Negotiating an employment agreement can leave any physician riddled with anxiety. Young physicians especially may be concerned about trying to change the provisions of a contract for fear a potential employer might rescind their offer.

Although the task of reviewing an employment agreement and negotiating certain points may be daunting, it is important and now expected. Employers will respect that you are simply trying to understand your employment agreement and are working to be sure that its terms are fair.

Here are 10 things to consider when evaluating and negotiating an employment agreement. One overarching theme is that you must understand the content of your employment agreement; the better you understand its content, the better you will be able to negotiate its terms.

1. **Duties**

   Employment agreements typically require you to provide services at an employer’s “offices” on a “full-time” basis. Although these phrases in and of themselves are not harmful, they could be inherently unfair to you if they are not appropriately defined. Depending on your specialty, “full time” might mean five days per week or four-and-a-half days per week or three days of clinic time and one day of surgery per week, etc. You need to be sure that your understanding of “full time” matches the employer’s definition. This also will help you as you compare compensation for two jobs, which may have different definitions of full time. Although it is typical for an employer to assign you to the office where your services are most needed, you should request that the employer consult with you...
before assigning you to a different location. This is particularly important if your compensation is based on your production and some offices are less productive than others.

2 Policies and procedures
Most employment agreements require you to comply with the employer’s policies and procedures, which can be amended from time to time by the employer. Although the employer can change the policies and procedures after you sign your employment agreement, you should request a copy of the current ones to make sure you find them acceptable before you sign the contract. For example, there might be a policy on compensation that states, “Employer shall pay Employee the compensation and provide to Employee the employment benefits to which Employee is entitled pursuant to the Compensation Policy, as is in place from time to time. Employer expressly reserves the right to modify the Compensation Policy at any time.” Or, a policy might suggest that an employer does not trust the employee to report income from outside activities, for example, “Employee shall, no later than April 20 of each year, submit her federal income tax return for the purposes of a review of the Employer’s other gross professional income.”

3 Term
Be sure to carefully review the term of the agreement in light of the termination provisions. For example, an employment agreement may indicate that the term begins January 1, 2014, and continues for three years. This appears to be a three-year agreement, but if the agreement allows the employer to terminate your employment without cause on 90 days prior written notice, the term is actually 90 days.

4 Termination
Although termination provisions are present in every physician employment agreement, they vary greatly. There are two types of termination provisions: 1) “for cause” and 2) “without cause.” Most physician employment agreements contain both for cause and without cause termination provisions.

For cause. Both you and the employer should be able to terminate for cause (meaning some sort of breach or violation of the agreement or other specifically defined action or inaction). If the employer can terminate your employment for cause, the employer should be required to give you notice of the problem and an opportunity to fix the problem within a reasonable time period (also called a “cure” period). In addition, the definition of actions that would qualify as “for cause” termination by the employer should a) be narrowly defined (for example, delete the phrase “including, but not limited to”), b) include materiality thresholds (for example, that a breach must be significant) and c) not include the phrase “in its sole discretion” for determinations of cause that are made by the employer.

Without cause. Both you and the employer should be able to terminate the contract without cause (meaning one party can terminate for any reason or no reason but not an illegal reason). Termination without cause typically requires notice, which generally is 60, 90 or 120 days. Where either party can terminate without cause, you should carefully think about the implications. For example, if the employer terminates you without cause, you should not have to pay for tail insurance and the covenant not to compete should not apply or at least should not apply within the first six months of the agreement (see below for discussion of tail insurance and covenant not to compete).

5 Compensation
Although most physician employment agreements establish base compensation, more and more also include productivity compensation based on relative value units performed by you and billed by the employer (realized at the time the service is provided) or cash receipts/collections (collected up to three or four months following the date the service is provided). If bonuses are based on a cash receipts/collections basis, the employer only collects nine months’ worth of billings during the first year. Thus, you should try to negotiate a pro-rated bonus for the first year (for example, you will receive a bonus if you achieve 75 percent of the threshold required for the first year) and should specify that, upon termination, the employer must pay you for any receipts collected within three months after termination.

6 Malpractice insurance
Insurance coverage is a crucial issue that you must carefully consider before signing any employment agreement. There are two kinds of insurance: 1) occurrence-based insurance and 2) claims-made insurance.

Occurrence-based insurance. Occurrence-based insurance covers malpractice incidents that allegedly occur while you are covered by the policy as an employee of the practice. If you are covered by a policy and someone is allegedly harmed by you but does not bring a claim until after you terminate your employment, the incident will still be covered by the policy even though you no longer have the insurance coverage because the alleged act occurred while you had coverage.

Claims-made insurance. Claims-made insurance covers claims made while you are covered by the policy. This could include claims stemming from harm allegedly caused by you before you were covered by the policy, as long as those claims are filed while you are covered. It also means that if harm allegedly occurs while you are covered by a policy but a claim is made after you have left employment and are no longer covered by the policy, you will not be covered unless you purchase “tail insurance” (also known as an extended-reporting endorsement). Expressed mathematically: Claims-made insurance + Tail insurance = Occurrence-based insurance.

Some employment agreements simply mention that you will be provided professional liability malpractice insurance without addressing whether the policy is occurrence-based or claims-made. Be sure to ask which type of insurance the employer is offering.

If you have occurrence-based insurance, it will continue to cover you after
you terminate and you do not need to discuss tail insurance. The same is true if your employer self-insures. If you have claims-made coverage, someone will need to purchase tail insurance to cover any claims that come in after you terminate your employment. Who pays for tail insurance should be negotiated in your employment agreement. Some employers split the cost of tail insurance with the physician. Others pay the entire cost of tail insurance or require that the physician pay the full cost. In some cases, the party that bears the cost of tail coverage depends on who terminates the employment agreement and for what reason. It may also vary depending on how long you actually work for the employer.

7 Outside activities
Many employment agreements prohibit you from providing outside services without the employer’s consent. You should carefully review the scope of the provision because it also may prohibit you from conducting research, speaking or publishing without the employer’s consent and may indicate that any money earned from such activities belongs to the employer. If you intend to provide any such services outside of your employment, try to negotiate the employer’s consent for those activities you know you will be conducting as part of the contract so you can keep any compensation you may receive, provided that you performed the services on your own time (e.g., vacations, weekends, etc.). Also, keep in mind that you will need your own malpractice insurance for outside professional activities, including volunteer activities.

8 Covenant not to compete
Almost all physician employment agreements contain a covenant not to compete (although it would be ideal for physicians if they didn’t). These provisions usually run one to two years following termination, and they can be complex. When reviewing a covenant not to compete, be sure to ask these questions:

- Is it reasonable under state law based on geographic area and duration? The geographic range should focus on areas from which the employer draws patients and should relate to the employer’s offices where you provided services (this is particularly important for employers that have offices spread across a geographic radius and you only provided services in a few of those offices).

- What sort of events trigger the covenant not to compete? Typically, the covenant not to compete is triggered if the employment terminates “for any reason.” However, you should not be prohibited from working for a competitor if the employer terminates you without cause or if you terminate because of the employer’s material breach. In contrast, you may be subject to a covenant not to compete if you terminate without cause or if the employer terminates you for cause.

- Certain items typically are excepted from covenants not to compete. They include:
  - Performing periodic hospital rounding
  - Employment as a hospitalist
  - Teaching at a university medical school or other academic institution
  - Providing medical director services
  - Providing review services to any agency, third-party payer or other organization for payment, quality, medical necessity or peer-review purposes
  - Conducting scholarly or academic research and/or writing
  - Performing volunteer services.

9 Call coverage
It is crucial to understand the call coverage obligations required by the agreement. Although it is important to make sure patients’ needs are met, it is also important to ensure that your health and well-being are protected. You should know that call coverage is shared equally or that you understand the circumstances under which call would not be shared equally among the staff (both junior and senior physicians). Keep in mind that if the division of labor for call coverage is based on the number of physicians in an office, your obligation will increase if other physicians leave the employer.

10 Integration provision
Most contracts have an integration provision that shows up in the miscellaneous section of the contract. The integration provision specifies that the contract is the entire agreement between the parties and supersedes any and all prior agreements, understandings, promises and representations made by either party concerning the subject matter in the agreement. In other words, the signed agreement is the final statement of the arrangement, and any previous agreements, even those made in writing before you signed the contract, are replaced by the agreement and are not enforceable. So, ensure that any promises made about the contract are written into the version that you sign.

Accordingly, if your potential employer tells you that it won’t enforce a particular term in the employment agreement or that you don’t have to worry that the agreement indicates that the employer won’t provide tail insurance because the employer always provides it even if not contractually required to do so, you must make sure those terms are reflected in the agreement or in a side letter that is dated the same date as the employment agreement.

Conclusion
Although this isn’t everything you need to know about physician employment agreements, we have touched on a number of important issues to consider when negotiating with a potential employer. Smaller and newer practices and those in rural areas will be more likely to negotiate than large health care systems, which use standard template employment agreements that are applicable to all physicians they employ. Even if you will not be able to negotiate the terms of your employment agreement, it is still worth having an attorney review it so that you can understand its benefits and limitations and take the terms into consideration when evaluating a job offer.

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