

FROM THE AMERICAN ACADEMY OF FAMILY PHYSICIANS

ENSURING YOUR EMPLOYMENT CONTRACT WORKS FOR YOU

September 2022



INTRODUCTION

A majority of family physicians practice as employees—chances are, you're one of them. Starting a new position is exciting, and you're probably eager to get started. But it is essential to take time to thoroughly review the terms of an employment contract before you sign. For employed physicians, the contract plays an important role in career success. If a misunderstanding emerges during your employment, you cannot rely on verbal promises and written correspondence (e.g., letters, emails). Only the terms spelled out in your contract matter.

Involving an attorney with expertise in physician contracts is also an important step in the process. Your knowledge and your attorney's advice can help ensure all the key aspects of your employment relationship are addressed in a thoughtful, constructive manner as you negotiate your contract's terms. The American Academy of Family Physicians (AAFP) developed this supplement to explain contract provisions and terms that are especially important to watch for and understand to protect your best interests. Other AAFP resources to help you navigate your career pathway, including employment contract negotiations, are available online at www.aafp.org/employment-contracting.

AAFP Employment Contracting Resources

- Employment Contracting: www.aafp.org/employment-contracting
- Navigating Physician Employment Contracts: www.aafp.org/fpm/2021/0900/p17.html
- *A Family Physician Guide to Employment Contracts*: www.aafp.org/physician-contract-guide
- Employed Physician Compensation Updates Letter Template: <https://tinyurl.com/2j5m7n3t>
- Making Sense of MACRA: A Guide for the Employed Physician: <https://tinyurl.com/2866wzct>

DUTIES

Physicians typically have a specific idea of what their employed role will entail, but these details rarely make it into the written contract. A contract should spell out the job for which you are hired. For example, it should specify the number of clinical face-to-face hours per week you're required to provide. It is also essential to understand whether the specified workweek allows adequate time to complete records, fill prescriptions, make patient-related phone calls, and handle similar administrative work. A 40-hour “clinical care” requirement that excludes administrative time should not be accepted.

Other key considerations and questions to ask include the following:

- Are you required to see a certain number of patients per hour?
- Is the role inpatient or outpatient based?
- Are you expected to perform certain specific procedures or defined activities?
- Have you negotiated not to perform certain services (e.g., obstetrics)?

One particular consideration is if you are comfortable serving as a supervising physician for one or more midlevel providers. The employer may specify a maximum number to be supervised or agree that supervision will not be required at all or will not be required for a certain period of time. These expectations and any compensation for supervision must be part of the contract.

In addition to stating specific job duties, the contract should specify where and when those duties will be performed, as well as any call or administrative obligations. In order for you to enforce promises made prior to executing the employment agreement, the written contract must contain all agreed-upon details. If an employer will not include information about factors such as work location, schedule, or call, try to obtain contract language that provides for collaboration or mutual agreement on these points.

OUTSIDE WORK

Almost every physician contract contains restrictions on a physician's ability to engage in outside work, whether clinical or non-clinical (e.g., moonlighting, serving as an expert witness, consulting, speaking, writing, serving on physician association committees or boards). Typically, such restrictions are intended to ensure full commitment to the employer in terms of loyalty and efforts. However, language prohibiting participation in outside opportunities—especially those that don't conflict with the employer's interests—can be frustrating.

If you already engage in outside work or have a firm opportunity, seek to carve out such positions in writing. You can expect to share details about the job, your time commitment, and malpractice insurance coverage. Watch for language allowing an employer to retract permission for approved outside work. This could force you to breach an outside contract.

If you don't yet have any outside opportunities lined up, it is essential to understand the employer's policies and conflicts of interest, as well as the process for seeking permission. Policies should spell out types of work that are permitted or not permitted. Be aware that restrictions are not always tied to whether outside work is compensated.

Many employers allow outside work but require the physician to turn over any revenue to the employer. This is true in both academic and non-academic settings. Ideally, in addition to allowing for approval of outside work, the contract should state that you will retain income from approved activities. However, this may be non-negotiable based on the employer's policies.

TERM AND TERMINATION

Every physician contract has a date on which it starts and a date on which it ends or a method for termination.

CONTRACTS THAT EXPIRE

Employment contracts with an end date are considered to expire on that date. It is ideal to include language stating the employer will offer either a new contract or an extension by a certain date (e.g., six months prior to expiration). If an employer rejects your request to include this contract language, mark your calendar to request a new contract six months prior to the expiration date. Additionally, start a job search at that time to ensure you're not left without a contract. An expired contract becomes an "at-will" contract. Its terms may be difficult to enforce and it can be terminated without notice, which creates job insecurity.

EVERGREEN CONTRACTS

Contracts that automatically renew without expiring are called "evergreen" contracts. One way to terminate an evergreen contract is by providing notice of non-renewal. Physicians may find this frustrating because notice can only be provided during a specified period prior to the contract's renewal date. For example, you might sign a three-year contract that can be terminated by providing 90 days' notice of non-renewal. This contract will automatically renew from year to year until the end of the initial three-year term. Therefore, the first time you can provide notice of non-renewal is 90 days before the renewal date. If you miss this notice period, you're locked in until the next notice period, unless there is another means of terminating the contract. To avoid being locked in by renewal provisions, be sure the contract specifies other grounds for termination.

GROUNDS FOR TERMINATION

Grounds for termination of an employment contract may include the following:

- Notice of non-renewal
- Automatic termination (e.g., death, disability, loss of license)
- "For cause" termination (e.g., breach of contract, failure to show up at work, patient safety concerns)
- "Without cause" termination (no reason needed)

Physicians must carefully review the grounds for termination in their contract. Look for language that gives you the right to be informed of any potential breach of contract and to cure a breach that is reasonably curable. Vague grounds for termination (e.g., failure to meet unspecified productivity goals, conduct impacting the employer's reputation) must be clarified or deleted, when possible. Language allowing for your immediate termination in the event of the employer's liquidation, closure, sale, or similar occurrence also should be deleted or tied to a notice period requirement. Additionally, be sure you have the right to terminate the employment agreement for cause if your employer breaches the contract.

The ability to terminate a physician contract without cause is a key provision. This allows either party to terminate the agreement by simply providing proper notice. You should seek language giving both parties the same right to without cause termination and the same notice period, and be sure the notice period is reasonable, allowing for potential relocation, credentialing, and other factors. The most standard notice period for physician contracts is 90 days. If the contract only allows you to give notice once you have worked a certain amount of time, ensure the contract puts the same restriction on the employer for notice of termination.

TERMINATION PROCESS

The ability to terminate a contract is the first element of a physician's employment exit strategy. Most contracts end when the physician provides notice of termination without cause in order to relocate or take a new position. Pay close attention to any language that allows an employer to accelerate the termination date once you give proper notice but does not require them to continue paying you during the notice period. This provision can jeopardize your planned departure and create financial insecurity.

It is essential to understand exactly what will happen when a contract terminates. The following are key considerations.

Interference With Work

Most physician contracts permit an employer to decide if you will work during the notice period. Be sure the employer is required to continue paying compensation and benefits during that period, regardless of whether you are allowed to work. If your compensation is tied partially or fully to production, the contract should include language defining how compensation will be calculated during the notice period if you are not allowed to work. It is also ideal to include language stating that the employer will not interfere with your work during the notice period by changing staffing, reallocating patients, or otherwise materially interfering with your ability to produce in the same manner.

Repayment Obligations

Employment contracts commonly require the physician to repay the employer for certain expenses upon termination. This may include signing or retention bonuses, advances, training stipends, relocation fees, education loan payments, and similar incentives. Repayment requirements and the amount the physician must repay may be tied to when termination occurs. For example, a contract can require you to remain employed for a period of time—typically between 12 and 36 months—in order to “earn forgiveness” on incentives. Some employers will require repayment of incentives in full if you are terminated for any reason, but you should try to negotiate for forgiveness on a prorated monthly basis. Ideally, you should also request language requiring complete forgiveness of incentives under certain circumstances (e.g., termination without cause by the employer, employer breach of contract, business sale/closure, death or disability).

Malpractice Tail Coverage

Physician contracts always address professional liability insurance and whether acquisition of a tail policy is required upon termination. Claims-made policies require a tail policy, but occurrence policies do not. If a tail policy is required, it is important to note who is responsible for payment, what type of tail coverage must be acquired (e.g., limits, duration), and the acquisition timeframe. Try to negotiate for alternatives to a tail policy, such as the ability to continue the same insurance policy after termination or the opportunity for a new employer to acquire a nose policy.

If an employer will not cover a tail policy's cost, it is advisable to at least seek payment by the employer under certain circumstances (e.g., termination without cause by the employer, employer breach of contract, business sale/closure, death or disability). Some employers may be willing to share the cost of a tail policy over time, pay part of the cost based on how long you are employed, or cover the entire cost once you have worked a certain amount of time.

Competition Provisions

Provisions that affect a physician's ability to compete with the employer following termination are standard in most employment contracts. Employers often consider the competition provisions or non-compete terms as non-negotiable. The majority of states will allow non-compete clauses if the length of time, scope, and geography are reasonable. However, some states apply very specific criteria for non-competes or do not allow such restrictions.

ELEMENTS OF A NON-COMPETE CLAUSE

TIME: Most non-compete terms apply while the physician is employed and run for one to two years following termination.

SCOPE: The non-compete scope should be tailored to the services and specialty the physician provided for the employer.

GEOGRAPHY: Most non-competes specify a radius intended to reflect the region from which the employer draws the majority of its patients and in which it has a protectable interest. The non-compete area's size can vary greatly based on the practice location, with larger areas common in more rural regions.

Before you sign a contract, be sure you could live with the terms of its competition provisions if you were terminated. It can be expensive to fight a non-compete. Additionally, your new employer will not want to be drawn into litigation, which could leave you unemployed.

If an employer won't reduce the radius or length of time, focus on tying the location provision only to where you spent most of your time. Additionally, it can be worthwhile to argue the circumstances in which the non-compete will apply. Employers can be compelled to agree the non-compete should not be enforced if the contract expires or if the employer breaches the contract or terminates the physician without cause.

You may also be able to negotiate for release from a non-compete if the practice is sold or you are terminated due to force majeure. Force majeure is a provision that allows the contract to be terminated or excuses a party's non-performance due to unexpected events beyond the control of either party (e.g., war, pandemic, natural disaster). It has only recently become common in physician contracts, largely because of the COVID-19 pandemic. Employers can also use force majeure to alter the physician's schedule, compensation, location, and other contractual provisions. Review the provision carefully for fairness.

Other restrictions on competition commonly include prohibitions on solicitation of employees, referral sources, patients, and others. Most physicians are not concerned about such restrictions. However, it is important to watch for language that can actually prohibit you from treating or rendering services to anyone who was previously the employer's patient. You may not necessarily know if someone is the employer's former patient, but such language can require you to turn away a patient, even if you made no effort to solicit or contact that patient. This type of language is likely against public policy in most states and should be deleted from the contract.

In most cases, non-competes are enforceable, and contracts will include language allowing the employer to seek injunctive relief (i.e., court action) or damages (i.e., money) from a physician if a violation occurs. The employer may also shift the burden of all legal fees and costs to the physician, regardless of the outcome. Such one-sided provisions should be deleted and replaced with language that either requires the non-prevailing party in any action to pay the legal fees and costs of the prevailing party or eliminates the requirement for any party to be responsible for the other party's legal fees.



ARBITRATION

Arbitration is a system that uses arbitrators to resolve a dispute between parties. Most physician contracts contain provisions that require disputes—other than issues covered under state laws—to be handled using arbitration rather than going to court. The arbitration language will also typically carve out certain issues (e.g., non-competes, non-solicitation, confidentiality, non-disparagement) for which the employer wants to use the court system for more immediate legal results.

The following are the most important questions to ask about arbitration provisions:

- **Is arbitration required and for what type of claims?** Know when you may use the court system and when you are prohibited from doing so.
- **Where will arbitration be held?** The contract will usually specify a state and city as the arbitration site. This is significant because it may not be where the employer is located or where you live.
- **Which arbitration approach will be followed?** There are many associations with arbitration guidelines, including the American Bar Association, JAMS, and the American Health Lawyers Association. Different approaches may have different rules to follow.
- **Who pays the legal fees?** Employers may try to shift legal fees to the physician or may indicate that the prevailing party's legal fees will be paid by the non-prevailing party. In some cases, the parties pay their own legal fees or allow the arbitrator to decide.

While many attorneys feel resolving disputes in a court of law is preferable, arbitration can be faster, less expensive, and more private, and may better suit both parties' needs. Most employers uniformly apply arbitration provisions to their contracts and may consider them non-negotiable. However, even if the contract prohibits parties from resolving a dispute in court, it is important to have language stating the parties can enforce any judgment of the arbitrator in a court. For example, if you are awarded monetary damages by an arbitrator and your employer refuses to pay, you should be able to ask a court to legally enforce the arbitrator's award against your employer.

It is advisable to have your contract reviewed by an attorney with expertise in physician contracts. You can locate attorneys through your state medical society, your state bar association's health law section, or national organizations such as the American Health Lawyers Association. Asking your chapter, mentors, and physician colleagues to recommend attorneys is also a great idea. Choose someone who will work collaboratively with you and the employer to reach an agreement. An overly aggressive attorney can frustrate efforts to achieve desired contract changes and may harm your future relationship with the employer.

CONCLUSION

In many cases, it is possible to improve physician employment contract provisions to better protect you, so understanding a contract before you sign should be your primary goal. Also, remember that the contract only comprises the terms written in its pages. You cannot rely on verbal promises, written correspondence, and other outside information.

Your relationship with an employer starts during the negotiation process. Employers may react poorly to receiving a revised contract from a physician's attorney when no prior discussion has been initiated by the physician. To encourage productive discussion and exploration of possible solutions, consider approaching the employer with questions and concerns as an initial step. By asking thoughtful questions, understanding the employer's position, and respectfully requesting changes that are significant to you, you can help build the foundation for a healthy, long-term employment relationship.

AUTHOR

Ericka L. Adler, JD, LL.M, specializes in regulatory and transactional health care law and devotes a large portion of her practice to advising professionals and practices about contracts and compensation arrangements.