

CONTRACTS

FOR THE NEW ERA

*With mergers, acquisitions, and buy-outs becoming as common as a cold, a carefully constructed employment contract is more important than ever. **How to negotiate like a pro and sidestep common blunders.***



LEO YOUNG THOUGHT HE'D FOUND HIS FUTURE when he joined a North Carolina multi-specialty practice as its newest family physician.

Fresh out of residency, he was excited about working in a small community. He had a good feeling about the other doctors on staff so when they offered him good money and a promise of partnership in two years, Young signed on.

But then the group merged. Within a month after Young started, his bosses handed him a new contract containing different terms. The new agreement was good for a year. And even though his salary stayed the same, there was no language assuring him of an equity position. Furthermore, the restrictive covenant had been extended from his county to 25 miles of any of the group's offices.

Young found the last clause particularly onerous since the practice was expanding—and now he didn't know if he'd be there after a year.

"I saw the handwriting on the wall," he says, "I knew, just by looking at the new contract, that I didn't have a future there. I was very discouraged."

For now and the future

Contracts have been part of medicine since physicians first sealed partnerships with handshakes.

Whether you're joining a large staff-model HMO or a small single-specialty practice, your first legal tie with any organization will be an employment contract. It's the structure under which you'll operate now and maybe even in the future. A contract is for the day when you and your bosses part company and you need to rely on more than your memory or the memories of others.

In a health-care environment defined by merger and acquisition, the group you join today may not be in the same formulation tomorrow.

Given that milieu, how can you ensure that the writing

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Negotiation Dos and Don'ts

• **Talk to people in the community to make sure that the group's reputation is stellar.** Don't rely solely on the input of physicians.

The night before an interview with a prospective employer, George Innes, MD, the head of Watertown, New York's Emergency Medicine Consultants, sat in the ER waiting room and talked with patients about the care they received there.

People were so candid that he asked for the name of the best area hospital and scheduled an interview with its emergency

medicine director. That's how he found his first job.

• **Don't let your spouse do the talking, even if he or she is a lawyer.** Unless your mate is a physician with a professional stake in this decision, (e.g. you're both joining the group), limit his or her role to that of adviser, not spokesperson. Anything else, say observers, just complicates the negotiations and sets the wrong tone.

If your group is slow with the paperwork, create your own letter of agreement. Send it out before your start date, asking for a sig-

nature to confirm the deal. A letter of intent not only protects you in a court of law, but it also shows that you mean business.

Ask the group for a copy of its contract in advance of your site visit. It may help you decide if the opportunity is worth further discussion. A working agreement can reveal volumes about the culture and detail-orientation of a practice.

• **Don't let the specifics prejudice your beliefs about the group's willingness to deal.** In fact, one concern observers have about placing a contract in the hands of

candidates is that they won't realize what's negotiable and nix any deal before the talks.

• **Do your homework.** Read the journals about going rates in your specialty and check other resources your specialty society or state medical association provides. If you're a member of the American Medical Association, you can get a free copy of *Contracts: What You Need to Know*, produced by the organization's Young Physicians Section. For further information, e-mail yps@ama-assn.org or call 312-464-4978. ■

Don't Start Work Without One

The most important non-negotiable item involving a contract is that you must have one.

After all, you're moving to a new location, and spending hours being licensed, going through credentialing, and attaching yourself to one or more health plans. That effort should be based on a written document.

While some organizations will offer you a take-it-or-leave-it deal, other entities still negotiate. It's not a sure thing that the bigger the group, the less flexibility you'll have, or vice versa.

"Don't accept the fact that everybody has had this contract and therefore you must take it or leave it," says George Innes, MD, the head of Watertown, New York's Emergency Medicine Consultants. "They're made to be altered. Just because somebody else has made a mistake doesn't mean you have to make the same mistake."

Indeed, make sure that the terms to which you agreed orally appear on paper. Innes once negotiated with the owners of an emergency medical group for a position as the assistant director of its new facility. When they wouldn't put that detail in writing he balked, certain that by signing a contract with vague wording he'd end up working at a less desirable site.

Just like Innes, you should get every item of importance in writing and be cautious about provisions such as professional liability insurance. Make sure that it's covered and clarify the type of policy.

A danger for all physicians, say some observers, is being left without "tail" coverage protecting them should they leave the practice. You need to know who's paying what—and for how long.

Also, don't accept provisions unless you have a clear idea of their implication. For example, pay close attention to:

Terms. While start and renewal dates are important, pay attention to termination clauses. If there's a "with cause" provision, make sure the reasons are spelled out. A "without cause" stipulation should apply equally to both sides.

Benefits. Health, life, and disability insurance are usually set in stone. Conversely, vacation, CME, and even moving expenses are more easily negotiated items.

Compensation. You'll probably have negotiating room in this area, as long as the group can still maintain internal equity. Also, you may be able to bargain loan for-

givenness. Granted, there's still a tax liability, but it's a disciplined way to reduce non-federal debt.

Bonuses. See how performance goals are structured and what criteria are used to judge you. Instead of relying on pure production, many groups look at other variables, such as utilization of resources and patient satisfaction, in measuring the worth of their physicians.

Obviously, there will be other items, such as equity ownership, unique to your situation. The bottom line is set your priorities and critically review the finished contract.

As part of his negotiation, Bruce Scott, MD, a partner in a Louisville, Kentucky, head and neck surgical practice, listed "do or die" issues important enough that he wouldn't sign unless they were met. Then he ranked items that he'd relinquish if push came to shove. But most important, Scott listed the provisions about which the group had compromised.

"You have to say, 'This is where we started at and this is where we ended up and they've given a lot,'" Scott says. "If you don't do that, you're going to come across as unreasonable." ■

in your contract protects you when you see the handwriting on the wall? How do you negotiate an agreement that fulfills your expectations while meeting someone else's needs?

Unfortunately, there are no absolute answers to those questions because there are no absolute rules to employment agreements, other than they must meet a legal threshold.

Your ability to craft a contract that protects your rights and secures your future depends, in large part, on the laws of the state, the policies of the practice, and your own business savvy.

As Young learned, in a changing health-care environment, there are no guarantees. But there are steps you can take to forge the best deal possible with the hopes that it holds up in the worst scenario imaginable. If you want to leave your contract talks with an agreement that provides some sense of security, you need to enter with a black bag of information. More specifically:

- Learn the business and clinical reputations of the practice.
- Determine the reach of the group's restrictive covenant.
- Scope out the managed-care environment.
- Develop a game plan, and be willing to deviate.

Negotiating an employment agreement requires more than setting down your compensation demands and setting up a date for your partnership review.

Like the technician who uses tools and a trained ear to tune a piano, you'll need savvy and due diligence to craft an acceptable agreement. You want to match the sounds—the proposal—you hear from the practice with the tones—the expectations—you have in your head. But reaching that level of harmony requires that you stay focused on your own goals while respecting those of the partners.

"A good business negotiator understands that you sign or don't sign an agreement based on its entirety, not on individual provisions," says Bruce Scott, MD, a partner in the Louisville, Kentucky-based Kentuckiana Ear, Nose, and Throat, Head and Neck Surgery.



Leo Young, MD had a good contract with a North Carolina multi-specialty group, but when the group merged, the new administrators wanted him to sign a new contract that he didn't like. Now he has a position with another group and an agreement he's happy with.

"If it contains some clauses that are undesirable but others give you something back, then you must ask yourself, 'Is this whole contract in my best interest?' You must make your decision based on that balance.

New twist on a familiar agreement

Employment contracts of today are essentially the same as those of yesterday, except for a few new twists on some old issues.

Federal fraud and abuse statutes, along with managed care, have made

groups cautious in the deals they strike, especially with compensation and signing bonuses.

Years ago, practices readily tailored agreements to lure physicians with lucrative packages and extravagant extras. But today the name of the contract game is to keep it simple, straightforward, and standard.

That doesn't mean that there are no variations on the theme. Every negotiation is unique, and there is usually some wiggle room, at least for compensation.

But unless you have special bargain-

ing clout—maybe you practice a rare subspecialty—it's unlikely that you'll construct a one-of-a-kind-deal that's dramatically different than those of your colleagues within the group.

It is likely, however, that the type of organization you join—an equity versus non-equity entity—will govern some of the provisions in your agreement.

If you're becoming a salaried employee of a staff-model HMO, you won't have a buy-in clause ensuring your future as a shareholder or partner. But if you're joining a group that still promotes equity ownership, you could find language, at the very least, alluding to that possibility.

That's not a sure bet either, however. Young's experience with a contract that had no clauses concerning a buy-in isn't so novel. Many groups are hesitant to commit to a future relationship until they've had a chance to evaluate the present situation.

At Piedmont HealthCare, the Statesville, North Carolina, physician-owned entity that joined with Young's original group, administrators are happy to explain the process of becoming an equity owner to a new associate. But they're not so eager to outline any deal in an initial employee agreement because they want to ensure that this physician is a good practitioner as well as a good fit.

"We don't want to make promises that we can't—or shouldn't—keep," says Lloyd Matson, the chief executive officer. "We want to be sure that we're interested in doing business with this person. We don't want to give guarantees that put us all in a difficult position if things don't work out."

But that's not a view shared by everyone. Many observers believe that when an equity position might be offered in the future, it should be addressed in writing in the present.

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The thinking in this camp is that if your employment is predicated on the notion that you'll be eligible as partner or shareholder, your employer should commit the promise to paper.

That doesn't mean that every figure in the formula has to be outlined. That's probably not feasible, especially if you're a new doctor with few bargaining chips. It may not even be wise, given the changing economic destinies of medical groups, but if the chance of future ownership is key to your employment, you shouldn't start your job without contract language or a letter of understanding that paves the way for serious buy-in discussions later.

Separate from your employment contract, a letter of agreement can lay out the group's philosophy about an equity position. By establishing those ground rules, you're also uncovering their plans for you.

"I don't think it's in your best interest to negotiate the exact wording of the partnership contract in advance, but you need to have an idea," says Scott. "You need to know coming into this if their intention is that you be a full and equal partner or if it's something else."

Look, listen, and learn

Indeed, it's in your best interest to know as much as you can about the business attitudes and practice philosophies of the group.

While it's a mistake to talk money before you have an offer, that doesn't mean that you can't establish financial parameters before you meet. Scott and his wife were on their way from the airport to a Memphis hotel when partners of a practice interviewing him mentioned that they had a \$500,000 goodwill buy-in. When he asked how they had arrived at the figure, the doctors said it was a compromise based on how long they had been in practice and how

much money they made per year. Some wanted to make the price \$1 million; others \$250,000. So they settled in the middle.

Like Scott, who had no intention of paying that kind of money, you could save the cost of a ticket by airing the points that could compromise your deal.

"If there's an issue that you're just not comfortable with, it would be unfair to waste their time—let alone yours—going through with the visit," says Mark Smith, a vice president with the recruiting firm Merritt, Hawkins and Associates, of Irving, Texas.

"It's better to say, 'I can tell you now that I don't feel comfortable with this issue. Do you have flexibility with it? If not, then I respectfully decline to pursue this further. If so, let's continue the conversation.'

"That approach doesn't show disrespect. It just reflects a level of preparation and seriousness on your part," Smith says.

In fact, due diligence is probably the best tool you have in protecting yourself in any event. You want to quiz administrators, partners, and even outsiders to find out everything you can about the group's current and future status. In a health-care market where alliances can change within months, you may only get answers that are best guesses. But at the least, administrators should tell you if they're agreeable to a group courting them for a merger or acquisition.

That information puts you on notice that changes may be in the wind. How will they affect your future as an equity owner? Or can you get contract language securing your current agreement?

Your strategy could be to negotiate a modification in the contract's assignment language so that the agreement can't be transferred without permission. Or you may want a provision that lets

you out of any legal relationship or penalties should the practice be acquired or incorporated.

While such clauses sound good, however, they also may not cut muster with the group. Administrators are likely to look at language favoring an employee as unduly restrictive, preventing them from taking action in the best interest of the practice.

"I think that this is a classic case of the needs of many outweighing the needs of a few," says Michael Schmidt, an attorney and shareholder with the Denver law firm Yu Stromberg Cleveland.

Young's concern was not in rewording his contract, even though the partners told him that they were in talks with a local practice. When they mentioned that a new union wouldn't affect his negotiations, he took that to mean that he'd continue working under his initial agreement.

What Young didn't count on was that Piedmont HealthCare's administrators wanted all shareholders and associates—including those who came in as part of any merger—under the same employee agreement.

Like other entities taking over other groups, Piedmont would assume the existing contracts of the physicians. But it also could issue its own agreements. Then, if someone like Young didn't sign on the new dotted line, administrators could exercise the first contract's termination clause.

By December 1996, Young finally decided he would rather move on than work under an agreement that he hadn't negotiated and didn't like. He resigned, giving a required four-month notice, which was overridden by a unanimous board vote to let him go January 31, 1997.

The good news was that Young was operating under the restrictive covenant of his first agreement, which allowed him

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to work anywhere outside the county of Iredell.

Little has changed with non-compete clauses over the years other than the geography may be defined by satellite offices or even managed-care contracts.

Often perceived as pernicious, if not unethical, covenants not to compete remain the safeguard groups use to prevent physicians from gaining access to their patients and leaving with significant business.

Not every state allows them, even though most jurisdictions have either crafted statutes or developed case law covering them. The only rule of thumb is that they must be “reasonable” in distance and duration. (Practices historically have limited the time frame to two or three years.)

The broader the clause, the less likely it will be affirmed in the courts. Judges have the discretion to reduce the parameters if they see that a physician’s ability to work is impeded or if a group can’t show that its legitimate business interests were compromised.

Say, for example, that you’re practicing in Chicago and move to Carbondale, a distance of approximately 350 miles, where you open an office near your former group’s satellite. What legitimate interests of your past employer will be hurt by you working close by?

“It’s not as if you have an advantage in Carbondale being part of the corporation in Chicago,” says Mark Rust, a partner in the legal firm of Barnes and Thornburg of Chicago. “These patients don’t know you from Adam. Your former group can’t willy-nilly say, ‘If you leave, we’re going to keep you from doing business anywhere.’”

Yet, while groups traditionally base the geography of restrictive covenants on physical location, they’re using other parameters these days as well.

Managed care not only has complicat-

ed the way doctors determine the scope of legitimate business interests but it’s also provided a method of defining non-compete clauses.

It may not matter at all to your present employer that you choose to practice down the street when you leave as long as you pull your patients from entirely different sources. It may matter quite a bit that you move across town but go after the same participants who’ve produced the group’s revenues.

Your current employer, say many observers, has a legitimate protectable interest if its contracts with specific panels have yielded a gold mine of patients.

Don’t be surprised if the restrictive covenant suggests that you can hang your shingle close by, but you can’t do business with the entity’s panels. With health-care plans controlling the patient flow in many markets, you should determine up front what percentage of the practice’s client base is covered by what plans.

Furthermore, by learning which other managed-care companies funnel patients to competing groups, you may uncover a place to land, should you jump ship.

“The recent focus on managed-care plans is an attempt to make the restrictive covenant slightly more reasonable,” says Schmidt. “It says to the doctor, ‘We didn’t totally foreclose you from practicing within a certain radius. We just wanted to protect our main provider agreements,’” he says.

Pick your battles

While you’ll want to be zealous in protecting your interests too, save your paranoia for the big issues—those that deal with your future—and don’t sweat the small stuff. Being obsessed with every detail could put you in the same boat as the plastic surgeon whose negotiation came down to how many books

she could buy for her library each year.

After hearing that the woman wanted a number in her contract, the partners, who already had played tug-of-war with her, rescinded the offer.

“You can’t cover every detail,” says Smith. “Pick your battles and insist on winning them. But don’t argue everything or you’ll be looking for a job for a long time. People will just sidestep you.”

Also, don’t leave the negotiating of your contract to anyone but yourself. While a recruiter can help you find the job and a lawyer can help you secure it legally, you should do the talking.

You may not even need an attorney if you’re not concerned about an equity position. But if your agreement has any degree of complexity, getting legal advice is sound business practice. You want a lawyer to ensure that the contract complies with various laws and that the playing field is reasonably level.

But you don’t want your attorney to take such an active role that his presence erodes the trust you’re building with your future employers. In fact, many doctors make the mistake of involving their attorneys too early in talks, long before there’s an agreement to review.

“If I’m going to bring somebody on, I want them to have trust in me and I want to have trust in them,” says George Innes, MD, the head of Watertown, New York’s Emergency Medicine Consultants. “One of the best ways for me to judge that is in the negotiations.

“If they’re working with me to come to a positive conclusion, then we’re in good shape. But if they say, ‘I’ll have my attorney call you,’ I’m probably not going to hire them,” Innes says.

Scott thought he had found the perfect match in the two physicians who interviewed him in 1993 for their Louisville, Kentucky, practice. Yet four months later, the talks had deteriorated

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so much that he was convinced he'd never practice with these individuals.

It wasn't that the physicians were mean-spirited. They simply had never negotiated an employment contract and were content to leave the legalities to their attorneys. The lawyers, in turn, crafted an agreement that protected the practice but raised Scott's ire.

Finally the three sat down alone to work out their philosophical differences before bringing back the attorneys to craft the contract. Two weeks later Scott had an agreement.

"I strongly recommend that physicians work out all the details they possibly can and then call the attorney and say, 'Write us a contract,'" says Scott. "I would have made a major mistake to let the legalese interfere with my partners and me coming together. It's been a fabulous relationship," he says.

Get the answers you need

As for Young, within days of leaving his first practice, he had negotiated another position as the fourth family physician in a single-specialty group. He now works for Mocksville Primary Care, located outside Iredell County, North Carolina, but within driving distance of home.

This time, there were no talks of partnership because he joined a hospital-owned group as an employed physician. Also, while the restrictive covenant is wider—it includes the county where he practices plus the one that houses his hospital—he's happier with other terms, particularly the salary.

Most of all, Young feels fairly secure that he'll work his entire five-year agreement, even though he acknowledges his fate could change with a merger or sale of the hospital.

This time, however, he's convinced he has a firmer grasp of the contract because the terms and issues, from salary to scheduling, are spelled out in such great

detail. "Everything was very succinct."

Also, Young just believes he did a better job of maintaining due diligence. While he still didn't seek legal advice, he made sure that every point he identified as important was in writing and that he understood everyone's intentions.

"In the first contract negotiations, I was polite," he says. "I asked questions in a roundabout way instead of coming right out with it. This time I was more direct. No one was offended. They just realized these were questions that needed answers." ■

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