“Negotiating Contracts with Employers -- Issues to be Considered by New Endocrinologists”

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I. New Employment Contract Considerations:

- Preliminary due diligence.
- Flat salary vs. production-based compensation schemes.
- Ancillary revenue streams in large, multi-specialty practices.
- Benefits.
- Recruitment agreement considerations
- Applicability of non-compete provisions and non-solicitation restrictions.
- In the event of a conflict, is mediation or arbitration required?
- Choice of law and venue considerations.
- Corporate practice of medicine Issues.
- Partnership track concerns.
- Professional Services Agreements (PSAs).
Presentation Outline

II. Leaving a Job? Considerations:

• Notice provisions.
• Recruitment bonus concerns if you leave position early.
• Contractual terminations “for cause” vs. “without cause.”
• Benefits. What can you take with you?
• State licensure & patient notice requirements.
• Hanging your own shingle! How should you move forward?
I. New Employment Contract Considerations: Preliminary Due Diligence

- Conduct due diligence before joining a practice or hospital.
  - What is the reputation of the group or hospital?
  - Is there a history of federal / state enforcement against the group or hospital?
  - Does the organization have a sound Compliance Program in place?
  - Are there “related” companies that need to be taken into consideration?
  - Who owns the group or hospital?
  - What is the payor mix? How reliant is the organization on Medicare and / or Medicaid payments?
  - How many capitation contracts are in place?
  - How would you describe the organization’s relationships with federal, state and private payors?
  - What resources will be available for you to build your practice?
  - What are the primary sources of referral to the practice or hospital?
  - Should you become a shareholder, what is the “buy-in”? Are their tax issues that must be considered? How much debt does the organization have? As a shareholder you may be subject to joint and several liability in the event that the organization becomes insolvent.
  - Is the organization’s corporate culture consistent with your goals?
  - What is working at the organization? What isn’t working at the organization?
  - Is there a formal peer-review process?
I. New Employment Contract Considerations: Flat Salary vs. Production Based Compensation

• How will your compensation be structured?

❖ What will your proposed status be under the contract? Will the position qualify as a bona-fide employee? What benefits will you receive? (e.g. vacation days, sick days, health insurance, 401K contributions, life insurance, cell phone allowance, medical malpractice insurance, tail coverage, car allowance).

❖ Is the compensation scheme compliant with statutory and regulatory requirements? Three major federal laws to consider include the Anti-Kickback Statute, Stark and the Eliminating Kickbacks in Recovery Act of 2018.

❖ The Anti-Kickback Employee Safe Harbor applies only to bona fide employees. Protects all referrals between employed physician and employer.

❖ Don’t forget about the Eliminating Kickbacks in Recovery Act of 2018 (EKRA).

❖ The Stark Law Employee Exception requires that there be a:

  ❑ A bona fide employee relationship (common law definition).
  ❑ Identifiable services
  ❑ Salary + bonus is fair market value for the employee’s services and is not tied to volume or value of referrals
  ❑ Commercially reasonable even without referrals from employee to employer
  ❑ Productivity bonuses are ok, IF only reflect services personally performed by the physician (may not include “incident to” services)
  ❑ Can require employee to refer to employer.
I. New Employment Contract Considerations: Flat Salary vs. Production Based Compensation

• How will your compensation be structured?

❖ How will your bonus be calculated?
  - Billings → Collections → Net Income?
  - wRVUs?
  - Quality benchmarks?
  - Is there a cap on your overall income? Watch out for “stacking”!

  *Base salary*
  *Productivity bonus*
  *Quality bonus*
  *Bonus for serving as a supervisor*
  *Bonus for serving as a medical director*
  *Subsidy for school loans*

❖ Will you be still be eligible for a bonus if you leave the organization before it is paid?

❖ When is bonus compensation paid?
  - Annually? Quarterly? Monthly?
I. New Employment Contract Considerations:
Ancillary Revenue Streams

- Are there revenue streams other than your salary that you can participate in?
  - Are there *performance incentives*?
  - Are you *allowed to earn income for services that you provide outside* the organization?
  - If so, under what circumstances will you be *allowed to work outside the organization*, including such non-patient care activities as research, publishing articles, teaching, consulting, and directorships?
  - *What type of insurance does the employer provide*, whether liability or other?
  - Is there mention of *deferred compensation, stock options, or severance packages*?
  - Review the compensation provision for tax consequences that may be triggered by the compensation plan such as a "golden parachute" or a "deferred compensation plan." *Hire a tax professional can identify any tax issues which may be avoided by redrafting the contract language.*
  - *Beware of any liquidated damage clauses.* Many times, if you receive a bonus and agree to work for a certain number of years, an employer will put in a liquidated damages clause stating that if you quit without notice and/or without what the employer considers a valid reason you will owe the employer money. The clause will state that you agree it is impracticable and difficult to determine the damages the employer will suffer if you quit and then provide factors to determine the damages.
I. New Employment Contract Considerations:
Recruitment Agreement Considerations

• Are you being offered a relocation or recruitment bonus?
  ❖ *Hospitals in rural areas will often offer to underwrite relocation expenses and provide income guarantees to new physicians joining a local physician group in order to meet a community need in exchange for a physician’s promise to stay in the community for a period of time (usually 3-4 years).*
  ❖ The income guarantees are usually treated as loans by the hospital that must be repaid, but can be “forgiven” over time if the physician stays in the community
  ❖ These are financial relationships that are subject to both the Anti-Kickback Statute and the Stark Law. Under the Anti-Kickback *Practitioner Recruitment Safe Harbor:*
    ❑ Either in practice < 1 year, or relocating practice into a HPSA for his or her specialty
    ❑ Signed, written agreement laying out benefits to physician, the terms of those benefits, and the obligations of each party
    ❑ If relocating, at least 75% of new practice revenue must be from new patients
    ❑ In either case, 75% of patients treated must reside in a HPSA/MUA/MUP
    ❑ Benefits are provided for 3 years or less
    ❑ Terms are not renegotiated during duration of agreement
    ❑ Can’t require referrals to hospital
    ❑ Can require staff privileges at hospital, but can’t restrict privileges at other hospitals or referrals to other providers
    ❑ Value of benefits can’t vary based on volume or value of referrals
    ❑ Must require nondiscriminatory treatment by physician
    ❑ Payments by hospital may only benefit the recruited practitioner, and not the practitioner’s employer
I. New Employment Contract Considerations: Recruitment Agreement Considerations

- Are you being offered a relocation or recruitment bonus? *Continued:*
  - Under the *Stark Law Exception:*
    - Either in practice < 1 year and establishing a practice in the hospital service area, or relocating practice into the hospital service area to become a hospital staff member
    - If relocating, must move at least 25 miles or 75% of new practice revenue must be from new patients (measured over prior 3 years).
    - Signed, written agreement between hospital, physician and group/employer (if there is one).
    - Must pass entire “benefit” through to new physician.
    - Group can only retain actual costs of recruiting the new physician.
    - Can only include additional incremental costs in determining new physician’s income and calculating amount of guarantee to pass through to new physician (e.g., can deduct cost of a new nurse dedicated to new physician, but not a pro-rata portion of an existing nurse)
    - Must keep records of costs and income guarantee payments for 5 years.
    - Can’t place practice restrictions on new physician other than those related to quality of care.
    - Must comply with Anti-Kickback Statute.
    - Can’t require referrals to hospital.
    - Can’t restrict privileges at other hospitals or referrals to other providers (except those that comply with Stark employment exception).
    - Value of benefits isn’t tied to volume or value of referrals.
    - Must require nondiscriminatory treatment by physician.
    - Payments by hospital may only benefit the recruited practitioner, and not the practitioner’s employer
I. New Employment Contract Considerations:
Recruitment Agreement Considerations

• What happens if you break your recruiting agreement obligations?

- More likely than not, a hospital will seek to have you repay all or part of the recruitment / relocation bonus you received. They have a compliance obligation to enforce these agreements.
- It’s important to understand your income/collection guarantee:
  - What income is included in the calculation? How does the group split global fees where multiple physicians care for a patient? What about reciprocal coverage arrangements?
  - What expenses are included in the calculation? Be specific.
  - Consider attaching a pro-forma identifying the “formula.”
- Keep in mind you don’t have to stay with the same group...generally you just have to stay in the hospital service area to maintain compliance with the repayment forgiveness provision.

• Applicability of non-compete provisions.

• **Non-competition clauses should be reasonable in time and scope and most states and courts have determined what is reasonable.** Important factors are the length of time restraining competition, the activity restrained, and the geographic area in which competition is restrained. Many times this can be negotiated.  

  *What is the time proposed in the agreement? What is the geographic restriction?*

• **Confidentiality clauses should be reviewed as to enforceability and content.** Certainly there is information that is beneficial to the employer that is not known to competitors or easily ascertained by competitors and this is reasonably protected. However, many times these clauses may be overreaching and can be renegotiated or narrowed.

• **It is prudent to have a general understanding of what information you can or cannot take, disseminate or use.** This is important to reduce the possibility of your former employer filing a lawsuit to prohibit you from using certain information and to seek damages from you.

• **Some states have specific restrictions on physician non-compete provisions.** Consult a local health law attorney for assistance.
I. New Employment Contract Considerations: Non-Solicitation Agreements

• Is a non-solicitation provision included in the agreement?

  Your employment agreement will likely include a discussion of specific “remedies” that may be pursued by an organization if you violate either the agreement’s non-compete or non-solicitation provisions. It may state that the organization will obtain a court injunction enjoining you from practicing within the restricted area, or from violating the non-solicitation requirements.

  In most agreements, a violating physician may be required to pay specified monetary damages if one of these contractual provisions are violated.
I. New Employment Contract Considerations: Is Mediation or Arbitration Required?

• If a conflict arises, is mediation or arbitration required?

- Mediation is normally a non-binding settlement conference whereby the employer and employee present their side of the case to an impartial trained mediator when all are present. Thereafter, the parties are separated and the mediator goes between the parties to attempt to reach a settlement. If a settlement is reached normally an agreement is signed and is enforceable in court. If the parties do not reach a settlement they have the option to go to court or to arbitration.

- Arbitration is a more formal process which incorporates many of the rules of formal litigation and is usually binding. This means that the arbitrator, after hearing formal presentations of evidence by both sides, will make a written decision which is final and enforceable absent some fraud or a significant erroneous application of law. The law favors finality of these arbitration decisions.

- Arbitration clauses or agreements may preempt an employee from filing a discrimination case or wrongful termination case in court. These clauses should be reviewed and pro’s and con’s weighed. Many times these terms are negotiable.
I. New Employment Contract Considerations: Choice of Law and Venue Considerations

• The law of which state will apply? What is the designated venue?
  ❖ *Most contracts will have a provision stating that the law of a particular state will govern the interpretation and enforcement of a contract.*

  ❖ There normally are also provisions that provide that the venue (location) of a lawsuit is to be in a certain county, and in state or federal court.

  ❖ This is important if, for example, you move from your former place of employment in California to Maine. If there is litigation you may be forced to hire an attorney in California and litigate on your employer’s home turf. Alternatively, if you remain in California, but the employer is national, the contract may state New York law governs and any litigation will be in New York.

  ❖ Many times choice of law and venue clauses can be negotiated and this can be important in terms of future litigation expenses.
I. New Employment Contract Considerations: Corporate Practice of Medicine Issues

Many states prohibit what is commonly known as the “Corporate Practice of Medicine.” The Corporate Practice of Medicine doctrine typically prohibits corporations owned by non-physicians from practicing medicine by directly or indirectly employing a licensed physician to provide professional medical services.

Based on this doctrine, non-physician individuals and entities generally cannot employ physicians.

Many states have established exceptions to this doctrine. For instance, in Texas a non-profit entity certified by the Texas Medical Board under Section 162.001(b) of the Texas Occupations Code can employ physicians as long as specific requirements are met.
I. New Employment Contract Considerations: Partner Track Concerns

- Partnership track concerns.
  - Has the organization spelled out their criteria for qualifying to become a partner?
  - Are their several levels of partnership?
  - How much is the “Buy-In”? Can you make payments to cover the buy-in?
  - Will you be eligible to invest in related joint ventures? Does the organization have to approve your investments?
  - Once you are a partner, will you be subject to joint and several liability for wrongdoing or judgments against the partnership?
  - How is governance handled? Will your equity interest in the organization provide any real opportunity to affect change?
  - Is there a “Buy-Out” provision in the agreement that would permit senior or key members of the organization to effectively purchase your equity interest without your concurrence. If so, what will the pay-out be based on?
  - Can you elect to leave after you become a partner and force a buy-out?
I. New Employment Contract Considerations: Making the Relationship Work

• Making the employment relationship work:

  ❖ Communicate early and often.

  ❖ Provide financial accounting statements and track monies paid and received. Review reports and ask questions!

  ❖ Resolve conflicts when they arise.

  ❖ Don’t wait to fix financial issues.

  ❖ Address employed physician concerns, especially those related to compliance, coding and billing. Failing to is the quickest way to become a *qui tam* defendant.
I. New Employment Contract Considerations: Professional Services Agreements

- Professional Services Agreements (PSAs).
- Opportunities may arise for you to serve in some role outside your normal employment:
  - Medical Director
  - Product Development
  - Locum Tenens or Reciprocal Coverage
  - On-Call Coverage
  - Teaching

- **Arrangements where you receive compensation for services from an entity to which you might refer or for which you might generate referrals or purchases are subject to the Anti-Kickback Statute and potentially the Stark Law.**
I. New Employment Contract Considerations: Professional Services Agreements

- The Anti-Kickback “personal services and management contracts safe harbor” and Stark Law “personal services arrangement exception” are very similar and require the following:

  - a **written agreement** that sets out **all the relevant terms/services** and is **signed by the parties**.
  - is for a term of **not less than one year**;
  - the aggregate services contracted for does not exceed those that are **reasonably necessary** to accomplish the commercially reasonable business purpose of the personal services
  - the aggregate compensation paid to the agent over the term of the agreement is **set in advance**, is consistent with **fair market value** in arms-length transactions and is **not determined in a manner that takes into account the volume or value of any referrals or business otherwise generated between the parties** for which payment may be made in whole or in part under **Medicare, Medicaid or other Federal health care programs**.
II. Considerations When Leaving a Job: Contractual Terminations

• Most employment relationships eventually terminate:
  ❖ You may become a partner.
  ❖ You may relocate.
  ❖ You may have a difference in practice style and it makes sense to part ways.
  ❖ You may retire.
II. Considerations When Leaving a Job: Contractual Terminations

• What is the length of the employment agreement? Can your contract be terminated “For Cause” or “Without Cause” (more commonly known as “At Will”)?

  ❖ **“At-Will” contracts.** If your employment is at-will, the employer can fire you for a good reason, bad reason or no reason at all. There are exceptions but at-will employment definitely favors the employer.
  
  ❖ Even though an agreement may state that you are to be employed for example, for three years, it may also state that you agree that you may be terminated at-will.
  
  ❖ If you are subsequently terminated at-will, then you may, or may not, be entitled to compensation that has not been paid such as a bonus.
  
  ❖ **“For Cause” contracts.** If the employment agreement is for a specific term (such as five years), and is not at-will, then you need to determine whether there are any provisions that outline how the employment may be terminated before the five year term expires.
  
  ❖ Contractual terminations for cause, range from failure to follow employer polices to the commission of crimes involving moral turpitude or any felonies.
  
  ❖ If you are terminated for cause, this basis for termination will normally limit your compensation to what salary you have earned through the date of termination and any bonus or incentive pay usually will not be paid.
II. Considerations When Leaving a Job: Contractual Terminations

- Key points to consider in the event of a termination:
  - Follow the requirements set out in your contract with respect to advance notice requirements and cure periods. Give appropriately timed, written notice to the other party.
  - If you are contemplating terminating the contract “With Cause,” you should clearly document why in writing. Show you investigated and uncovered relevant facts on how the employment contract was breached.
  - It is a good idea to cover the “Breakup” in your written contract
    - Who will notify patients? Who will pay for copies of patient records for those patients who request copies from the departing physician?
    - How will outstanding compensation and bonus payments be handled?
    - Is there an end date when all collections for the departing physician will be cut-off and a final reconciliation of salary and bonus will be done?
    - What obligations does the employer have to file claims and pursue outstanding collections after the employee leaves?
    - What about hospitalized and pregnant patients? Need to address continuity of care and retain the treating physician’s right to safely transition the patient.
    - Address who will be responsible for tail coverage, how much, how long the departing physician has to purchase coverage, etc.
II. Considerations When Leaving a Job: Contractual Terminations

• Case Study:

- A young OB/GYN who was employed for 3 years by another physician decides not to pursue partnership citing personality conflicts. She desired an orderly termination, so we reviewed her written contract and advised her regarding available options. She was owed about $25K in incentive compensation from the previous year, as well as most of her incentive compensation for the current year. The total owed to the departing OB/GYN was approximately $100K. The OB/GYN was very capable and well-liked by her patients. Based on these factors and the nature of the services she provides, the OB/GYN anticipated that most patients would want to transfer to her new practice. Therefore, patient transition was important. There was no non-compete.

- Gave advance, written notice of termination in accordance with contract terms.

- Contract addressed patient notices and transition, tail insurance responsibilities, and billing and the collection for pre-termination services.

- Biggest issue was over unpaid incentive compensation, which was ultimately paid.

- The employed OB/GYN kept very good records and knew what she was owed.
II. Considerations When Leaving a Job: Contractual Terminations

- **Case Study:** Orthopedic surgeon in first year of 5 year employment agreement with a rural hospital. Contract included $100K signing bonus, $10K in relocation expenses, and $120K liquidated damage clause if the physician terminated without cause. Major issues arose regarding hospital policies, procedures, staff, patient safety, OR scheduling, etc. The physician communicated his concerns, sometimes orally, sometimes in writing. The hospital dragged its feet for months and failed to correct the issues. The physician got fed up and sent an email to the CEO giving minimal notice that he was leaving. The email did not explicitly refer to hospital’s breach of agreement. The hospital demanded repayment of pro-rata portion of signing bonus ($80K), all relocation expenses and liquidated damages.

- If only he had called his attorney before he sent that email! If the notice had warned the hospital of breach, the physician may have avoided a large settlement or sought damages.
- Agreement had mandatory arbitration provision. Hospital demanded $200K+. We settled before arbitration for $80K.
- We were able to convince the hospital’s attorney to settle to avoid embarrassing discussion about hospital working conditions, policies and patient safety issues, and because they likely wouldn’t get the liquidated damages as they were excessive.
- The underlying agreement was not reviewed by an attorney before the physician signed. It was very long (5 years), included mandatory repayment of the signing bonus and relocation expenses if the physician left the community for any reason, and included a huge liquidated damage provision. Many of these terms might have been negotiated if he had consulted an attorney.
II. Considerations When Leaving a Job: Benefits

• Benefits. What can you take with you?

  ❖ You will likely be able to sign-up for COBRA to provide health care coverage until you qualify for benefits in your new position.

  ❖ With respect to professional liability insurance, you should try and get the employer to include a provision in your agreement providing for “tail coverage.” Most employers have “claims-made” coverage for adverse events that occur while a physician is an employee. If however, a claim is made AFTER a physician has left the group’s employment, there would be no coverage. “Tail coverage” can be purchased by the group to protect against this lapse in coverage. *Unfortunately, if you are terminated for cause, an employment agreement will typically require that you pay all or part of the tail coverage premiums, which can be expensive.*
II. Considerations When Leaving a Job: State License Notice Requirements

• State licensure notice requirements.

- **Your State Medical Board likely requires that you provide notice of a change in address within 30 days.** For example, in Oregon, the failure to notify the State Medical Board of a change in address within 30 days can result in your license being placed on “Inactive Status.” Depending on the facts, it can also result in more severe disciplinary action.

• Federal change of address requirements.

- **The Drug Enforcement Administration (DEA) is cracking down on provider’s primary practice address change requests.** It is now taking 2-3 weeks for the DEA to process practice address updates when transferring to a different state. The delay in the DEA processing time is leading to delays with credentialing and privileging completion.

- **Medicare requires that you notify CMS of a change in location within 30 days.** Update your personal enrollment with current contact information, and if you leave the state where you are licensed, you should terminate any reassignments to your group. We’ve handled several Medicare revocation matters where a group filed claims using a former physician’s Medicare credentials where the physician’s license had expired in that state. The physician didn’t realize the practice was still using his credentials.
II. Considerations When Leaving a Job: Hanging Out Your Shingle!

- Find a competent attorney to help you.
- Incorporate – You need a legal entity to “own” your practice and protect you from personal liability for business debts.
- Find a practice location you can reasonably afford! Have an attorney review the lease. Understand that if you are young with no business credit history or track record, you will likely have to give personal guarantee on lease.
- Insure – Find an insurance broker that can help you with professional liability, audit and cybersecurity insurance
- Enroll – with NPPES, Medicare/Medicaid and any other governmental programs. If you’ve never done this, consider finding an experienced attorney help you. Don’t EVER let anyone sign an enrollment form for you and review EVERYTHING.
- Seek commercial insurance contracts – This can take time. Start early.
II. Considerations When Leaving a Job: Hanging Out Your Shingle!

• Evaluate operational needs – staffing, equipment, etc. and be strategic. Have legal counsel review any leases and draft contracts.

• Review several EMR options – have your legal counsel review the contract. Consider the level of training and support you and your staff will need and make this a priority. The better your documentation is the more likely you are to get paid and stay out of trouble.

• Put a compliance program into place and TRAIN YOUR STAFF!

• Educate yourself, not just about your clinical area of expertise, but about running a business and health law regulatory issues.

• Find an excellent CPA/tax advisor.
III. Conclusion:

• Summary points to keep in mind:

  ❖ If possible, “date” first before entering into a business arrangement.
  ❖ Engage a qualified health lawyer to assist you. Don’t be afraid to ask for a quote before hiring an attorney!
  ❖ Do your homework.
  ❖ Fully discuss terms with your legal counsel.
  ❖ A written contract is essential to avoid conflict and should include a logical plan to be followed in the event of a termination.
  ❖ Be aware of Federal (and State) laws that affect employment / recruitment relationships.
  ❖ Communicate early and often.
  ❖ Keep good records.
  ❖ Document breaches.
  ❖ If terminate, follow your agreement, provide required notices, and implement your “break up” plan.
QUESTIONS

This outline is provided as general information only. It does not constitute legal advice and should not be used as a substitute for seeking legal counsel. Robert Liles is an attorney with Liles Parker. The Firm represents physicians and other health care providers nationwide.

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