basis to hold you responsible for the costs of finding your replacement and for interim staffing costs, such as the difference between a locum tenens rate and what you were paid. If you need a shorter period of time, talk to your employer, a shorter transition may be possible.

Payments after Termination. Your contract should state what, if anything will be paid to you when it comes to an end. For example, will you be paid for unused vacation? If your compensation is based on your collections, will you continue to receive collection credit after the end of the contract and for how long? On rare occasions some contracts will contain a provision requiring the physician to repay the group on a prorated basis for expenses, such as continuing education or used vacation. For example, if you attended CME early in the year, you would have to reimburse the group for a prorata portion. If this provision appears, try to have it deleted.

Vacation and Other Leave. Your contract should state the amount of vacation you may take with pay. Most often your vacation will be stated either as a number of weeks or days. Vacation varies by practice. A new physician will usually get a minimum of two weeks vacation, but three weeks is more common.

Most groups do not allow vacation to accrue from one year to the next. Larger practices will also have a staff physician handbook that will include the group's policy for sick leave and other absences. Some practices count sick days as vacation. If a maternity leave is a concern, ask the practice for its maternity leave policy. The Family and Medical Leave Act (FMLA) only applies to employers with more than 50 employees. Leave for military service is also covered by federal law, and you should get specific advice on it if you can be called to active duty.

Caution: If your compensation is strictly based upon a productivity formula, any vacation you take will reduce your productivity, and in essence, you pay for your own vacation.

Continuing Medical Education. CME is an important component of your contract. Most contracts allow one week for CME in addition to your vacation. The employer should pay the cost of your CME, such as registration fees, lodging and travel, but most contracts will state an upper limit on these expenses. A common reimbursement amount is \$2,500, but can range from \$1,500 to \$3,000.

A Word About Professional Liability. The following paragraphs discuss malpractice insurance, so a brief discussion about your professional liability is in order. A physician always has personal liability for his or her negligent acts or omissions that injure a patient. Even if you are employed, you have personal liability. Because you are an employee, the group is also liable. Thus, malpractice insurance is a must. Lawyers will disagree on how much insurance to have. Some lawyers will say that excess insurance induces plaintiff's lawyers to sue for greater amounts. Nevertheless, some minimum insurance is necessary

to provide a defense against even frivolous claims. Malpractice insurance has become very expensive, and although tort reform measures have been adopted, it will likely remain expensive for the foreseeable future. As a result, the amount of insurance to maintain will in a large part be a function of its cost.

Professional Liability Insurance. The contract should state that the employer pays for your malpractice insurance. You should be interested in the amount of coverage, known as the “policy limits.” You will also want to know the policy’s deductible, which is the amount you must pay before the insurance company becomes responsible. Most hospitals require a minimum amount of insurance in order to have active staff privileges. These limits are customarily \$200,000 for each occurrence and \$600,000 in the aggregate for all occurrences in a year.

Prior Acts. Your employer-provided insurance will only cover the period of time that you work for the group. Thus, consider whether you need to arrange for insurance coverage predating your employment, sometimes called “nose” coverage. If you are taking a position out of residency or fellowship, you probably do not need to worry too much about insurance covering that period of time, although it is not unheard of for a resident to be sued after leaving training.

“Claims Made” vs. “Occurrence” Policies. Most policies issued now are on a “claims made” basis, meaning that you are insured for a claim if it is made while the policy is in effect. The other type of insurance is “occurrence,” meaning that you are insured for any injury occurring during the policy period no matter when the claim is made ultimately

against you. Occurrence policies are attractive but can be expensive.

Self-insured Coverage. Be aware that as a result of the “malpractice insurance crisis” some employers choose to self-insure. If that is the situation for your employer, be sure to obtain information about the terms of the self insurance, as there is possibly no actual insurance policy, but an accounting reserve, perhaps not funded, that has been entered on the employer’s books for possible claims.

Disclosure in Application. Before the insurance company will issue a policy of insurance, an application must be made. In the application, you will be required to disclose any prior claims made against you or any events that you know about that might give rise to a claim. While no one likes to air dirty laundry, it is important to give the insurance company full disclosure. First, the insurance company probably knows of any pending lawsuits through the National Practitioner Data Bank, and second, if there is an inaccuracy in the application, the insurance company will have a basis to deny coverage when a claim arises later.

Notice of Claims. The insurance policy will require you to give prompt notice of any claims. Some states, like Texas, require a plaintiff to give a notice of a medical claim before filing suit. If you receive a notice, you should promptly notify the insurance company even though a lawsuit has not been filed. If a lawsuit is filed, the insurance company is required to provide a defense for you. It will hire an attorney. This attorney has ethical obligations to both you and the insurance company. While the insurance company may select the attorney to defend you, you have the right to make sure the attorney is acceptable to you.

Make sure the attorney has the experience necessary to defend the type of claim being asserted against you. Not all claims fall within a malpractice insurance policy. Some claims are covered by general liability policies, so always err on the side of notifying all insurance companies who have issued insurance policies for your benefit. It is not unheard of that claims may fall within directors and officers liability insurance policies, homeowners, policies or automobile insurance policies.

Tail Insurance. Tail insurance is a description for insurance that covers your employer and you after you leave the practice. After you leave the group, the group is still liable for professional liability claims made against you. As a result, your physician employment contract will contain provisions on who is responsible for buying the tail policy. If you had an “occurrence” policy while employed, there is no need for a tail policy; you only need a tail policy if your insurance policy was based on “claims made.”

Extended Reporting Endorsement. Tail insurance is an endorsement to your malpractice policy that extends the claims made insurance for a specific period of time. The extension can be as short as one year or as long as seven years or in some cases, depending on the insurance company, indefinitely. The cost increases with the length of the extended coverage. An injured person has only a limited period of time (“limitations”) to sue for malpractice. Most states, Texas included, require the injured person to bring a malpractice suit within two years of the injury or, if the injury is not known, within two years after the injury is discovered. Thus, the longer the extension, the greater the protection.

Caution: Minors have until two years after they reach majority, 18 years of age, to bring suit. Be aware that some employment contracts require you to obtain a tail policy for the maximum period of limitations, which could be an indefinite period of time. If your contract has a provision requiring a tail for the maximum period, ask the group to state that the tail need only be for two years. Remember, however, that the tail insures you for claims as well, so be judicious in its length.

Who Pays the Tail Premium? The tail insurance premium, due when the extended endorsement is purchased, is usually a multiple of the original premium. Most often the physician employment contract will say that the physician is responsible for purchasing the tail policy at the end of the contract, no matter who ends the contract. If that is true in your contract, consider asking the employer to buy the tail policy if it terminates your employment without cause, and in all other instances, you will buy the policy. Frequently, the contract also will authorize the employer to buy the policy for the physician if the physician fails to do so and charge back the cost or withhold the cost from amounts due to the physician.

Alternatives to a Tail. If your contract obligates you to buy a tail, ask that the contract allow you, as an alternate arrangement, to maintain a claims made policy with a prior effective date that precedes the date of your employment. Sometimes this form of coverage, which has the net effect of a tail, is cheaper than buying an outright tail.

Benefits. Employment benefits will typically include participation in health, disability and life insurance programs and participation in qualified retirement 401(k) plans. Your contract should list all of the

benefits that the employer extends to you as a result of your employment. Even though the benefits are listed, don't be surprised if the employer reserves the right to change the benefits.

Summary Plan Descriptions. Participation in insurance and retirement plans are governed by the plan documents. Ask for summary plan descriptions (SPDs) of the plans (the summaries are preprinted documents prepared by the benefit provider) so you will know how they will benefit you. SPDs are a quick way to know what is provided and the conditions for participation.

Health Insurance. Most employers will pay the cost of your health insurance, but require you to pay the premiums for your spouse and dependents. Sometimes larger groups will provide life insurance, dental insurance, disability insurance (discussed in a subsequent section), and long-term insurance.

Cafeteria or 125 Plans. You are not taxed on premiums that your employer pays for your health insurance coverage. Many groups will allow you to obtain dependent health insurance coverage and other types of insurance coverages, such as dental, disability, long-term care, and other health care benefits through a cafeteria plan or 125 plan (meaning section 125 of the Internal Revenue Code) by using pre-tax payroll deductions. These plans allow you to save the taxes on additional benefits.

Disability Insurance. If your employer does not furnish disability insurance, make sure you obtain coverage. Actuarially, your disability is much more likely than your death early in your professional career. If you pay for the insurance, the benefits will be tax-free when paid to you. If your employer pays

for the insurance, the benefits will be taxable to you as ordinary income. If your family situation allows, get quotes for a longer exclusion period, such as 90 days, which will help reduce the cost of the insurance. While policies vary, the disability insurance benefit is usually paid monthly up to five years.

Retirement Plans. Retirement plans will have very detailed specifics on your years of service before you become vested in employer contributions. Some retirement plans, such as a 401(k) plan, allow you to defer some of your compensation (\$15,500 in 2007) to the plan. These contributions are always 100 percent vested. Complex Internal Revenue Code provisions govern qualified retirement plans, but one overriding concept, with few exceptions, is that all plan participants must be treated equally. You will not pay income taxes on the contribution, and the subsequent earnings on the contributions' will be tax deferred. Any withdrawals before retirement age (55 years) can lead to significant income tax penalties in addition to ordinary income taxes. If possible, try to maximize your contributions to the retirement plan to provide for future retirement income.

Other Employment Benefits. Other benefits include cell phone, pager, subscriptions, and journals, and membership dues in medical societies and board specialization. Often the contract will state a cap on the amount that the employer will spend on benefits other than insurance and retirement. Some groups give its physician employees an expense account, having a maximum stated amount from which the physician may select benefits. Thus, one physician may choose to attend CME in an exotic location and another may choose the latest laptop computer. The group's CPA will have significant input on these arrangements to make sure that the employer may

deduct the expenditures as legitimate business expenses. There could also be one-time benefits, such as reimbursement of your moving expenses. Consider asking the group to add to the contract that you will be eligible for all benefits maintained for physician employees.

Mandatory Expenditures. Your contract may require you to maintain a car and a business telephone line at your expense. These provisions are included not so much to shift the cost to you as to allow you to personally deduct these costs for tax purposes. Your accountant should advise you on the deductibility of these expenses on your individual tax return.

Mandatory Reimbursement. Your contract may have a provision to the effect that if the employer is denied a tax deduction for business expenditures made on your behalf, you must reimburse the employer for them. Sometimes you will see a reference to Revenue Ruling 69-115, which allows this type of provision. If the practice includes this requirement in the contract, don't be alarmed. It allows you to deduct the amount reimbursed to the practice on your personal return.

Indemnification. Some employment contracts will state that the physician will indemnify the group for any claims or losses resulting from the physician's acts or omissions while employed. Indemnity is a legal concept that requires one person to pay another for losses sustained. If at all possible, seek to delete these types of obligations. The group should rely on a malpractice policy covering it, instead of your promise to indemnify it.

Restricted Activities. Physician employment contracts have become very sophisticated. Employers

are now adding a variety of provisions to protect the goodwill and investment in their practice. Primary among these restrictions is the covenant not to compete, which is discussed immediately below. Other restrictions will include your promise to maintain and not disclose the employer's proprietary and confidential information, such as its patient list, referring physician list and unique policies and procedures. In addition, you may be asked to promise that you will not attempt to hire the employer's employees after you leave. A parallel promise is that you will not solicit patients after you leave. A discussion of these restrictions starts with the covenant not to compete.

Covenant Not to Compete. Covenants not to compete have become ubiquitous to physician contracts. Contrary to popular wisdom, covenants not to compete are enforceable if they meet certain common law, and in some states, statutory requirements. For example, Texas has a law specifying additional requirements for the covenant to be enforceable.

Minimum Requirements. Courts view a covenant not to compete as a restriction on trade that will be enforced only to the minimum extent necessary to protect legitimate interests the employer has in the employment relationship. As such, the employer must have an interest that requires protection, such as a trade secret or confidential information or specialized training. In addition to the foregoing, the covenant's restrictions must also be reasonable as to three specific items: geographic scope, duration, and restricted activity.

Geographic Scope. Typically, noncompete covenants are described as a radius from a location.

Be familiar with the geographic area described, as it is a measurement based on a linear radius and not the distance traversed on streets by an automobile. Typically, primary care practices will use a smaller radius than a specialty practice, since the primary care practice has a larger base for its patients nearer the practice than the specialty practice. In large metropolitan areas, a radius exceeding five miles should cause some concern.

Length of Time. The noncompete covenant can only continue for a reasonable period of time. Most lawyers believe that a covenant should not extend more than two years, with a one-year limit being very common.

Activity Restricted. The covenant should be very specific as to the type of medicine that is restricted. If a subspecialty is involved, the restriction should be limited to the subspecialty, and not the general practice of medicine. Consider asking for limited exceptions to preserve your options, such as working at a medical school, locum tenens, or the Department of Veterans Affairs, without being considered in competition.

Unique Texas Requirements. For physicians practicing in Texas, Texas law requires that the covenant not to compete contain certain provisions, or it will not be enforceable. The contract must (i) give you access to a list of patients seen in the year before your termination and copies of patients' medical records upon the patient's authorization; (ii) allow you to continue to treat patients with acute illnesses; and, (iii) most importantly, provide you the right to buy-out the restriction. The buy-out amount is discussed in a later section. Regardless of the buy-out amount, Texas law entitles the employer and the employed

physician to an independent arbitration of the buy-out amount if you decide to compete at the end of your employment. So take some comfort that if you later leave the practice, and the buy-out amount is unreasonably high, you can ask a neutral party to set the buy-out price.

Buy-Out Amount. As the Texas law is relatively new, there is little guidance on what the buy-out amount should be. Frequently, a practice will insert an amount without actually trying to quantify the cost of the buy-out. Some practices will set the amount at unreasonable level to prevent the physician from competing. Even though the amount can be reset by an arbitrator, as discussed in the prior section, the practice may feel it has nothing to lose in setting a high buy-out amount. Generally, the buy-out amount should be an amount that is representative of the harm that would occur to the practice if the covenant is violated. Usually this amount is the revenue that would be generated by the physician less the practice's operating costs associated with the physician, to wit, the profit of the physician.

Caution: Covenants not to compete are in a state of flux and both court decisions and new laws could affect the statements in this booklet. For this reason, consult with an attorney if your contract contains a covenant not to compete.

Negotiations. Always ask to delete the covenant not to compete. If the employer insists on the covenant, ask that the covenant not apply if: (1) you leave for any reason in the first year, or (2) the employer terminates your employment without cause. Sometimes employers will agree to limit the noncompete under those conditions.

Caution on Noncompete Covenants. A noncompete covenant can have a very dramatic impact on your professional career. It is not unusual if your first employment opportunity does not work out. Unfortunately the noncompete covenant can have a very chilling effect on your ability to find employment. You have selected a community that is attractive to your family and you. You may have bought a house and started to put down roots. The noncompete may result in your having to relocate to a new community, or at a minimum, if you live in a large metropolitan area, having to join a practice far from you home and/or in your emerging referral base. While you may have the *right* to buy-out the restriction, you may not be financially able to do so. Bottom line: Think about the possible consequences of the noncompete before you sign a contract with one in it.

Confidentiality Covenants. Employers now want to protect confidential information used in their practice. This information extends beyond patient privacy issues, and focuses on information that gives the group a competitive advantage. The contract will typically state that confidential information of the practice will be shared with you during your employment. You are asked not to disclose that information during your employment and after you leave. Very frequently the period of nondisclosure after your departure will be stated as a period of years, with three years being common. However, unlike the covenant not to compete, the covenant not to disclose confidential information may have an indefinite duration.

Caution: Even if your contract does not contain a confidentiality provision, employers have protected rights in confidential trade secrets. When negotiating your contract, focus on the length of time

you are not to disclose confidential information. Some lawyers will ask that “carve outs” be added to the covenant. These carve outs exclude confidential information that you learn from other sources or that is generally known to the public. Note: Texas Medical Board rules require physicians departing from a practice to notify patients of the departure.

Nonsolicitation. Nonsolicitation covenants come in two varieties. Your contract may have one or both. First, employers ask that the physician employee promise not to solicit for employment or to hire any employees of the employer for a period of one year after the physician leaves the group. The promise may be extended to include both existing employees at the time of the physician’s departure and any employees who were employed by the employer for one year prior to the departure. A second variety on nonsolicitation is the promise that you will not contact patients or referring physicians with whom you had contact during your employment.

Consequences of Violating Restrictions. If your contract has restrictions on your activity, it also will contain a description of legal actions to which your employer may resort if you violate a restriction. These descriptions will contain statements to the effect that a violation of the restriction may cause irreparable injury that cannot be satisfied by monetary damages. As a result, the employer will have the right to seek injunctive relief. What this means in practical terms is that the employer may get an expedited court order prohibiting you from continuing a restricted activity that you agreed not to do in your contract. In their zeal to provide maximum protection for the employer, its attorney also will add language that you acknowledge the restrictions are fair and reasonable.

While I find the language to be one-sided, I typically do not try to negotiate around these provisions. Either the restriction to begin with is acceptable or not, and if it is acceptable, I believe that the physician should observe the restriction upon departure. At least in the case of the covenant not to compete, Texas law requires that the physician have the opportunity to pay a reasonable price to buy it out.

Ownership of Medical Records. Medical records are an important asset to every practice. Because of their value, your contract will almost always assign the ownership of any medical records you create to the practice itself. If you leave the practice, you may need access to these records, (e.g., for a malpractice suit.) If the contract is silent on this issue, you should ask your employer for this limited access. The practice may be sensitive to this request because of its concern to protect its confidential information. This access was previously discussed in the section on confidentiality covenants.

Inventions; Intellectual Property. Many times, an employment contract will include a section discussing the employee's inventions. The contract will provide that anything you invent, discover, or write while you are employed that constitutes intellectual property belongs to the group. It will go on to say that you agree to assign your ownership of the invention to the group and will assist it with patenting or otherwise protecting it. I suspect the invention provisions have emerged in physician contracts more from attorney's copying general employment contract forms used in industry than an outright concern that the group own a physician's inventions. If you see this provision, ask that it be deleted, particularly if you are engaged in research or activities that could lead to an invention. While inventions are concrete examples, the contract

provisions can extend to writings, protocols, and processes as well.

Equity Ownership. Your employer will likely be an entity of some type, such as a professional corporation, professional association, or professional limited liability company. At some point you may want to become an owner in the entity, which is frequently, though incorrectly, referred to as becoming a “partner.” Typically a group will consider you for “partnership” after some minimum period of time, which may range from one to five years, with two years being the most common. If you want to be considered for “partnership,” ask your employer to add provisions to the contract committing it to consider you for equity ownership. Usually these provisions are not very specific, because the group does not want to commit in advance that you will become a partner until you have proven your productivity, but at least you have a commitment to be considered.

Specifics. You will want to ask the employer what the terms for becoming a “partner.” For example, is there a buy-in and how much is the buy-in? Will the group finance the buy-in for you or will you have to borrow the money from a bank? Ask for a copy of the agreements among the owners that govern their ownership. These papers go by a variety of names, but are generally referred to as a “buy-sell agreement” and/or a “deferred compensation agreement.” Most importantly, try to get an understanding on how the physician owners are treated differently than the staff physician.

Ancillary Services and Entities. The business of medicine now requires physicians to take advantage of revenue-producing ancillary services. For example,

many practices own labs, x-ray, diagnostic imaging, etc. While a number of regulations apply to physician ownership of ancillary services (notably the Stark law), many practices legally operate ancillary services. You should understand which ancillary services the group's patients receive, their revenue potential, and who provides them — your group or another entity (perhaps affiliated.) For example, some practices use one entity for professional services and another to provide ancillary or technical services. These distinctions could affect your compensation. If you are entitled to a production-based compensation, you will want to receive credit for revenue generated from these ancillary services for your patients.

Related Investment Opportunities. You should inquire whether there are other entities owned by the owners of the practice group that are related to the practice. For example, the senior owners of the practice may also own the building where the practice is located. The owner of the building rents it to the practice group. Thus, part of the group's overhead becomes additional revenue for a subset of the practice's owners. Similarly, related entities may lease equipment or provide management services. Be aware of these possibilities, and if they exist, make sure that you will at some point in the future have the opportunity to buy into these related entities. The discussion below about equity ownership applies equally to these related entities.

Dispute Resolution

Governing Law and Location. Your contract will say that the laws of the state where you practice govern it. It may also say that any lawsuits arising from a dispute must be brought in the courts of a particular city or county. Many states have laws that

allow the party who wins a lawsuit over a contract to also be awarded the cost of bringing the suit, including attorney's fees, and your contract may reiterate the law. Rarely, a contract will limit the time period in which the physician may bring a claim against the employer. In Texas, the minimum time limit is six months. In the absence of a time limit, the period is four years, longer in some states.

Arbitration. In lieu of bringing a suit in the courts, some contracts specify an alternate means for resolving a dispute, such as binding arbitration. Parties who agree to binding arbitration are precluded from using the courts to decide the dispute. The contract's arbitration provisions should, at a minimum, state where the arbitration is to be held, the number of arbitrators who will decide the dispute, and the rules that will govern the arbitration. The most common set of rules are the commercial arbitration rules of the American Arbitration Association (AAA), a nonprofit national dispute resolution organization (www.adr.org). Other organizations also are used, such as the American Health Lawyers Association Alternative Dispute Resolution Service (www.healthlawyers.org), but AAA is the most common. If AAA administers the arbitration, the party initiating the proceeding must pay a filing fee. The AAA's rules and filing costs are posted on their Web site.

Which Is Better? Attorneys differ on whether it is better to have binding arbitration or not. Factors in favor of arbitration are speed of resolution, professional decision-maker, and reduced costs. Factors in favor of traditional lawsuits are well-defined rules of procedure, opportunity for jury trial, and opportunity for appellate review of trial court

decisions. Your individual attorney will be in the best position to advise you on arbitration.

Part III Hospital Income Guaranty and Relocation Agreements

Introduction to Hospital Agreements. Up to this point, we have focused our attention on employment agreements between an employing group and you. In this Part of the brochure we turn our attention to an additional type of contract, which I generically call a “hospital assistance contract.” This contract is a contract that is in addition to your employment contract. It will typically come directly from the hospital offering the assistance, but it is usually negotiated and signed at the same time that you negotiate and sign your employment contract. Note that hospital contracts are a separate contract. It can be just between the hospital and you or among the hospital, the employing group and you, but the hospital agreement will be separate from and in addition to your employment agreement.

Hospital Assistance Agreements. Many hospitals and hospital systems will offer contractual recruitment incentives to physicians, in the form of financial assistance, to relocate to the hospital’s patient community. If the physician is completing training in the same area as the hospital, the hospital may also offer a contract for you to remain in the same locale. While the hospital is performing an admirable community service in attracting and assisting high quality providers, they also are motivated by the referral relationship that the arrangement will foster. Hospital systems have recruiting staff that will work with groups looking to expand and will work with new physicians looking to open their private practice or join a group upon completion of their training.

Limited Benefit, Limited Term. These agreements usually last only one year, which is usually called the “guarantee period” in the contract and are for the specific purpose of assisting you in starting your practice or assisting the group employing you. As you will see below, the assistance is stated to be a fixed amount, which is usually referred to as the “guarantee amount,” but the actual amount of hospital assistance will depend on your success in bringing in revenue. The quicker you transition to charging and collecting fees as a full time practitioner, the less the hospital will pay you.

Contract Names; Technical Language. As a result of use or custom, the hospital assistance agreements go by a variety of names. The contract names most commonly used are a “relocation agreement,” an “income guaranty agreement” or a “collection guaranty agreement.” The common elements of these contracts are discussed later. If you have trouble reading the contract, don’t be alarmed; contracts can be very difficult to understand even though they may only be a few pages. After reading Elements Common to Most Hospital Assistance Agreements, you will find it easier to dissect the technical language in the contract and to spot the type of contract the hospital is offering.

Retention Provisions. Contracts are cleverly designed to encourage you to stay in the community to which you are being recruited by imposing financial disincentives. In exchange for the hospital’s financial assistance, the hospital will require you to remain in the hospital’s community at least four years, although a shorter three-year period is sometimes used.

Regulatory Issues. While these types of contracts are becoming very common, the sponsoring hospital must provide the benefits in a way that complies with applicable health care law. For example, if the hospital is part of a non-profit organization, such as faith-based system, the contract must comply with IRS regulations unique to entities that are exempt from federal income taxation. In addition, because of the possibility for the referral of patients to the hospital, all hospital contracts must comply with the Stark law and the approved “safe-harbor” exceptions, as discussed in greater detail below.

Elements Common to Most Hospital Assistance Agreements. While hospital assistance contracts come in many different versions and go by different names, they typically share very common elements. First, there is a guarantee of income or collections. Second, there is the provision of additional benefits, such as assistance with marketing, relocation expenses, practice management and software, and malpractice insurance. Third, the contract will provide for repayment of the benefits provided. Fourth, the contract imposes a variety of conditions to the hospital’s ongoing obligations, such as maintaining a full-time practice in the hospital’s community, maintaining your medical license, maintaining enrollment in Medicare/Medicaid programs, and maintaining active staff privileges with the hospital.

Remember, as with employment agreements, hospital assistance agreements can be negotiated. Keep in mind, however, that the hospital system with whom you are practicing may comprise many hospitals over a wide geographic area; therefore, the contracting officer likely will resist changes that deviate from the hospital’s contracting policy or uniform provisions.

Guaranteed Financial Assistance. Almost all hospital assistance contracts are in the form of a fixed amount that the hospital will guarantee as your income for one year, and in rare instances, two years. In other words, the hospital will guarantee that your income is at least a certain level. The actual contract terms contain provisions that measure your revenues, and the hospital pays a supplemental amount if you don't reach the target amount. The supplemental payment now is almost universally in the form of a loan in order to comply with the federal fraud and abuse laws, including the Stark and the Anti-Kickback statutes. In fact, don't be surprised if the hospital contract has various exhibits, among which may be a promissory note equal to the full amount of the guarantee.

Procedure — How Do You Get Paid? The contract will state the specific procedures you must follow before the hospital will pay you monthly assistance. First, you must timely bill all your patient charges. Second you must provide the hospital with a certificate that states how much you billed. Third, you give the hospital the right to inspect your records to confirm the amounts you billed and subsequently collected. The contract usually is specific about the fact that you will practice full time (e.g., 40 hours per week, and no more time off than a few weeks for vacation).

Example. Typically, the hospital will guarantee that you will receive a fixed amount monthly for the first 12 months of your practice. The payments are made in arrears, meaning that you will receive a monthly payment following a month of service. The hospital arrives at the stated guarantee amount using a projection of your monthly salary and your practice

expenses for one year. Thus, a hospital might guarantee that you will have a minimum of \$30,000 per month, out of which you will pay a salary, such as \$150,000 per year, and the expenses of operating your practice, such as rent, staff, supplies, etc.

What the Guarantee Really Means. The stated guarantee amount is a maximum amount of assistance that the hospital will pay to you. It is expressed both as a monthly maximum and an annual maximum. However, the guaranteed amount is not in addition to what you make. In other words, the hospital's assistance is measured against your actual revenues. In the first few months of the term of the hospital contract, the hospital might pay you the full monthly guarantee, because you haven't yet started receiving collections for your billings. After a few months, you will start collecting for your patient encounters and have revenue. The revenue that you collect will be deducted from the guaranteed amount, and the hospital will only pay you the shortfall. Continuing the prior example, if you collected \$35,000 in a month, the hospital would not pay you anything, because you collected more than its minimum guarantee. Thus, if the total guarantee amount is \$360,000 (\$30,000 per month), you may only receive a fraction of that amount because your practice is collecting on the claims you submit for your patient encounters.

Excess Collections. Most hospital assistance contracts state that if you have collections in a month that exceeds the guaranteed amount for that month, the excess will be rolled forward to succeeding months. In that event, the hospital's guarantee will be reduced. So, if you collected \$35,000 and the hospital guarantee was \$30,000, the hospital's guarantee amount for the succeeding month would be reduced

to \$25,000. If you collect more than \$25,000 in the following month, you will not receive a payment from the hospital. When you think about it, the reduction is only fair. The hospital is offering its assistance to make sure that you can earn enough to pay your salary and expenses while you establish your practice. Sometimes, any excess must be applied to repay prior advances, though this type of provision is rare.

“True Up” at the End of the Guarantee Period.

The contract will provide at the end of the initial assistance or “guarantee period” (e.g., the first year during the hospital pays you monthly assistance) that the hospital will review your collections and the amount of assistance that you received from the hospital. The “true up” period will include a 60-day period after the end of the first year in which your additional collections will be counted. You will be asked to provide an accounting of your billings and collections. Basically, all the “guarantee payments” made by the hospital will be added, and you will owe this amount to the hospital. The contract language to cover the true up is usually very tortured reading. Keep in mind that it is written to arrive at the net amount that the hospital paid you.

Repayment. Some hospitals require the physician to repay the loaned assistance over the remainder of the contract period, (e.g., the remaining three years, in 36 monthly installments, but usually without interest.) More commonly, the hospital will forgive a monthly installment for each month that the physician remains in the community, (e.g., 1/36 of the balance per month of continued practice in the community.) If you leave the community before the end of the contract, the remaining, unforgiven loan balance will be due.

Performance Conditions; Breach of the Agreement. As mentioned above, the hospital's assistance obligations are predicated on a number of conditions with which you must comply. If you do not observe the conditions stated in the contract, the hospital could declare you to be in breach of the contract, immediately stop making monthly assistance payments, and declare prior assistance it paid to be due and payable.

Examples. Many of the listed conditions are in the nature of serious, catastrophic events, but ones in your control, such as the loss of your medical license, the loss of staff privileges with the hospital, or ceasing to actively practice in the community. As a consequence of a breach of the contract, the hospital can terminate its assistance and declare the loan amount due. Typically upon termination of the contract due to your default you will be given six months to repay the loan, usually with interest at the prevailing prime rate.

Remaining in the Hospital's Patient Community. As mentioned in the previous paragraph, all hospital assistance agreements are conditioned on the recruited physician practicing full time in the hospital's patient community for at least the contract period, usually four years. Commonly, the contract will define the geographic boundaries of the practice area by zip codes that include the location of the hospital and a surrounding area. In a large metropolitan area with competing hospital systems, the defined area may be fairly restricted. If you move your practice outside of this area, you will be in breach of the assistance agreement, and the hospital may seek repayment of the loan from you.

Caution: The requirement to continue to practice in the defined area is very important to the hospital. If you do not fulfill the full term of your practice commitment, you can and should expect the hospital to take steps, including possibly legal action, against you to collect the remaining balance of the assistance. Thus, it is critically important that you carefully evaluate the community to which you are being recruited to practice. You are making a very long-term commitment and you cannot just abandon your commitment after the hospital's payments to you stop. When you think about it, the commitment you make in the hospital agreement is just as significant as your obligations in a noncompete agreement with a group employing you.

Special Issues of Concern. In addition to the conditions described above, the breach of which can cause you to be in default of the contract, hospital assistance contracts frequently provide for termination upon the death or disability of the physician. My concern over these provisions is that if the hospital contract is terminated before the end of its four-year period, the loan becomes due. You should ask the hospital to delete any provision that makes the loan due upon your death or disability. Truly, that is a risk for which the hospital is in a better position to bear than your family and estate.

Restrictions on Investments in Competing Enterprises. The Stark law prohibits the hospital contract or your employing group from restricting your ability to compete via a noncompete covenant. However, some hospital assistance agreements impose certain investment restrictions on the physician. A common example is to prohibit the physician from owning an interest in a hospital, diagnostic imagine center or ambulatory surgical

center (ASC). Some hospital contracts prohibit the physician from engaging in any activity that would compete with the hospital's business. Obviously, the hospital is protecting its sources of revenues from physician encroachment.

Caution: The restrictions described are for the duration of the hospital contract (e.g., four years). During that period your practice will mature and you may be offered opportunities to invest in entities, such as ASCs, that compete with the hospital's business. The restriction could preclude you from taking advantage of an investment opportunity that could supplement your practice income.

Other Financial Assistance. The hospital's assistance contract almost always includes "up-front" monetary assistance paid at the beginning of the contract to assist you in establishing your practice. Subject to meeting the regulatory requirement that the assistance meet fair market value standards, this assistance can be somewhat customized to the physician's particular practice needs.

Examples of Other Assistance. Types of assistance include (i) a fixed amount up to which the hospital will reimburse the physician for relocating to the hospital's community; (ii) the first year's malpractice premium, not to exceed a stated amount, or alternatively, the premium for a tail policy; (iii) marketing expenses, up to fixed amount, to market your practice through advertisements in the media; and (iv) specific practice needs, such as billing software. Sometimes the up front assistance includes a one-time signing bonus of \$5,000 to \$25,000. Some contracts will offer to send you or your staff to programs relating to practice operations, such as billing, coding, accounting and marketing. The

foregoing are just examples of what you will commonly encounter, but this part of an assistance contract is one in which you can negotiate for payments that will best help your practice to succeed.

Repayment of Other Assistance. As in the case of the monthly income guarantee, most hospitals will treat the additional assistance as a loan. However, unlike the monthly guarantee, the loan for the “up front” assistance usually does not have to be repaid or is forgiven on the same basis as the guarantee amount. Sometimes it must be repaid if you do not remain in the community for the minimum contracted period, e.g., four years, or if you were to otherwise breach the agreement.

Loan Forgiveness. Even though the assistance the hospital provides is in the form of a loan, you may not be obligated to pay the loan back if you maintain an active practice in the community for term of the contract. The mechanics of the loan forgiveness vary. Sometimes the hospital will forgive a prorata amount for each month served. Others forgive the loan annually, e.g., 25 percent per year. The period over which the loan is forgiven will usually be three or four years, the balance of the term after the initial year of assistance. Thus, if you practice in the locale for the stated time, you don't have to repay any amounts loaned to you.

Tax Consequences of Loan Forgiveness. While the loan forgiveness sounds great, you must remember that any amount forgiven will be income on which you must pay federal income tax. The hospital will send you annually a Form 1099 that states the amount that was forgiven, and will also send the form to the IRS. You must report the amount on your tax return and pay the associated tax. Texas does not have a state

income tax, but be aware other states may have an income tax that would also apply to the forgiven amount.

Coordination with Group Employment. Much of the above discussion speaks to the hospital recruiting you as an individual to the community to practice. The same concepts apply to you when you are recruited to join a group in the hospital's community. However, instead of a contract just between the hospital and you, the contract is with three parties: the hospital, the employing practice, and you.

Only the Incremental Cost. When a hospital assists your recruitment into an existing practice the Stark law is fairly specific on the amount of assistance that can be offered to the practice and you. The hospital may only assist the practice with the incremental cost of adding you as a member. This amount would include your salary and the added cost the practice will incur to support your position, such as a nurse or additional equipment. By contrast, the hospital may more fully assist the physician setting up his or her solo practice. In that vein, it is not uncommon to encounter several solos, each contracting separately with a hospital, but with a view to combine into a group when the initial assistance period ends. If they started as a group, the assistance might be diminished because the hospital can only assist with the incremental cost of additional physicians.

Responsible Parties. The hospital contract may provide that the assistance will be paid directly to the employing group. In that the instance, the group must sign the contract and use the payments only for the employed physician's benefit. In addition, the group must also agree to repay the loaned amount of

assistance if the recruited physician doesn't satisfy the contract conditions, such as practicing in the community for the requisite period of time. As an alternative, the contract can provide that the assistance will only be paid to the physician. In that instance, only the recruited physician is liable for repayment.

Collateral for Repayment. The hospital's contract often will require the employing group to pledge the receivables attributable to your services to secure the repayment of the guaranteed amount. The contract also may require the group to pay your receivables to you if you leave the group's employ before the end of the hospital's guarantee period. This latter requirement is added to make sure the employee has a means to repay the loaned assistance.

Contracting Challenges. While the foregoing rules applicable to hospital assistance to employing groups are somewhat straightforward, the actual contract terms for the arrangement can be more problematic. For example, if the payments are made to the group, and the recruited physician meets the requirements for loan forgiveness, who gets the Form 1099 and who pays the income tax on the forgiven amount? If the payment is made directly to the physician, how does the money pass to the practice that is incurring the cost of the physician? If the physician doesn't satisfy the continuing practice requirement, how does the group protect itself when the hospital is looking to it for repayment? There are solutions to these questions, but they do require careful drafting and consideration of the consequences.

Stark Law Provisions.

Safe-Harbor Regulations. The regulations interpreting the Stark law's application to physician recruitment allow hospital assistance agreements to fall within a "safe harbor" to the Stark law if certain conditions are met. The term "safe harbor" means that, if the conditions in the regulations are observed, the contractual relationship will not violate the Stark law.

Fair Market Value. Central to the regulations is the fundamental premise that the hospital's assistance must be for fair market value. The hospital may not pay more than the fair market value of the assistance provided to the physician or the employing group. This requirement means that the hospital must only pay assistance that would be needed to attract the physician to the specialty. The salary must be competitive but not in excess of what a new physician would be paid to come to the community. The additional assistance must be at its fair market value, such as the actual projected cost of staff, rent and insurance premiums. Frequently, the hospital will document the fair market value of the assistance through consultants or internal evaluations that the assistance does not exceed what the services would cost in the open market.

Relocation. To prevent abuse, the regulations impose additional conditions on the recruitment of the assisted physician. If the physician is coming out of training or has been in practice for less than one year, the physician can be recruited from any geographic area, including from the hospital's community. If the physician has been practicing for more than one year, the physician must relocate from outside the community. The regulations allow the physician to

satisfy this relocation requirement in one of two ways. First, and easiest, the physician must physically relocate his or her practice at least 25 miles from the prior practice location. Second, the physician must relocate in a manner that results in at least 75 percent of his or her patient encounters coming from patients the physician hasn't treated in the last three years.

Noncompete Covenant Prohibited. If the hospital is assisting a group employing a new physician, the Stark regulations prohibit the practice from imposing a noncompete covenant on the new physician for the duration of the contract.

Staff Privileges. The hospital assistance contract may not require you to refer patients to the hospital, but you can be required, as a condition, to maintain privileges at the hospital. Moreover, you cannot be prohibited from establishing privileges at competing hospitals and referring patients to them.

IRS Requirements. As mentioned at the beginning of this part, 501(c)(3) tax-exempt hospitals face additional requirements under the Internal Revenue Code and its regulations pertaining to tax-exempt organizations. The charitable hospital must satisfy these requirements, in addition to the Stark requirements, to maintain its tax-exempt status.

Public Benefit. To be exempt from taxes, a charitable organization must demonstrate that no part of its profits or income inure to the benefit of private individuals. The favorable tax status is conditioned on the premise that the charity's mission is for the benefit of the community as a whole. Thus, the benefit that the private physician receives as a result of the assistance is outweighed by the benefit to the

community in recruiting the physician to the community.

Community Need. There must be a need in the community for the recruited physician in the physician's medical specialty. The hospital must be able to show that its community is underserved in the particular medical specialty by demonstrating a need for the specialty of the physician recruited.

Part IV Other Agreements

Independent Contractor Agreements. A physician independent contractor agreement is very similar to a physician employment contract. Both contracts are professional services contracts. They differ in two principal respects. First, under general common law principles, the employer does not have responsibility for the actions of an independent contractor. The independent contractor exercises independent control of his or her actions, for which the employer is not responsible, unless the employer is ignoring activities of the independent contractor that would likely lead to injuries. The facts and circumstances of the relationship with the employer determine the contractor's status, not the designation "independent contractor." If the employer exerts control over the relationship, such as the ability to approve or direct the scope of work, the means of work, the location of work and similar items, the relationship will be deemed to be an employment relationship even though it has been designated an independent contractor relationship. As discussed above on employment contracts, an employer has equal liability with the employee for negligent acts.

The second difference for independent contractor agreements is the employer's responsibility

for employment taxes. Employers must pay employment taxes on the wages of employees. Independent contractors are responsible for those employment taxes, commonly called “self-employment taxes.” Again, the denomination of the relationship is not controlling. The IRS will apply 20 factors in determining the nature of the relationship to distinguish between employee and independent contractor.

These factors are much like those described above. In addition to paying self-employment taxes, the independent contractor also is responsible for making quarterly income tax deposits. In the independent contractor relationship, the employer is not responsible for withholding income taxes from payments to the independent contractor. Other than these two principal distinctions, virtually all other aspects of the independent contractor agreement are similar to the employment contract.

Letter Agreements. Almost all of the preceding discussion has been with respect to formal, multi-page contracts. I have seen on more than just a few occasions the entire employment arrangement embodied in a “term sheet” or offer letter. These usually are very informal in style and typically written by the office manager or the managing physician.

A term sheet or offer letter or expression of interest can be a really useful tool in physician employment contracts, but it should not supplant a carefully written, thorough employment contract. The term sheet should outline the major points for the new physician. If the parties agree on the major points, then the group asks its attorney to prepare the formal contract. The term sheet allows the parties to make

sure that they are both on the same page on key items, such as salary and vacation and bonus.

Usually when I see a letter agreement, it is when the recruited physician is unhappy and wants to leave the group. Needless to say, that is too late in the game to be concerned about what your rights are.

* * * * *

Good luck in negotiating your employment contract. We wish you the best in your professional career. On the following pages are checklists to use when evaluating employment contracts and hospital assistance agreements.

Mike Kreager
June 2007

Checklist for Employment Contract	
List	Notes
Start Date With the Group	
Base Salary	
Bonus; Fixed Amount or Formula	
❖ Request Sample Calculation	
Duties	
Location Assigned	
Equitable Call Coverage	
❖ Weekend, Weekday, Holiday	
Mentoring; Referral Relationships	
Malpractice Insurance Limits	
Tail — Who Pays	
Termination	
❖ Without Cause; Minimum Notice	
❖ Cause	
Payment After Termination; Bonus Payment for Post-termination Collections	
Benefits	
❖ Group Health Insurance; Employee; Dependent	
❖ Disability Insurance Qualification Period; Benefit	
❖ Life Insurance Amount	
❖ Dues, Subscriptions, Licenses: Amount	

	❖ CME Amount	
	❖ Vacation	
	❖ Sick Leave	
	Confidentiality Covenant	
	Nonsolicitation Covenant	
	Noncompete Covenant	
	❖ How Far	
	❖ How Long	
	❖ Buy-out Amount	
	Inventions Covered	
	“Partnership” Opportunity	
	Governing Law	
	Arbitration	

Checklist for Hospital Assistance Agreement	
List	Notes
Guarantee Amount	
❖ Monthly Amount	
Guarantee Duration	
Contract Duration	
Repayment of Loan; Terms	
Loan Forgiveness; Terms	
Conditions	
❖ Practice in Community	
❖ Death or Disability	
❖ Restrictions on Investments	
Upfront Additional Payments	
❖ Sign Up Bonuses	
❖ Relocation Expense Reimbursement	
❖ Malpractice Premium	
❖ Software	
❖ Marketing/Advertising	
❖ Other	
Default Consequences	

Notes:

7373 Broadway ♦ Suite 500 ♦ San Antonio ♦ Texas

