Typical Physician Employment Agreement Negotiating Points (from the physician's point of view)

The Employment Agreement sets forth the employer's and the individual physician's understanding of the terms and conditions of their business relationship.

Pre-Contract Discussions — Often the prospective physician employee and the employer will have a number of informal discussions before a contract is drafted. Please understand that agreements reached during those early discussions will not be binding on anyone unless included in the actual contract that is ultimately signed.

Letter of Intent — Before circulating the actual contract, the employer may send out a "letter of intent" to make sure that there is agreement on the basic terms of employment. There is little advantage to the prospective physician employee in signing such a document. If you must, please review it carefully, make sure that it is not binding, and look for any restrictions on your talking to other prospective employers.

Contract — Read and understand the document that your prospective employer has put in front of you. It is a legal document and will be binding on you after it is signed. The employer's lawyer has drafted it, and he is not your friend. Get help.

Before You Sign — It is important for the parties to perform business and legal due diligence on each other.

• Business Due Diligence: Contractual arrangements with physicians are based on both the personality and professionalism of the parties. Business due diligence will help reassure the parties that there is a reasonable personal and financial basis for the parties to enter into a contract. Business due diligence includes review and research into the following issues: What is the professional background of the parties — what is the professional and business reputation of each party? What kinds and how many malpractice actions have been filed? What managed care plans are in effect? What do the financial statements look like? Who are the parties' accountants? Bankers? What has been the experience of each party in similar contractual arrangements?

• Legal Due Diligence: There are voluminous regulatory issues affecting physicians, groups, hospitals, MCO's, and others. Because of this increased scrutiny, legal due diligence will help reassure the parties that everyone takes these issues seriously. Legal due diligence includes review and research into the following issues: Has there been any exclusion of any party from participating in the Medicare program or from any managed care plan? Does the party have a compliance plan — if so, what does it say? Is a third party billing company used — if so, does it have a compliance plan? Who are the parties' lawyers and consultants?

Hot Topics to be on the Look Out For –

• Hospital Recruitment: Is this arrangement part of a hospital recruitment program? Many hospitals help physician groups recruit new physicians by providing loans to the group and/or physician which may be forgiven over time subject to the physician's maintaining privileges at the hospital and working in the area for a specified time period.

• Exclusive Contracts: Does the group that you are joining have an exclusive contract with one or more hospitals? If so, if and when the exclusive contract terminates (or your employment agreement terminates), you may be required to resign from your privileges at the hospital(s).

Provisions in (or that should be in) Every Employment Agreement

1. **What Type of Business/Legal Relationship** — The individual physician can be contracted with either as an employee or independent contractor. As an employee, the group will have control over the way the employee discharges his or her duties, when time off is taken, shifts to be worked, etc. The employer will pay withholding, social security, and Medicare taxes on the employee's wages. If full time, the employee will participate in the group's retirement and other fringe benefit programs. Independent contractors, on the other hand, are "independent" in how they perform their duties for the group contracting with them. There is no withholding or employment taxes paid with respect to their compensation, and they are not entitled to participate in retirement and fringe benefit programs. The correct classification of a physician as either an employee or an independent contractor is very important. If a group engages a physician and treats him as an independent contractor, but the IRS later decides that the physician was actually an employee, the group will be responsible for paying back employment taxes, contributions to retirement plans, plus interest and penalties. Because this can have a severe economic impact on a group, groups often include in their independent contractor agreements an obligation for the physician to indemnify the group for all such unpaid taxes, contributions, interest, and penalties in the event a reclassification occurs. The physician should be very sensitive about signing such a provision.

2. **Term and How to Terminate/For Cause vs. Not For Cause** — The parties should understand precisely the term of the arrangement that they are entering into. If the agreement is renewable, it is important to specify whether or not the agreement terminates or renews automatically and the prior notice, if any, that is required. If the agreement can be terminated without cause at any time, it is important to realize that the actual term of the agreement is really only the length of the notice period for termination. For example, a two-year employment agreement that can be terminated by either party with 60 days prior written notice, is really only a 60-day contract. If the agreement can be terminated with cause, the specific types of cause that are sufficient for termination should be listed, as well as the conditions under which the defaulting party can cure the situation.

– Termination How/When By Employer

– Termination How/When By Employee

You should also be prepared to address salary and benefit continuation and calculation after termination.

Beware of penalties and paybacks as a result of early termination [e.g., moving expenses, sign-on bonus, EHR incentives and licensing fees].

3. **Compensation** — Non-owner physicians are compensated in a variety of ways. Often, especially during the first year or two of employment, there can be a base pay plus a discretionary incentive bonus. Alternatively, compensation can be based solely on a percentage of actual collections for services rendered. Depending on the circumstances, there may be a shift from one form of compensation to the other or a hybrid of both. The agreement should set forth the specific formula or methodology for determining the physician's compensation (which may include how expenses are allocated among the different physician employees).

– Salary

– Guaranty

– Productivity-Based

– Periodic Increases

– Bonuses

4. **Fringe Benefits and Perks** — Fringe benefits should also be listed with specificity: health insurance for the physician, dependent coverage, if any, CME reimbursement, books and journals, retirement benefits, life and disability insurance, cell phone and beeper, moving expenses, office and facilities. If these benefits are critical to the employee, he or she may want to include a provision in the agreement prohibiting any changes to them without the employee's consent.

– Health Insurance [family coverage included?]

– Disability Insurance

– Life Insurance

– Pension/Profit-Sharing/401K

– CME Allowance

– Books and Journals

– Car/Mileage Allowance

– Malpractice Insurance/"Tail" and "Nose" coverage

– Vacation/Time Off/Sick Leave

5. **Duties and Extent of Service** — The agreement should specify whether it is full time, part time, or temporary. Often, a physician will want to use his or her time off to do other fee-generating services. Employers, on the other hand, often feel this is inappropriate. Also, if a physician desires to perform charitable or other professional activities that are not income-producing (e.g., speaking, writing, serving on the boards of civic organizations), that should also be addressed in the agreement.

– Detailed Description and Practice Location

– Full-Time/"Moonlighting"?

– Expert Witness Fees

– Teaching/Writing/Speaking

– Expand/Develop New Practice Areas

– Investments and Outside Activities

6. **Day/Night Calls and Weekend Calls and Vacation Coverage** — The call schedule can sometimes be a point of major contention. The method by which call is shared needs to be clear in the agreement. The time off policy should also be clearly understood by the parties. The time off allowance may include vacation time, time for CME, sick leave, and the like.

– How Determined?

– How Shared?

– How Compensated?

7. **Restrictive Covenants** — Restrictive covenants include promises not to compete, not to solicit patients or employees or referral sources, and to keep group and patient information confidential. While this may vary from state to state, the physician and the group (whether an employment or independent contractor relationship) should assume that restrictive covenants are enforceable.

In Florida, Section 542.335, Florida Statutes, governs the enforceability of covenants not to compete. By its express terms, Section 542.335 requires, at least, that covenants not to compete be subject to:

(a) Reasonable time limitations — more than two year period is presumed unreasonable in

employment arrangements.

(b) Reasonable geographical area limitations — limitation as to specific facilities where an employer provides medical services was found to be reasonable.

(c) Reasonable business interest — employer must prove that the restriction is reasonably necessary to protect a legitimate business interest, which includes:

i. Valuable confidential business information;

ii. Substantial relationships with existing or prospective patient, customers or clients; and

iii. Patient, customer or client good-will associated with an ongoing practice, a specific geographic location or area, or specialized training.

For the group, these covenants are a way to protect its investment in the training and development of the physician. For the individual physician, the covenants can be an onerous burden that may require the physician to leave the community in which he or she has been living and working.

The typical remedy for violating the covenants is an injunction which, if granted, will prohibit the departing physician from further violations. Sometimes, "liquidated" or specified monetary damages will be provided. Sometimes, the group will accept the alternative of a cash payment from the departing physician to "buy out" the restrictive covenants, thereby freeing the departing to solicit patients, compete, etc. These payments though can be very high — in the five to six figure range.

Although most group practices require their new physician employees to sign contracts containing restrictive covenants, the provisions should be carefully read and understood by both parties and negotiated to the extent possible, especially the provisions relating to the time period for the restrictions (usually six months to two years, and sometimes longer) and the geographic area of the restriction (sometimes a county where the employee physician has been working or a specific mile radius from the office(s) location(s)). Make sure you understand the following:

– What is Restricted

– Type of Practice

– Patient Solicitation

– Employee Solicitation

– Hospital Privileges

– Referral Sources

– Time Period

– Geographic Area

– Remedies [Cash vs. Injunction]

8. **Employer-Controlled Matters** — There are a number of issues in the operation of the medical practice that are determined solely by the employer/owners.

– Fees, Billings, Collections, Records [EHR]

– Patient Admission

– Managed Care Plan Particiapation and Medicare and Medicaid

– Group Involvement in Other Business Ventures [e.g., IPA's, PHO's, PPM's, MSO's]

– Hiring and Firing of Staff Employees

– General Policies and Procedures, Complaince Plan

9. **Becoming an Owner in the Group** — If applicable, the time period and possible terms for a physician employee to become an owner of his employer/group practice should be described in the agreement. It is often difficult, however, to address these issues with much particularity at the start of the business relationship.

10. **Indemnity Provision** — This provision is often included in agreements. It provides that the employee is financially responsible to the employer for damages or losses experienced by the employer for the employee's breach of terms of the agreement. These can be problematic, because the employee could be responsible personally to the employer for any malpractice damages not covered by insurance, repayments to third party payors because of an inadvertent billing/coding mistake, etc. These should be avoided, or at least be mutual.

11. **Attorneys' Fee Provision** – One should be included in the Agreement providing that the winning party has its/her/his legal fees paid by the other side.

12. **Change of Law** — Because of the rapidly changing healthcare law regulatory environment, it is not uncommon for agreements to include a provision that allows the agreement to be changed or terminated if one or more provisions (usually dealing with compensation) become problematic as a result of new laws or regulations or new agency or judicial interpretations.