PHYSICIAN EMPLOYMENT:

TOP FIVE ISSUES TO CONSIDER
The Physicians Advocacy Institute, Inc. (PAI) developed this resource to provide practical support to physicians who are contemplating employment. To inform the resource, PAI surveyed physicians and physicians’ counsel across the country to identify the five most critical issues to consider when negotiating an employment agreement. This resource does not cover every topic relevant to the employment decision and does not take the place of good legal counsel for physicians who are negotiating an agreement. It also does not discuss issues relating to the sale of a medical practice to another entity.

The PAI and its affiliated state medical associations are committed to working to preserve physicians’ ability to practice medicine in a variety of practice settings, from solo and small group practice to highly integrated health systems. Regardless of the practice setting, it is imperative that a physician considers the characteristics of a proposed arrangement in order to ensure that he or she will be able to provide the best possible care to patients while being compensated fairly.

Through a national effort to raise awareness of these top five issues for physicians who are contemplating employment, PAI and its affiliated state medical associations hope to educate entities that employ physicians to better address these considerations from the onset to avoid problems that may arise once the employment relationship is established.

For more information regarding the resource, please contact Kelly Kenney at k2strategiesllc@gmail.com.
A physician’s decision to enter into an employment agreement involves a uniquely complex set of contractual, financial and ethical considerations. Once a physician commits to employment by a hospital or integrated delivery system, unfavorable contract terms or a failure for the health system to thrive can have long-term implications for the physician’s ability to practice in his or her chosen area. As such, a physician should venture into an employment relationship only after carefully considering whether the terms of the employment agreement and myriad other, less tangible factors support the decision.

Physicians can expect to be courted as prospective employees by hospitals and other health systems as these entities continue to position themselves competitively in the rapidly evolving health care marketplace. The forces behind this employment trend are well known. There is increasing pressure from public and private health care payers for providers to organize into integrated delivery systems, including the most highly integrated Accountable Care Organizations (ACOs) and other structures with varying levels of integration. Integrated health care organizations are better able to compete in systems that reward physicians and other health care providers to deliver high quality, comprehensive medical care to a defined population of patients on a risk or incentive basis.

Before considering the terms of an employment agreement, a physician must consider overarching factors relating to how the prospective employer is positioned in the health care marketplace in which it competes. This involves understanding the prospective employer’s:

- Management philosophy;
- Market power and plans for growth; and
- Ability to excel under evolving payment methodologies, which often involve profiling or rating mechanisms that ostensibly measure the health system’s ability to meet quality, efficiency and patient satisfaction benchmarks.

After assessing these factors, it is important that the physician considers carefully how his or her practice will fit into the entity’s system. If these factors all favor moving forward, a physician needs to review the terms of the proposed agreement and any other policies employed by the prospective employer that might affect his or her professional performance and satisfaction.

The “Top Five” Issues any physician contemplating an employment agreement must consider relate to: Autonomy, Compensation, Influence, Governance and Due Process.
ISSUE #1

DOES THE ARRANGEMENT ALLOW AN APPROPRIATE LEVEL OF AUTONOMY?

The very nature of employment means foregoing some of the clinical and business autonomy that independent practice affords. Typically, health system employers expect physicians to follow clinical protocols endorsed by the system. As pressure intensifies to reduce variation in health care costs and outcomes, the trend to adopt “evidenced-based” clinical protocols is likely to continue.

Notwithstanding the health system’s expectation that its employee-physicians adhere to clinical and other policies, physicians have separate ethical responsibilities to patients that demand careful consideration of the decision-making structures and other policies employed by the health system that could impact a physician’s ability to act autonomously, particularly with regard to clinical decisions.

POINTS TO UNDERSTAND AND CONSIDER:

- Any contract provision that might impact the level of clinical autonomy necessary for a physician to exercise his or her best medical judgment. On this issue, it is important to understand the health system’s policies and procedures with regard to the following points:
  - How are clinical protocols implemented? What policies and procedures apply when your best medical judgment is to vary from a protocol in a specific situation?
  - Other policies relating to referrals, tests or procedures that may create a conflict of interest with regard to providing the best treatment for a patient.
  - Any language that would impede a physician’s ability to communicate with patients, including explicit “gag” clause language.

- Contract language that restricts business or other activities outside of employment.

- Contract language that hinders the right to participate fully in the organized medical staff or peer review process, including the right to hold a leadership position or communicate a perspective about any topic relevant to these activities.
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ISSUE #2

WILL THE COMPENSATION STRUCTURE REFLECT YOUR FULL VALUE IN THE IMMEDIATE, MID- AND LONG-TERM?

Hospitals and other entities that employ physicians do so because they believe it will be profitable for them over the long-term. It is important that a physician understands fully how his or her practice will yield income to the health system or hospital in order to accurately judge the compensation terms offered, and where appropriate, demand terms that better reflect that value.

In addition to the direct billings that a physician’s practice generates, health systems and hospitals employ physicians based on the understanding that they will generate increased business for the entity from referrals and repeat business from patients newly exposed to the health system. Notably, “self-referral” laws restrict employed physician compensation for referrals of government payer patients to specialists or for ancillary services within the employer’s system. It is important during the negotiating process, however, that a physician understand how this factor might make employing certain physicians more attractive than others.

The full value that a physician practice brings to a health system also encompasses the less tangible factor of how the physician will facilitate the employer’s ability to maximize profits under various payment systems. In a fee-for-service environment, profits are maximized when a health system employs physicians who generate a high volume of procedures and/or tests. In a risk-based reimbursement environment, these entities profit when the health system’s physicians restrain expenditures and reduce variation. As such, primary care physicians are critical to the profitability of entities that are pursuing risk-based reimbursement. Under an ACO, specialists also play a major role in the entity’s ability to assume responsibility for a full spectrum of patient care in a risk-based system. Again, from a leverage-standpoint, these factors are important for the physician to understand when negotiating a salary.

POINTS TO UNDERSTAND AND CONSIDER:

- The prospective employer’s long-term business strategy for growth in its market. This includes understanding the employer’s approach to maximizing profits within the context of changing payment methodologies from public and private payers. Points to consider include:
  - Is the entity committed to sustaining fee for service and/or engaging in incentive-based and/or risk-based payments?
  - Are the entity’s short-term and long-term strategies aligned?
  - Given these factors, how successful would one expect the entity to be over the term of the employment agreement?
How does the physician’s particular practice characteristics align with the employer’s long-term strategy? Will these characteristics serve as an asset to the employer, and if so, how?

- The prospective employer’s offer for compensation is often a complicated formula that deserves careful attention. There are many different models, but generally compensation is one or a combination of the following:
  - Base salary, often calculated as a percentage of collections from billed services;
  - A percentage of billed services above some multiple of the salary;
  - Productivity or incentive payments for meeting specific benchmarks;
  - Compensation for collections from ancillary billings for services of non-physician practitioners under the physician’s supervision; and/or:
  - Compensation to account for a practice’s ability to generate “downstream” or referral-based business for the employer entity, subject to self-referral restrictions.

- If the employer offers a base salary with incentives or bonuses for meeting certain benchmarks, it is important to understand and be able to control the factors that affect the physician’s ability to meet those benchmarks.
ISSUE #3

DOES THE ARRANGEMENT GIVE YOU ENOUGH INFLUENCE OVER DECISIONS RELATING TO STAFFING, MEDICAL SUPPLIES AND TECHNOLOGY?

Health systems such as hospitals employ a variety of cost-containment measures to offset the costs of employing physicians. Reducing overhead costs is a major focus for health system employers who generally lose money during the first several years of employing physicians. Often, the focus of these measures is to reduce spending on ancillary medical and administrative staff, centralize purchasing of medical, surgical and office supplies and limit major capital expenditures. Care must be taken by physicians to retain some level of input into these policies and decisions, as they can have significant impact on professional performance and satisfaction.

Physicians who are contemplating employment often view reducing the daily administrative hassle that comes with private practice, including hiring and firing office staff and ancillary providers, as a major positive. In most employment arrangements, the employing entity assumes these administrative functions. However, in the context of physician employment, it is critical that the entire team – from front office and billing staff to nurses and other ancillary providers – work together to provide top quality, cost-effective care to patients. The shift towards utilizing physician profiling and patient satisfaction surveys as indicators of excellence, coupled with the advent of "shared savings" and other risk-based payment methodologies, makes having a highly qualified staff who are aligned in interest and approach even more important to physicians. Thus, physicians should work to retain some influence over key staffing decisions.

POINTS TO UNDERSTAND AND CONSIDER:

Prior to entering into an employment relationship with a health system or hospital, make certain to understand the entity’s policies and procedures that might affect your day-to-day practice environment, including:

- General policies governing staffing (such as physician to nurse ratios), equipment, and other resources that impact patient care.

- Opportunity for physician input into decisions relating to major capital expenditures, medical equipment and supplies, technology (including “solutions” for EMRs, billing and payment) and hiring/firing ancillary medical and administrative staff.

- The degree of “team-based” care that involves supervising and/or coordinating with non-physician practitioners.

- “On-call” policies.
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ISSUE #4

DOES THE ENTITY’S GOVERNANCE STRUCTURE PROVIDE AN OPTIMAL PRACTICE ENVIRONMENT?

A well-run organized medical staff strengthens the employed physicians’ ability to practice medicine in a manner that puts patient care first. As such, physicians contemplating employment in a hospital setting should be confident that the hospital’s organized medical staff is self-governed and has a strong leadership and bylaws. It is also important that the organized medical staff has primary responsibility over clinical matters and a well-established, physician-driven peer review process.

POINTS TO UNDERSTAND AND CONSIDER:

Prior to entering into an employment arrangement with an entity that has an organized medical staff, it is important to review the organized medical staff bylaws and interview its leadership, if possible, with the following points in mind:

- Does the hospital medical staff meet standards of self-governance, including the ability to adopt and enforce medical staff bylaws, make autonomous decisions relating to medical staff membership and elect officers?
- Through its bylaws and adopted procedures, does the organized medical staff provide due process for physician membership decisions?
- Is there autonomy within the hospital medical staff’s peer review process?
- Does the hospital medical staff have appropriate responsibility for clinical functions and policies within the hospital?
- Does the hospital’s governing body function well with the hospital medical staff?
- If the hospital is part of a larger system, is there an autonomous medical staff or other mechanism that ensures “local” representation for physicians from each hospital within the system? It is important to feel comfortable that there will be a voice for all physicians on clinical and membership decisions.
- Understand how the terms of the employment agreement interact with the hospital medical staff bylaws, particularly on issues relating to due process, termination of employment and hospital medical staff privilege suspension or revocation. Be aware of conflicting contractual language or language that allows one document’s provisions to supersede the other document’s terms.
ISSUE #5

DOES THE EMPLOYMENT AGREEMENT PROVIDE DUE PROCESS IN THE EVENT OF TERMINATION, MODIFICATION, OR OTHER EVENT THAT IMPACTS EMPLOYMENT?

There are general issues of fairness and due process relevant to all employment agreements that take on particular importance in the context of physician employment. In a health care environment rife with changing business alliances, payment pressures, technology and government regulation, physicians need to be confident that their contract terms safeguard against decisions to unilaterally alter the terms of employment or even more drastically, terminate employment without adequate due process. These safeguards should extend to ensure that physicians are able to continue to meet ongoing obligations to patients in the event of a termination.

POINTS TO UNDERSTAND AND CONSIDER:

- Provisions that provide “due process” or specify dispute resolution procedures in the event of a disagreement regarding major points of employment or a termination of employment. Physicians should feel comfortable with provisions relating to these essential safeguards, including:
  - “Due process” procedures, which should clearly establish each party’s right to terminate the contract, provide the opportunity for each side to present its position when a dispute arises, and establish an opportunity and timeframe to cure “breaches.”
  - Any dispute resolution processes stipulated in the agreement, such as mandatory non-binding mediation required prior to any binding dispute resolution, such as arbitration or litigation.

- Provisions relating to the physician’s continuing obligation to treat patients after a termination of employment.

- Provisions relating to the impact of termination of the employment contract on hospital medical staff privileges or participation in an ACO.

- The impact of a merger or other change of ownership structure on the physician’s contractual rights and responsibilities, including compensation, staffing, on-call duties, and other key aspects of the operations, including hospital medical staff policies and composition.

- Non-compete clauses that are overly restrictive in terms of duration or geographical reach.