

# **Fundamentals of Physician Services Agreements**

**Senior Pediatric Resident Retreat**

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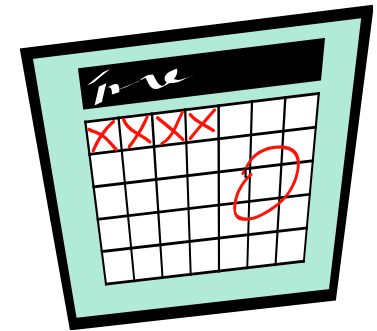


# Background

- Perspective
- Purpose of an agreement
  - Are the parties on the same page?
  - Protection?
  - Benefit – for whom?
- Relativity
- Employment vs. Independent Contractor
- For-profit vs. nonprofit employers

# Term

- Commencement Date
  - Specified Date
  - Conditional Date
    - ◆ Receipt of State License
    - ◆ Receipt of Hospital Privileges
- Expiration Date
  - What is the initial term of the Agreement?  
(1 year? 2 years? 5 years?)



# Term

- **Renewal Terms**

- **Evergreen Clause (automatic renewal)**

EXAMPLE: This Agreement shall automatically renew annually following the Initial Term for successive one (1) year terms, unless either Party elects not to renew this Agreement by providing the other Party with written notice of such intention not to renew at least 180 days prior to expiration of the then-current term.

- **Pros and Cons**

# Duties

- Time Commitment

- Work Schedule

- ◆ Nights, weekends and holiday call schedule
    - ◆ On-call

- » Restricted - physician is required to stay on the premises
      - » Unrestricted - physician is not required to stay on the premises (available via pager/phone)



# Income from other sources

- Moonlighting
  - Commitment
  - Non-competition
  - Malpractice Insurance
- Outside activities:
  - Expert Testimony
  - Lectures/Teaching/Publishing
  - Medical Director Fees





# Duties

- Locations – do you care?
- Compliance with Other Documents (Medical Staff Bylaws, Hospital Rules and Regulations)
- Required Licenses, Hospital Privileges and Board Certifications
- HMO/PPO Memberships
- How are patients assigned?

# Duties

- Ownership of Patient Records and Charts
  - Patient information and records are the property of employer
- Billing Issues
  - Assignment of Fees
  - Completion of Medical Records and Reports
  - Indemnification







# Compensation

- Compensation Structures Used:
  - Set Amount
  - Revenue minus expenses
    - ◆ Example: Physician paid Collections minus direct overhead and percentage of indirect/fixed overhead
    - ◆ Other considerations
      - Are advances given? If so, might have to pay back.
      - Lag in time between when services provided/paid for
      - How is compensation paid after expiration/termination of agreement of term?
      - Benefits are arguably not benefits

# Compensation (cont.)

- Productivity-based compensation (might include a cap – i.e., 75th percentile by specialty)
- Numerous Types of Productivity-Based Compensation



# Compensation (cont.)

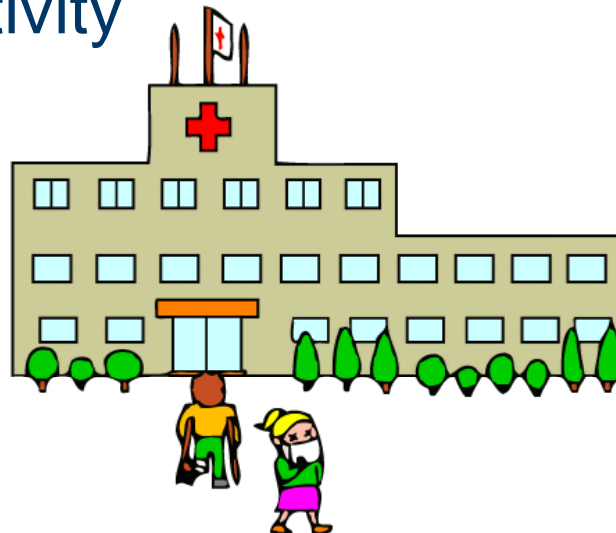
- **Percentage of collections**
  - Greater incentive for physician to see patients with higher paying payors
  - **EXAMPLE:** Physician shall receive annual total compensation equal to \_\_\_\_% of all amounts collected by Employer from professional services personally performed by, and attributed to, Physician

# Compensation (cont.)

- Percentage of gross charges
  - Charges may not be aligned with collections
  - Does “professional gross charges” mean value of physician services before reduction due to charity care, contractual adjustments, bad debts, etc.?

# Compensation (cont.)

- Compensation per Work RVU
  - RVU's value is assigned by Medicare
  - Physician is compensated for work effort regardless of payor/collections
  - May be tied to survey data based upon productivity



# Compensation (cont.)



## – Third-Party Surveys

- ◆ Medical Group Management Association (MGMA)
  - Physician Compensation and Productivity Survey
- ◆ HayGroup
  - Physicians Compensation Survey
- ◆ Sullivan, Cotter & Associates, Inc.
  - Physician Compensation and Productivity Survey
- ◆ Hospital and Healthcare Compensation Service
  - Physician Salary Survey Report

# Compensation (cont.)

- Combination - Fixed base salary plus productivity bonus
  - Example: Guaranteed annual salary of \$175,000 with additional incentive compensation of \$40 per RVU above 4,500 RVUs worked
  - Other considerations
    - ◆ Annual Adjustment?
    - ◆ Is a bonus prorated/paid if employment ends prior to end of term?



# Why Are Employers Concerned about Fair Market Value?

- Anti-Kickback
- It is illegal to knowingly or willfully:
  - Offer, pay, solicit or receive remuneration;
  - Directly or indirectly;
  - In cash or in kind;
  - In exchange for referring an individual or furnishing or arranging for a good or service; and
  - Payment may be made by Medicare or Medicaid.





# Anti-Kickback Statute

- It is illegal to knowingly or willfully:
  - Offer, pay, solicit or receive remuneration;
  - Directly or indirectly;
  - In cash or in kind;
  - In exchange for referring an individual or furnishing or arranging for a good or service; and
  - Payment may be made by Medicare or Medicaid.
- Intent-Based Statute – May be implied

# Anti-Kickback Statute (cont.)

- Consequences
  - Fines and Penalties
  - Exclusion from Medicare/Medicaid
  - Criminal Liability
- Employment Safe Harbor
  - Fair Market Value
  - Arm's Length Negotiations
  - Reasonable

# Stark Act

- A physician is prohibited from making a referral:
  - To an entity;
  - For the furnishing of a designated health service (DHS);
  - For which payment may be made under Medicare or Medicaid;
  - If the physician (or an immediate family member);
  - Has a financial relationship with the entity.
- **Strict Liability – Not Intent-Based**

# Stark Act (cont.)

- DHS include: clinical laboratory services; PT, OT and SLP services; radiology/certain other imaging services; radiation therapy services and supplies; DME/supplies; and inpatient and outpatient hospital services.
- Financial relationship means an ownership or investment interest in the entity or a compensation arrangement between the physician (or an immediate family member of such physician) and the entity.



# Stark Act Safe Harbor

- Bona fide employment exception
  - Employment is for identifiable services
  - Compensation is consistent with Fair Market Value
  - Employment agreement is commercially reasonable
  - Not determined in a manner that takes into account the volume or value of any referrals by the referring physician
  - NOTE: employers may direct where the employed physician refers as long as the requirement is in writing and related to services covered by the employment arrangement and, among other requirements, the patient does not prefer another provider and the physician believes that the referred entity is in the patient's best interest



# Benefits

- Who really pays?
- PTO (may include vacation/sick/CME)
  - How far in advance do you need to request vacation time?
  - Does unused vacation time carry forward to subsequent years?
  - If unused vacation time at end of employment, do you get paid for it?
  - Do you have to pay back if more than pro rata amount used as of termination date



## Benefits (cont.)

- Seminars/CME
- Maternity/paternity leave
- Expense Reimbursement
  - Staff fees and dues
  - Medical journals
  - Professional associations
  - Moving expenses
  - Subscriptions and journals

# Benefits (cont.)

- Retirement Plans
- Disability Insurance
- Health Insurance







# Malpractice Insurance

- Who pays – Employer or Employee?
- Occurrence Policy
- Claims Made
- Tail Policies



# Additional Liability Provision

- Indemnification - A promise by one party (the "Indemnifying Party") to reimburse or pay directly to the other party (the "Indemnified Party") certain costs, damages or losses.
- Beware of the following example:

Despite the existence of any policy of insurance, Employee shall defend, indemnify and hold harmless Practice against all suits, judgments, claims for loss or damages, expenses, attorneys' fees brought by any third party against Practice arising in whole or in part from any act, omission, negligence or more culpable act of Employee. Employee's obligations to indemnify and defend Practice shall not be limited or precluded by any allegations, judicial determination or findings by verdict or negligence, acts or omissions, intentional or otherwise, of Practice

# Termination

- Death
- Disability
  - Unable to perform duties for certain period of time
  - What does it mean to be disabled?
    - ◆ Example: inability of Employee to substantially perform essential functions of Employee's duties, with or without reasonable accommodation – who decides?
    - ◆ Compare the following: 180 consecutive days v. 180 days during any fiscal year





# Termination

- For cause
  - Material breach of employment agreement
  - Lists may vary significantly
- Without cause
  - Terminate the employment relationship for any reason following specified number of days notice

# Termination

- Without Cause (con't)
  - Failure by Employee to give proper notice of termination of employment agreement
    - ◆ Example: If Employee fails to give 90 days notice prior to termination, Employee shall pay liquidated damages to Practice of \$500 per day for each day within the 90 day notice period that Employee fails to appear for work
      - Thus, if you give 30 days notice under this model, you owe the Practice \$30,000.
      - Practice's rationale for this provision: Costs and time in securing another Employee, obtaining coverage for existing patients, missed opportunities, rescheduling



# Termination

- Other events
  - Substantial change in business of Practice such that Practice determines that it is no longer practical or economically feasible to employ Employee
- Patient Abandonment Issues



# Non-Competition Covenants

- Enforceability varies from state to state
- Duration – During employment + 1 to 2 years following employment
- Restricted Activities
- Restricted Area
  - Examples
    - ◆ Geographic area within 25-mile radius of any office in which practice has an office
    - ◆ Geographic area within a 10-mile radius of practice's principal office

# Non-Competition Covenants (cont.)

- Enforceability

- Indiana Supreme Court issued a ruling in 2008 clarifying enforceability
- Physician prohibited from practicing for 2 years in 14 central Indiana (and adjacent) counties where practice offices located
- During the last 2 years of physician's employment , he only performed services in 3 of the 14 counties
- Holding: Geographic scope of the covenant was unreasonable – enforceable only for 3 counties



# Non-Competition Covenants (cont.)

- **Carve Outs**
  - Termination without cause by Practice
  - Termination by Employee for cause
  - Practice provides notice of nonrenewal
- **Buyout Clause**



# Other Covenants

- Non-solicitation
  - No solicitation or hiring of employee, independent contractor or agent of Practice during Restricted Period
  - No solicitation of any patient of Practice through advertisement, circular, newsletter or other means of communication
- Non-interference

# Ownership Opportunities

- Firm offer v. non-binding



# Things to Think About

- Personalities
- Building Ownership Income
- Ancillary Business Income
- Ages of Current Owners
- Debt Issues
- Ancillary Documents
- Be Realistic
- Good Cop – Bad Cop



# Thank you!

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