Purists take one or the other of two views about contracts. The first view is moral: people always ought to keep their promises. The other is economic: people are entitled to break their promises provided they are willing to pay for the damage they cause. Now, if you suffer from a broken promise, you will probably see things in the moral light, but the economic view comes closer to what courts make people do.

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This is a brief introduction to key concepts in physician employment agreements from the employee’s perspective. It does not try to cover all the possible topics, but it does try to identify the most common, most important, ones. It also does not try to cover the law of every state or even any particular state. But it will give you some background and basic vocabulary to use when you think and talk about these matters.

**Written Contracts.** It is usually not necessary for an employment contact to be in writing, and if a written contract is necessary, it will be because of some special state or federal law that applies to a specific situation. So the problem with oral contracts is not that they are unenforceable; it is that their contents and meaning are hard to prove. That, of course, is reason enough to need a written contract.

**The Letter of Intent.** When employers are ready to make an offer, many of them – but by no means all – will send a prospective employee a “letter of intent.” It will usually describe the position being offered, the tentative starting date, the salary, and perhaps some other matters such as moving expenses, signing bonus, work location, and preconditions such as getting a license and obtaining medical staff privileges at a particular hospital. A letter of intent is almost always non-binding. If it is non-binding, signing it does not create a contract between the prospective employer and employee, and either party can walk away without owing the other party anything. If you get a letter of intent, you will want to discuss it with your lawyer to be sure you know if anything is actually being promised.

**The Term of the Agreement.** Occasionally you will see a contract that has no express term (i.e., no specified time period), but most employment contracts are for a definite initial term, and then automatically renew for additional terms, unless one party tells the other it is letting the contract expire at the end of the then-current term. This initial term may be one year, two, or more, and that does not make much difference. But the renewal provision demands your attention,
because it can slip up on you, and you may inadvertently allow a contract to renew when you do not want to do that.

Termination Provisions. There are two types of termination provisions: (i) termination for cause, and (ii) termination without cause. Most employment contracts have both.

Termination for Cause. Employers usually want to include a long list of things that would permit them to terminate the contract immediately without having to pay damages to the employed physician. Some of these are specific and unobjectionable, such as loss of licensure, exclusion from Medicare, and loss of hospital privileges. Some are vague and undesirable from the physician's point of view, such as conduct that casts the employer "in a bad light" or constitutes "disruptive behavior." Some are concrete but nevertheless undesirable, such as being arrested or failing, even just once, to meet the standard of care. The employee can do several things to minimize the effects of overly broad grounds for terminating a contract. One is to insist on having a reasonable amount of time to cure (i.e., to fix) any breach of the contract that can be cured. Another is to narrow the grounds; for example, instead of having a contract allow termination if the employee is arrested for an alleged crime, the contract might say it can be terminated if the employee is convicted of a felony or a misdemeanor involving theft or a breach of trust.

On the other hand, employers usually do not want to specify the grounds on which the employee may terminate the agreement for cause. At a minimum the employee will want the contract to say he or she may terminate the contract on account of a material (i.e., fundamentally important) breach that is not cured within a specified number of days after the employee gives the employer notice of the breach and demands it be cured. The exact number of days is not terribly important; anything from 15 to 60 would be reasonable.

Termination without Cause. Most employment contracts also have a clause that says either party may end the contract by giving the other party a specific amount of prior notice of termination. The notice will probably have to be in writing. The amount of notice may be anywhere from 10 days to 180 days or more. (The longest I have seen was 270 days.) Whatever the notice period, it needs to be the same for both parties, not a short time for the employer and a long time for the employee. There is no perfect amount of time. When you want to leave, a short period is good for you. When you are being asked to leave, a long period is good. On balance 90 or 120 days is probably the best. However, hospitals often ask for 180 days or more because, they say, it will take them at least that long to recruit a replacement.

Occasionally a contract will say it cannot be terminated without cause by either party during the initial term. In other words (without the double negative), it says that during the initial term you can only be fired for cause. If you have moved 1,000 miles to take a job, this is a good provision to have in your contract.
Overall, termination without cause provisions do more good than harm because they allow parties to part ways without one party alleging misconduct or incompetence by the other. It is like a no-fault divorce.

**Salary after Termination: Working out the Notice Period.** If an employer fires an employee without cause, the employer can make the employee leave immediately and then pay the employee the salary for the time not worked. If the employee quits without cause, the employer may want to accelerate the employee’s leaving without having to pay any salary for the days not worked; of course, the employee wants the contract to forbid this. If the employee is fired for cause, salary will end immediately. If the employee quits for cause, the employer should have to pay damages in lieu of the salary the employee would have earned had he or she not been forced to quit.

**Tail Coverage.** The employment contract should explain who must pay for tail coverage, and under what circumstances. There is quite a lot of variation in agreements concerning tail coverage. It is common for the departing employee to have to pay for the tail, and for the employer to have the right to make sure this happens by buying the tail policy and then charging the premium to the physician. On the other hand, some employers will assume all responsibility for the cost of tail coverage; this is most common with large employers such as hospitals and very large practices. A reasonable middle ground is to lay the cost of the tail on the party who is most responsible for ending the agreement. That is, the employer must pay for the tail if the employer terminates the contract without cause or if the employee terminates the contract with cause, and vice versa, namely the employee pays the tail if the employee terminates without cause or the employer terminates for cause.

**Compensation.** Compensation formulas vary a lot. There may be a guaranteed initial amount for the first year, but more and more compensation is based on productivity, perhaps coupled with bonuses based on some measure of clinical quality, patient satisfaction, and administrative efficiency. If the formula is based on the number of relative value units (RVUs) generated during a year, the formula should not vary according to the patient mix, nor should it drop because of a shortfall in actual collections. It helps if the compensation formula shows model calculations for the first year or two. If the contract does not show examples, it is good to ask for some. In the end, you should be able to determine if the expected work load corresponds to what is typical for the area and if the compensation you will earn with this amount of work (i.e., the expected number of RVUs) is fair market compensation for the area.

In addition to understanding how you will be paid while employed, you need to understand what will happen upon leaving employment. If you leave in the middle of the year, it is common to lose any bonus that may have been accumulating and to lose any right to share in your accounts receivable which are collected after you leave.
Outside Work and Assignment of Earnings. You will undoubtedly assign your earnings to your employer; even if you have a contractual right to be paid a portion of your collected receivables, that does not mean you own those receivables. In addition, you may be asked to assign to your employer your earnings from moonlighting, consulting, reviewing medical records, participating in clinical research, lecturing, writing, and testifying. This may be acceptable to you so long as these earnings are factored into your total compensation from your employer. On the other hand, you may be allowed to keep all your income from some or all of these outside sources. Regardless of how your employer treats your earnings from your medical activities, the contract should leave no doubt that you are entitled to manage your investments and keep all earnings from any activity that is not medical, whatever it may be, provided it does not interfere with your work for your employer.

Non-Competition Clauses. There are various kinds of non-competition clauses, and if they are written correctly, they are legal and enforceable in most jurisdictions. That said, the law governing them varies from state to state, so I will only try to explain the basic principles behind them, and if you are presented with a non-compete you will need to check with local counsel to see if it is legal in that jurisdiction.

Non-Competes as to Employment. When physicians refer to a non-compete, they usually mean the situation where an employee quits or is fired, cannot practice nearby, and has to leave the area. Most states allow non-competes if the terms are reasonable. Here is how courts judge reasonableness:

First, did the employer give the employee something in exchange for the promise not to compete? If the non-compete is part of the original employment contract, then the offer of employment is enough to support the non-compete, but if the non-compete is added later, it has to be supported by something new, such as a raise, a promotion, or a contract extension.

Second, is the area reasonable? The non-compete can protect the employer's actual market and actual patient base, but nothing more. In an urban area, primary care physicians may have a market that lies within a few miles of their offices. Urban specialists may have larger areas. Rural practices may have even larger areas. It once was common to define the area in terms of counties, and that is probably still legal in many situations, but now it is more common to see the area defined as a circle with its center at the physician's office and a radius of so many miles.

Third, is the time reasonable? In North Carolina, a one-year non-compete is certainly fine. Two years is presumptively OK. Three years would begin to be questionable, and more than three years is very suspect, and probably unenforceable. Other states may be different than this.
Fourth, is it reasonable or unreasonable in light of patient needs? There are cases where specialists have successfully argued that their leaving the area would deprive patients of services that could not be replaced and, therefore, their non-compete violated public policy and was unenforceable.

Even though courts will enforce a proper non-compete, they are not favored under the law, and some states will entirely refuse to enforce a non-compete if it is defective in any way. Others will reform a defective non-compete, but only to some extent.

Non-Solicitation of Patients. Employment contracts often forbid a physician to solicit patients after leaving employment. This provision is generally legal, with the following caveats. As a matter of professional ethics and public policy, patients are entitled to choose their own doctor, so patients may follow their physician to a new location if they choose. State law or licensing boards will insist that patients be given adequate notice of a physician’s leaving a practice and an opportunity to arrange for continuing care with that physician or another. General public advertising, as opposed to direct mail, e-mail, or telephone contact, should not be considered solicitation.

Non-Solicitation of Employees. Contracts also often forbid a physician from soliciting or employing someone who had worked for the physician’s former employer. Restrictions that last for a year or two are presumptively legal.

Injunctions and Liquidated Damages. Employment agreements often ask employed physicians to agree that the non-competition provisions can be enforced against them by a preliminary and a permanent injunction (i.e., a court order making the parties perform the contract as it is written). A preliminary injunction is issued early in the case and lasts until the case has been tried or settled, while a permanent injunction is issued as part of the trial decision or settlement and lasts forever. All injunctions are exceptions to the principle described above that people are free to break their contracts if they are willing to pay the damages required to make the other party whole.

In a non-compete case, the preliminary injunction is more important than the permanent injunction, because the preliminary injunction can be issued early in the case. Since it can be issued before the case is actually tried, the law says the person asking for a preliminary injunction has to show he or she is (i) likely to win the case in the end and (ii) would be irreparably damaged if the injunction were not granted while the case is pending. These can be hard things to prove. Therefore, to make it easier for employers to get preliminary injunctions, they put clauses in contracts making the employee acknowledge the preliminary injunction is legal and necessary.

Contracts also often include a “liquidated damages” provision that says if the departing employee breaches the non-competition clause the departing employee acknowledges the
employer will be damaged in a specified amount of money. Although it may seem to be trying to have it both ways, (i) the contract may say the employer is entitled to an injunction because any breach of the non-compete cannot be cured by paying damages, and at the same time (ii) it may say the damages in the event of a breach are agreed to be $XXXXX. There is a theoretical cap on liquidated damages. They must bear a reasonable relationship to the cost of hiring and training the departing employee, the value of the departing employee to the practice, and the cost of replacing him or her with a new employee. Liquidated damages may not be so large as to become a penalty for leaving.

From the employee's point of view, a reasonable amount of liquidated damages, such as six months' or one year's salary, can be liberating, provided the contract makes it clear that the employee is released from the non-compete and may go to work nearby immediately after paying the liquidated damages. If the contract does not explicitly say the employee can "buy-out" the non-compete by paying the liquidated damages, it needs to.

Reaching Ownership. At one time it went without saying that a physician would either become a part-owner of the practice or would leave. That rule does not apply to hospital employment, of course, and it is no longer universally true with group practices. Before signing a contract, you need to know if there is a path to ownership, what it will be, how long it will take, and what it will cost. You want this in writing.

The Entire Agreement Clause. The "entire agreement" clause (sometimes called the integration clause because it "integrates" all the parties' prior discussions and correspondence into the final version of the written contract) is an important clause. It means that unless there is fraud, which is easy to allege but hard to prove, the final written contract is the whole agreement between the parties, and it supersedes all the earlier discussions and understandings. This means anything the parties discussed and may have seemed to agree upon disappears from the deal if it is not included in the signed written contact.

Amendments. The contract will probably say that all amendments have to be in writing, and it may say the amendment has to be signed by both parties.

Bargaining Power. The physician seeking employment has less bargaining power than the employer. The larger the employer, the truer this is. In a related point, large employers are often unwilling to change the standard language in their contracts, because dozens or hundreds of others have already signed the very same thing.

The Most Important Practical Consideration. The single most important thing to do before you sign a contract is to find out if your prospective employer is a good group to work for. If people come and stay, that is a very good sign. If people repeatedly come and go, that is a very bad sign. Another good test of a well-run office is the attitude of the staff and mid-levels. If they seem happy, they are probably treated well, and you will probably be treated well also, but if you
can sense the tension, it is probably not a good place to practice medicine. Timeliness is another important consideration. If the prospective employer who is courting you is slow to deal with your questions, things will only get worse after you sign on. Of course, the paperwork matters. A group with current, complete, printed policies and clear contracts is likely to be a better place than one without those things. Finally, when you get to the point of reviewing a proposed contract, look to see if it is even-handed. If the employer can terminate the contract on 30 days’ notice, but the employee must give 90 days’ notice, that is a bad sign.

A Word about Legal Fees. It will take an experienced lawyer about one hour to read and spot the issues in a typical physician’s employment contract. It will take about another hour to write up a memo explaining the key points. If you shop around, you can probably find a well-qualified attorney who will do the job for a flat fee that is something less than the regular hourly rate for the actual time the lawyer expects to spend on the task. However, you should not expect a flat fee for negotiations and revisions, and if you have lots of questions for your lawyer, the meter will be running.

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