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New Ophthalmologist Employment Contracts

Once you have settled on the right candidate for your practice, you need to make a formal offer in writing. This offer will form the basis for your employer-employee relationship, and will probably contain the outlines of future "co-ownership" and buy-in (and perhaps other) arrangements for your new associate. The employment contract between a practice and its new ophthalmologist can be the basis for a long and productive relationship. Therefore, it is important that the contract cover all the reasonable contingencies -- from the first day of employment to the time of co-ownership.

Written Agreement

It is essential, for both parties, that all new ophthalmologist employment contracts be in writing. While the trust implied in a handshake agreement is admirable, it is not advisable when both an ophthalmologist's career and a practice's success are at stake. Employment contracts for ophthalmologists are so detailed and complex that even well-intentioned people will forget some of the exact terms of an oral agreement, and time often distorts one's perception of what was discussed and agreed. Further, by clarifying each person's expectations up front, a written agreement helps prevent frustrations that can result later.

A new ophthalmologist employment contract need not be composed of dense legal jargon. It should be written in common language that is clear, easy to read and free of ambiguity. We recommend that practices use a letter agreement that serves in the place of a more formal and structured contract. Such letter agreements are legally binding and usually more comprehensible and less threatening than standard contracts.

Term of Employment

Your new ophthalmologist employment contract should clearly state the length of time the new ophthalmologist is expected to be an employee of the practice. Traditional employment terms range from 12 to 36 months, though the current trend is toward a full two to three year period. This does not mean that the new ophthalmologist is guaranteed employment. Rather the agreed term simply describes the length of time the new ophthalmologist will be an employee before becoming a "co-owner". The new ophthalmologist's employment should also be made contingent upon the ophthalmologist's obtaining staff privileges at your hospital and ASC, appropriate state and DEA licenses, and professional liability insurance.

The contract should also explain that employment is "at will" -- meaning that either of you may end the employment whenever you wish. In that regard, we recommend that the contract include a notice provision upon which either party may terminate the relationship by simply giving written notice (typically 30-90 days) to the other.

The employment contract should also include a provision allowing for immediately terminating the employee-ophthalmologist for cause, which supersedes the notice provision. Such a provision should include the circumstances that would trigger immediate firing - loss of license or hospital/ASC privileges; suspension, exclusion, or other sanction from or under the Medicare/Medicaid or similar programs; ineligibility for standard premium professional liability insurance coverage; conviction of a felony; dishonesty; refusal to follow direction; and divulging confidential patient information are several examples. For the practice's protection, some practices also reserve the option of letting the ophthalmologist go if he or she experiences too long a period of disability (usually beyond 90-180 days).

Evaluations

A specific evaluation period and procedure should be set out, during which the ophthalmologist's performance will be compared with specific criteria and objectives. These criteria should be stated in the contract, particularly if the evaluation will relate directly to an eventual offer of co-ownership. Typical criteria include the ophthalmologist's commitment of time and energy to the practice; the ophthalmologist's level of productivity, efficiency and overall contribution to the practice; and the ophthalmologist's interest in the practice from an entrepreneurial standpoint. Interpersonal factors should also be reviewed, including the ophthalmologist's ability to work with other ophthalmologists and staff, as well as the ability to earn the confidence of patients and referrers.

Compensation

Compensation provided in the contract should clearly state the base salary and any incentive compensation or any other bonus arrangement the practice will offer. The contract should not only lay out the compensation the new ophthalmologist will receive for the first year of employment but also during the remaining term of the contract. An increase of \$10,000-\$15,000 is typical for the second year.

Despite our misgivings about incentive pay and regular bonuses, incentive compensation is the norm in ophthalmology. If you decide that an incentive compensation arrangement is warranted, try to avoid those that focus on individual productivity--i.e. those where the practice simply pays the new ophthalmologist a percentage of the gross income he or she generates for the practice, in excess of the practice's cost to employ the ophthalmologist and profit on his efforts. Such formulas do not foster group thinking. In addition, the new ophthalmologist may simply be doing work that you funnel to him or her without any real growth in the practice and there is no protection from overall increases in overhead which remain the responsibility of the practice. Nevertheless, most incentive compensation arrangements are based on a percentage of the gross income he or she generates for the practice, in excess of the practice's cost to employ the ophthalmologist and profit on his efforts (e.g. – 20% of actual collections for the ophthalmologist's services in excess of \$400,000).

Discretionary bonuses can be given for any number of reasons. Quite often, they are based on a subjective assessment of the ophthalmologist's overall contribution to the practice's success. This subjective evaluation process can certainly be tied into the evaluation criteria discussed above. However, it is not necessary for the practice to set its evaluation criteria for bonuses in writing -- that is what being subjective means.

Business Expenses

It is generally accepted that the practice will pay a portion of the general business expenses incurred by the new ophthalmologist. Those expenses usually include professional liability insurance; professional society dues; professional journals, books and subscriptions; hospital staff fees; professional travel and educational costs; and sometimes, automobile expenses related to work. Most practices pay the entire cost of professional liability insurance. However, as to the other expenses, we recommend that they not exceed a stated dollar amount per year (e.g. – \$1,500-\$2,500 per year), or that they be pre-approved by the practice.

Although most practices pay the entire cost of professional liability insurance it is important to specifically agree upon whether the practice will also pay for the new ophthalmologist's "tail" coverage on a claims-made malpractice policy. The issue of who pays the tail is important, because it can be quite expensive. The "tail" covers any claims brought after the period covered by the claims-made insurance. Typically, the tail becomes due if the new ophthalmologist leaves the state or the area, or if the ophthalmologist changes professional liability carriers. In the past, practices generally assumed much or all of the cost for the malpractice tail. The trend today is to make the new ophthalmologist responsible for at least one-half of the malpractice tail cost.

Fringe Benefits

It is important to detail the new ophthalmologist's fringe benefits within the contract, as these will often constitute trade-offs for the salary you will be paying. Most practices offer a range of fringe benefits to the employee-ophthalmologist, including basic health and major medical insurance for the ophthalmologist (and often for his or her family); group term life insurance; coverage under the practice's retirement plan(s); and perhaps disability insurance.

If the practice has a retirement plan, the contract should explain when the new ophthalmologist becomes eligible to participate and how contributions will be made. Depending upon the retirement plan's eligibility provisions, contributions the practice makes to the retirement plan could easily be in addition to any salary increase you offer in subsequent years.

Vacations and Professional Absence

Two to four weeks, during the first year of employment, is a standard period for paid vacation. Another week is usually provided for medical education, professional society meetings, or to take board examinations. These weeks may be bundled into total paid time off, or may be allocated between vacation and professional absence. Depending upon what paid time off is provided for the senior ophthalmologist(s), the amount of vacation and professional time off usually increases with the length of employment; however, these periods are almost always less than an "owners" entitlement.

Sick and Disability Leave

The contract should explain in detail how much sick time the new ophthalmologist will receive during each year of employment. Five (5) to thirty (30) days of paid absence for illness or disability is standard. At a minimum, pregnancy-related leave must be treated as any other disability under the practice's sick and disability leave policy, although state and local laws may require even more.

Restrictive Covenants

For most practices, but especially for a small group or solo practice that is ready to expand, a restrictive covenant is an essential protection. However, the covenant is only useful if it will be upheld and enforced by a court of law. While some ophthalmologists, attorneys and practice advisors are skeptical about their enforceability, restrictive covenants have been upheld in most states.

The key is to write the restrictions in a manner that will not raise concerns with judges deciding restrictive covenant disputes. The courts view these covenants as anti-competitive and a restraint on free trade, and will limit or refuse to enforce covenants which are not reasonable, well conceived, and carefully drafted. Here are several guidelines for structuring a restrictive covenant:

- **Reasonable Time**: The restriction should be effective only for as long as is reasonably necessary to protect your interests and moderate your risk of injury. A new ophthalmologist who leaves your service area for one or two years will typically lose much of any advantage gained directly through working with your practice. Therefore, a restriction for longer than that reasonable period could jeopardize your covenant.
- **Specific Geography**: The covenant must be tied to your practice's actual (or in some states reasonably anticipated) service area, with clarity and specificity being extremely important. Geographic restrictions based on a simple mile radius from your practice can be overly broad -- a practice's actual drawing capacity will rarely translate into a nice round circle. Instead, within the contract itself, you might define your practice service area in terms of specific geographic boundaries such as roads, bodies of water, zip codes, or municipal lines. We often recommend attaching to the contract a map which defines the practice service area.
- **The Public Good**: Your restriction must be reasonable in its effect on the general public. A court will not enforce a covenant that may harm the public health. This becomes an issue if there exists a shortage of a particular specialty in an area, or if excluding the ophthalmologist would adversely impact the delivery of ophthalmology services in that locale. A court will also look at

the economic harm that a restrictive covenant could cause the general public. A court could find that enforcement of a covenant risks creating a monopoly -- potentially limiting the availability of public care in the event of an emergency, or driving up future fees.

- **Necessary for Practice's Protection:** Restrictive covenants must also be reasonably necessary for protecting your practice's legitimate interests. For example, a group primarily servicing HMO patients may have difficulty justifying restrictions on a former employee-ophthalmologist who begins or joins a non-HMO related practice. Your contract should include a clear and concise review of your practice's specific ophthalmology interests, and a statement that the physician signing the contract accepts the importance of these interests.
- **Appropriate Timing:** Make sure that the covenant is signed before your employee starts working. A restrictive covenant entered into after an ophthalmologist joins your employment will expose you to the challenge that it lacks "adequate consideration" -- in other words, there is no value to the new ophthalmologist for signing the restrictive covenant provision other than the concern of losing his or her job. You should also make it clear that the covenant will continue in effect until it is changed by a subsequent written agreement. Otherwise, an employee-ophthalmologist who continues beyond the originally agreed to employment period might challenge the covenant by asserting that it lapsed upon the end of the original employment term.
- **Specify Your Remedy:** It is wise to specify the remedy you will seek if the covenant is violated. The best protection is absolute prohibition (temporary and permanent injunctive relief) against competitive practice upon an employee-ophthalmologist's termination of employment. This type of restriction is sometimes very difficult to enforce. In some instances, specific money damages ("liquidated damages") may be more appropriate and may be the only remedy allowed in some states. The amount of liquidated damages -- which should be stipulated in the contract -- must simply represent a reasonable estimate of the economic harm which would be caused to your practice by the ophthalmologist's competition and must not be a penalty. One good approach is to tie that liquidated damages amount to a portion of the departed physician's cumulative salary from your practice with a cap on the maximum amount.

Most ophthalmologists today recognize the practice's legitimate interest in protecting the existing practice from an ophthalmologist who leaves the practice. As a result, restrictive covenants are commonplace in ophthalmology employment contractual arrangements.

Non-Solicitation Agreement

Whether or not you use a restrictive covenant in your contract, we urge you to include a Non-Solicitation Agreement. Its purpose is to prevent the young ophthalmologist from soliciting the practice's patients, referral resources, employees, or contractual arrangements before or immediately after the ophthalmologist leaves your practice. It is usually used in addition to -- not instead of -- a restrictive covenant because while an associate may be restricted from competing within 10 miles of your office under the restrictive covenant, the ophthalmologist may choose to locate 10.1 miles away and immediately begin to solicit the patients he/she saw while with your practice. In those states where a restrictive covenant is not enforceable, a Non-Solicitation Agreement may be the only recourse.

If the ophthalmologist violates your Non-Solicitation Agreement, you may try to gain an injunction against the solicitation of your patients although liquidated damages may ultimately be the most effective remedy. The key is to specify your chosen remedy within the contract, just as for the restrictive covenant.

Additional Provisions

Most new ophthalmologist employment contracts contain only the primary elements of the employment contract discussed above. However, to be most effective, we recommend that virtually all new ophthalmologist employment contracts should include several other additional provisions, such as an outline of the buy-in, income division and co-ownership arrangements as well as an additional special provision for solo practitioners who die or become disabled before the buy-in, income division and co-ownership arrangements come into play.

Co-Ownership

An ophthalmologist who intends to commit to your practice for the next two or three years will want to know when co-ownership may be offered and under what terms. We believe it best to include a broad outline of the process and the criteria that you will use to evaluate the new ophthalmologist's potential for co-ownership. This provision might provide that co-ownership will be considered after two or three years of initial employment and the fulfilling of other criteria such as achievement of Board Certification and perhaps additional evaluation criteria.

The general co-ownership terms should include an explanation of how the price of the co-ownership interest in the practice will be determined, the formula to be used to set the dollar value of the co-ownership interest, how much of a co-ownership interest is to be purchased, and possibly the payment terms.

Income Division

The employment contract should also set out the rough details of how the new ophthalmologist's income will be discounted or reduced during the co-ownership period after the expiration of the initial employment period. Typically, the associate takes reduced income shares during the co-ownership period which phase up over a number of years, reflecting his/her growth in productivity and overall practice responsibility. We increasingly favor this "inexact" income division approach. Under this method the new ophthalmologist's income share might be 60% of a full share in his/her first year after the initial employment period, then 70% in the second year and so on until "full parity" is reached in the fifth year.

Senior Ophthalmologist's Untimely Death or Disability

If you are a solo practitioner or in a group practice that has no other co-owners, you should make it clear what will happen if you die before the new ophthalmologist gains co-ownership. To protect yourself, the contract should require the new ophthalmologist to purchase the practice (or your practice entity) in the event of your death or permanent disability. The financial and payment details should be worked out in broad terms in the initial employment contract. Your failure to deal with this issue could result in your patient base moving to the new ophthalmologist without compensation to you or your heirs.

The financial aspects of this special provision should be arranged so that the new ophthalmologist can reasonably meet the payment schedule. It does no one any good if the financing terms are so steep that the new ophthalmologist cannot possibly meet them. To implement this special provision, it will be important to set a price for the practice. This price could be presented as a set figure; or perhaps more appropriately, determined as a percentage of practice gross revenue for the last full year -- plus the value of hard assets, supplies, possibly accounts receivable, etc.

Conclusion

A written employment contract, touching on all the pertinent details of the new ophthalmologist's practice relationship, is the foundation for a productive and successful work arrangement. While recognizing the legitimate needs and interests of the employee-ophthalmologist, the contract must protect the investment -- of dollars and sweat -- made by the practice's current owner(s). This overview can help guide your thoughts as you develop a contract for your new ophthalmologist. However, it is important that you discuss the details of any proposed or final contract with attorneys and other advisors experienced in ophthalmology employment and practice arrangements.

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