



## legal matters

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**Housewarming Gifts** Salary guarantees, relocation expenses, and signing bonuses are nice perks when you're starting a new position, but be sure you follow the rules and know the key elements of recruitment agreements.

BY BRUCE D. ARMON



Physician recruitment agreements are an increasingly common way

for hospitals to attract physicians to communities. For a physician, these agreements can provide a guaranteed income for a defined period of time, cover a physician's relocation costs to the community, provide a signing bonus, and even help a physician retire medical education debt. For a hospital, it may be the only way to attract a young physician willing to relocate in a time when the demand for physi-

cians exceeds the supply. If the recruited physician is going to be employed by a private practice rather than establish his own medical practice, the employer may seek benefits as well from the recruitment relationship. Depending on the compensation provided to the physician, the employer may retain the economic benefits of the recruitment agreement. The recruitment agreement may also help the

employer strengthen its own relationship with the recruiting hospital by remaining a key physician group within the hospital medical staff.

In 2001, the [American Medical Association](#) reported there were 229 active physicians for every 100,000 civilians. In 1975, there were 135 active physicians per 100,000 civilians. Despite this aggregate increase in the number of active physicians, the current physician

base is older. According to a [study by the Pennsylvania Medical Society](#), the percentage of young doctors (under the age of 35 and not in a residency program) across the country dropped from 12.6 percent to 5.6 percent from 1985 to 2000.

Statistics vary as to whether there is a national shortage of primary care or specialist physicians. There is a general consensus, however, that there is a need for primary care and specialist physicians in rural and urban communities. The hospitals in these communities are most likely to utilize physician recruitment agreements to ensure they can serve the medical needs

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of their communities.

### Fraud and abuse statutes

The physician executing the recruitment agreement, the medical practice which will employ the recruited physician, and the hospital proffering the recruitment arrangement must each be sure that its actions are legal. The federal indictments handed out last summer against a hospital and its administrator in San Diego, California for alleged criminal violations relating to its physician recruitment agreements have made many of us even more aware of the potential conflicting interests and legal issues at the center of these agreements. According to the indictments, between 1992 and 2002, more than \$10 million was paid to recruit more than 100 physicians to the hospital's service area. The federal government alleges that a portion of the recruitment payments was actually kickbacks paid to established members of the private practices employing the recruited physicians to increase their patient admissions to the hospital.

The federal anti-kickback statute prohibits the knowing and willful solicitation or receipt of any remuneration in return for referring persons or arranging for acquisition of goods or services which may be paid for by Medicare, Medicaid, or another federal health-care program. Remuneration includes the transfer of anything of value, in cash or in-kind, directly or indirectly, covertly or overtly. Federal courts have ruled that if one purpose of the payment is to induce referrals, the anti-kickback statute is violated.

Because the anti-kickback statute is so broad, the Department of Health and Human Services (HHS) has promulgated "safe harbors" to define

arrangements that are not subject to the anti-kickback statute because such arrangements are unlikely to result in fraud and abuse. An arrangement that meets all of the elements of a particular safe harbor will ensure that its participants are not prosecuted or sanctioned. An arrangement that does not meet all of the elements of a safe harbor is not necessarily presumed to be in violation of the anti-kickback statute; it does not, however, have the protection of the safe harbor.

There is a safe harbor governing practitioner recruitment efforts that protects efforts to induce a physician who has been practicing within her current specialty for less than one year to locate, or to induce any other practitioner to relocate, her primary area of practice into a health professional shortage area (HPSA) that is served by the hospital. The HPSA determination is based on three criteria. For information regarding the HPSA process, go to <http://bhpr.hrsa.gov/shortage/hpsaguide-pc.htm>

There are nine standards in the practitioner recruitment safe harbor. They include, among others:

- The agreement must be set forth in writing;
- The benefits are provided by the entity for a period not in excess of three years and the terms are not renegotiated during this three-year period in any substantial aspect;
- There is no requirement that the practitioner make referrals to, be in a position to make or influence referrals to, or otherwise generate business for the entity as a condition for receiving the benefits;
- The practitioner is not restricted from

establishing staff privileges at, referring any service to, or otherwise generating any business for any other entity of his choosing; and,

- The payment or exchange of anything of value may not directly or indirectly benefit any person (other than the practitioner being recruited) or entity in a position to make or influence referrals to the entity providing the recruitment payments or benefits of items or services payable by a federal health-care program.

The regulatory site for the safe harbor is 42 CFR 1001.952(n). To view it in its entirety, go to

[www.gpoaccess.gov/cfr/retrieve.html](http://www.gpoaccess.gov/cfr/retrieve.html)

In 2001, the HHS Office of Inspector General (OIG) released Advisory Opinion 01-4 relating to an otolaryngologist recruitment agreement by a hospital in a rural community. The OIG identified four factors in considering the risks posed by a recruiting agreement:

- whether there is documented evidence of an objective need for the practitioner's services;
- whether the practitioner has an existing stream of referrals within the recruiting entity's service area;
- whether the benefit is narrowly tailored so that it does not exceed that which is reasonably necessary to recruit a practitioner; and
- whether the remuneration directly or indirectly benefits other referral sources.

The OIG reiterated this was not an exhaustive list of factors that must be considered and concluded that this specific agreement would not result in administrative sanctions. For a copy of Advisory Opinion 01-4, go to

<http://oig.hhs.gov/fraud/docs/advisoryopini->

[ons/2001/ao01-04.pdf](#).

In addition to the anti-kickback statute, a physician recruitment agreement can involve the [Stark statute](#). The Stark statute prohibits a physician from making a referral to an entity for the furnishing of designated health services if the physician (or an immediate family member) has a financial relationship with that entity, unless an exception applies. There is a Stark statutory exception for physician recruitment arrangements. The exception applies to remuneration from a hospital to a physician to relocate to the hospital's geographic area so long as the physician is not required to refer patients to the hospital, the amount of remuneration is not determined in a manner that takes into account the volume or value of any referrals by the recruited physician, and other regulatory provisions. Proposed regulations were issued in January, 1998 but as of press time no final regulations have been promulgated.

#### Key elements of the agreement

There is no uniform template for a physician recruitment agreement, but following are several of the key issues which should be addressed in the agreement.

- **Your recruitment agreement must be in writing and you must understand every provision in the agreement before you execute the agreement.**
- **Ensure there are no inconsistencies between your employment agreement and the recruitment agreement with the hospital** if you are going to be employed by a private practice as part of your recruitment by the hospital. This is particularly important if neither the hospital nor the private practice is going to execute the document drafted by the other, even though you will be executing both agreements.
- **Understand the parameters of the hospital income guarantee. What is the maximum number of dollars the hospital will provide to you?** How long (months or years) will the guarantee last? How frequently will the hospital pay you, and what do you and/or your private practice have to provide the hospital to calculate the monthly amount the hospital provides? If you are executing an agreement with a private practice, the private practice will likely require you to immediately forward all sums received from the hospital to the private practice. There are income tax implications for receipt of this money. The hospital should forward you a Form 1099 for the year in question. If you give the money directly to the private practice, your accountant should identify on your tax return that you received this money as a nominee for the private practice and you should "zero out" this sum with a corresponding credit so you have zero taxable income from this transaction.
- **Understand the business ramifications of the guarantee and how it works with your business needs.** While it may be tempting to have several hundred thousand dollars at your disposal from a hospital (and a convenient means for your private practice employer to totally offset their promised salary to you), there is no such thing as free money. Most recruitment agreements (and private practice agreements) have performance provisions. While an income guarantee agreement may provide you a cushion during the first year, get set for a very hard landing in year two if you have not sufficiently built your practice revenues.
- **Understand how the income guarantee is forgiven.** Most agreements provide that if the physician stays in the hospital's service area (note, this does not mean working explicitly for the private practice) for a defined number of years, the income guarantee is entirely forgiven. The income guarantee should be forgiven incrementally (i.e., for every month or year you are in the community the respective portion of the total income guarantee is forgiven).
- **Understand the timing and impact of termination provisions in both agreements.** The repayment obligations for you and/or the private practice may be different depending on whether you or the hospital or your private practice employer terminate one of the agreements for cause or without cause. In turn, there may be tax implications from the termination and you should consult your accountant to ensure you have reported your income and expenses appropriately.
- **Understand what happens if you become disabled.** Your private practice employment agreement may provide short and/or long-term disability coverage. You need to make sure you are protected from repayment obligations pursuant to the recruitment agreement if you become "permanently disabled" and unable to continue your medical career.
- **Understand your short and long-term objectives.** Similar to a private practice employment agreement, almost anything in a hospital recruitment agreement is negotiable. Depending on your short and long-term objectives, you should ne-

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gotiate the terms of this agreement accordingly. For instance, if you are not sure you want to remain in a particular community, you should strive to shorten the forgiveness period so you can leave sooner without financial penalty. If you are unsure of the bill collection methods used by your private practice employer, you should ensure there are precise accounting mechanisms required by the hospital and consequences to the private practice employer if they do not adhere to these requirements.

A physician recruitment agreement with a hospital can be a wonderful way to integrate yourself into a community for a significant period of time. To ensure your new practice's future and allow you to exit an undesirable situation without a severe financial penalty, you must negotiate these agreements carefully. ■

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