

A Physician's Guide To Employment Contracts

Including a Sample Employment Agreement
and Answers to Frequently Asked Questions



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Physicians often view employment contracts as a dense, impenetrable collection of incomprehensible words. But the physician who knows what to look for can use the employment contract as a useful tool in defining and describing the employment relationship.

The Physicians Guide to Employment Contract discusses a variety of provisions found in most physician employment agreements in Minnesota. Physicians are invited to consider the issues raised in this document when they negotiate employment contracts. This guide includes a sample employment agreement, which illustrates how some of the key provisions in an employment agreement may be written.

This document addresses many provisions common to physician employment agreements in Minnesota, but it is not exhaustive in scope. Physicians should seek legal advice specific to their situation to be sure that a particular contract is appropriate and in their best interests.

A good employment agreement will balance the interests of the employer with the interests of the employee, and clearly describe the understanding of the parties.

1. Who Are the Parties? The agreement should include the legal name of all the parties. If either party is a legal entity such as a partnership or a corporation, this should be indicated in the contract. For-profit corporations are required to include a corporate designation such as "Incorporated," "Limited," or "Inc." in their legal name; non-profit corporations are permitted, but not required to include a corporate designation in their title in Minnesota. It is important to call the parties by their proper, legal names because a third party would use the proper, legal name in the contract when interpreting or enforcing the agreement.

2. What Is the Term of the Contract? Most physician employment contracts are for one- or two-year terms, and will state that the contract will automatically renew at the end of each term.

The "term" section of the contract must be read in conjunction with the "termination" section which usually appears later in the contract. (See paragraph 2, of the sample agreement) This is because the termination paragraph usually allows the parties to end the contract before the end of its term for a variety of reasons, or even for no reason at all. Thus, as discussed more fully below, what appears to be a one- or two-year contract may in fact be a contract that could be terminated tomorrow if there is a reason, or in 60 or 90 days without stating a reason.

3. What Are the Physician's Responsibilities? A good contract will provide at least some detail about the physician's typical duties, the physician's typical schedule, where the physician typically works, and expectations about call. A contract that simply says the physician will "perform the usual duties of a physician" doesn't give either party

much information about the expectations of the other party. Attention to this section is particularly important for physicians who wish to work part time, to work only a specific schedule or in a specific clinic, or who have special arrangements concerning call. This section can also be used to answer questions about what level of involvement in administrative duties is anticipated and whether certain community activities are expected.

4. What Are the Employer's Responsibilities? A good contract will also define the employer's duties. These might include items such as providing office space, support staff, supplies, billing services, and the like. If the physician has certain expectations about the level of nursing staff or working with a particular nurse, these should be described in this section.

5. How Will the Physician be Compensated? Compensation usually has two components: cash and benefits. The typical employment agreement will provide for a guaranteed salary for the first one to two years. After that, the physician is usually compensated based on "production" using the employer's formula. Employers almost never include the production schedule in the employment agreement. If the employer is not willing to attach the current production schedule, the incoming physician employee should be familiar with the production schedule and should ask whether it is likely to be changed in the near future. This can be confirmed in a letter.

It is important for physicians to keep in mind that a clinic might offer an employed physician an opportunity to buy into the practice after a period of time. This type of agreement in which the physician would be able to purchase shares or options in the clinic may or may not be part of the employment agreement. Such arrangements might be referred to as a "buy-in" clause or a "partnership" arrangement. It is preferable to have these types of arrangements drafted separately from the employment agreement since their duration may be longer than the employment agreement. In addition, they should be reviewed by the physician's appropriate financial and legal representatives.

Family health insurance, dental insurance, life insurance, an allowance for continuing medical education (CME) paid time off or vacation and sick pay, short-term disability insurance, long-term disability insurance and retirement plans are common benefits.

Physicians should consider the importance of short-term disability insurance. If a physician experiences a short-term disability caused by illness, accident, injury or pregnancy, short-term disability income can replace lost income when the physician is not working. Physicians should also speak with their financial advisor about how to maximize the benefits of contributions to tax-deferred retirement plans and any matching contributions from the employer.

6. Who Pays for Malpractice Insurance and "Tail Coverage"? Most employers provide professional liability insurance while the physician works for the employer. Coverage of \$1,000,000 per incident/\$3,000,000 in the aggregate is common, but may be

higher in some medical specialties. Coverage of \$2,000,000 per incident/\$4,000,000 in the aggregate is becoming more prevalent in the market. The employment agreement should indicate who will pay for malpractice “tail” coverage after the physician leaves. Tail coverage is coverage for claims made after a liability policy has terminated. Employers often pay for tail coverage, sometimes splitting the cost with the physician depending on length of service, and sometimes do not pay for such coverage at all. If the employer does not offer tail coverage, the physician should make sure that the cost of purchasing tail coverage is reflected in the overall compensation package.

7. Is there a Non-Compete, Non-Solicitation or Confidentiality Agreement? A non-compete agreement prevents a departing physician from competing with the employer in a specific geographic area (usually a radius of between five and 50 miles) for a specific period of time (usually one or two years.) While many agreements do not have non-competes, if the employer requires one, the physician should negotiate the terms so that the non-compete is only effective if it is the employee’s choice to leave, and the radius is as small as possible and for the shortest time possible. This approach should provide a reasonable balance between the employer’s interest in protecting its practice and the physician’s ability to earn a living.

Some employers have begun to use non-solicitation agreements as a substitute for non-compete agreements. In a non-solicitation agreement, the employee may practice anywhere, but agrees not to ask patients to transfer to the new clinic.

8. Is Other Employment Permitted? If so, who is entitled to the income from the outside employment? Some employees prohibit outside employment; others allow it with employer approval, or allow it but require that the income be turned over to the employer. If the physician anticipates “moonlighting,” the physician should negotiate to minimize the employer’s control over the outside employment and income from it. If the physician expects to be involved in significant volunteer activities as a physician, the contract should say whether the employer has the right to approve or reject such volunteer activities.

9. How Can the Agreement be Terminated? The termination section usually allows the employer to immediately terminate the physician’s employment if certain events occur, such as the physician losing his or her medical license, being convicted of a felony, or dying. Many contracts also permit immediate termination if the employee’s license is restricted, if privileges are significantly restricted, or the employee becomes disabled.

Almost all contracts also permit early termination by either party by simply giving notice. While the notice periods range from 30 to 180 days, most physician employment agreements permit either party to terminate the agreement with 60 to 90 days notice. A physician who expects to have difficulty finding another position in his or her specialty, or who is concerned about whether his or her practice will be viable in the new setting may want a longer notice period, while an employee who may want to leave fairly

quickly because of a better opportunity or a family situation may want a shorter notice period.

Most employers also have employee handbooks that describe the employer's policies and procedures. The employment agreement often incorporates the handbook by reference. Although most employers have abandoned handbook provisions that prescribe a certain set of actions before employment can be terminated, in Minnesota the handbook may create certain contractual rights to continued employment until certain disciplinary actions have been taken.

10. Will the Physician Have Continuing Access to Records? Most employment agreements say that patient records belong to the employer. However, the physician should negotiate for reasonable access to them even after the physician leaves the employer if access is necessary for purposes of defending a malpractice action, a credentials committee investigation, or a Board of Medical Practice inquiry. Access to such records is very helpful, and sometimes necessary, to defend these kinds of actions.

11. Who Controls the Physician's Research and Writing Results? If the physician employee will be doing research, publish books or papers during work time or even after hours, the research results and the written materials belong to the employer unless there is a written agreement that gives the physician the ownership rights to these materials. Thus, the physician who may be performing research or publishing medical materials should address these issues in the employment agreement.

12. Recruitment Incentives. Some employers, especially those in rural areas, may offer special incentives to a physician in order to bring the employee to the community. Both parties should review such incentives carefully to ensure that the incentives are permitted under federal law.

13. How Will Disputes be Resolved, and Who Will Pay the Costs and Attorney's Fees? Most employment disputes are resolved between the parties. But if there is a dispute that must be resolved by a third party, who will that party be? Ordinarily disputes are resolved in the courts, and each party will pay their own litigation costs and attorney fees. Sometimes, however, the parties will agree to use alternative ways of resolving disputes. These alternatives may include mediation or arbitration. Mediation and arbitration are private matters, while litigation is generally a matter of public record. Mediation and arbitration can be faster than litigation, but often cost as much or more than litigation.

Many non-compete agreements say that the physician will pay the employer's attorney fees if the employer goes to court to enforce the non-compete agreement. While employment agreements almost never say that the employer will pay the physician's attorney's fees in litigation, contracts will sometimes say that if there is a dispute, the loser will pay the winner's fees. This kind of provision provides a more level playing field between the employer and the physician.

14. Miscellaneous “Boilerplate” Provisions. Most employment agreements have a series of “boilerplate” provisions that usually come at the end of the agreement. Most of them usually just restate what is already the law on these points.

15. Other Considerations. A successful employment relationship will be based on a number of factors not typically covered in the employment agreement. These include the following:

- a. Who Makes Decisions? The structure, leadership and politics of the employer are an important part of the physician’s long-term employment in the organization. The physician should ask to see the articles of incorporation and bylaws of the organization. The physician should also ask: What is the culture of the organization like? How is the practice organized, and who are its leaders? How are they elected or appointed, and by whom? If the physician is eligible to become an owner of the clinic in the future, is there a cost to buy in? What is that cost?
- b. Communications. Will the physician’s work be evaluated on a regular basis? Does the employer provide feedback on issues early and often, so that issues may be resolved before they spin out of control? Is there a mentoring process? Is there a policy book or handbook that outlines important policies, procedures and expectations? Is it followed?

16. Is It Possible to Change the Employer’s Employment Contract? Most employers use a standard employment contract for all physician employees. Generally, large employers are less likely to change their form to accommodate the physician than small organizations. Small employers are often willing to make at least some changes to their agreements.

Even if the employer won’t change the form, it may be possible to clarify certain provisions through use of a letter signed by the physician and the employer. Such a signed letter may be helpful in interpreting the contract at a later date.

As always, individual employers and employees should consult their own attorneys for legal advice specific to their individual situations.

The Minnesota Medical Association gratefully acknowledges the work of Mary K. Martin, Esq. in contributing to this guide. Ms. Martin maintains a law practice in St. Paul, Minnesota.

SAMPLE EMPLOYMENT AGREEMENT
THIS DOCUMENT IS A GENERAL ILLUSTRATION ONLY. EMPLOYERS
AND PHYSICIANS MUST CONSULT AN ATTORNEY FOR ADVICE SPECIFIC
TO THEIR INDIVIDUAL SITUATIONS

1. The Parties. This is an Employment Agreement between _____
M.D. (Employee) and _____ a professional corporation, (Employer).

2. Term. This Agreement is for a ____-year term, beginning on _____
2004, and ending _____, 200____.

3. Employee Responsibilities. Employee will perform the duties of a licensed
physician. The duties of a licensed physician include but are not limited to diagnostic
interview examinations, evaluations, telephone consultations, preparation of clinical
reports and charting of individual patient medical records; providing in-service education
of staff; and providing other health services or procedures as requested from time to time
by the Employer, providing on-call services, attending staff meetings, and all related
travel, record keeping, charting and other services related to the services described above.
All services will be provided in a manner that meets or exceeds the community standard
of practice.
 - 3.1 Employee will work the following workweek:

 - 3.2 Employee will work at the following location(s):

 - 3.3 Employee will be on call as follows:

 - 3.4 Employee agrees to abide by all policies and procedures of Employer,
including clinic policies and scheduling policies, except as modified in this
Agreement. In addition, Employee agrees as follows:
 - a. Employee will maintain a valid license to practice medicine in Minnesota
at all times during this Agreement, and will provide a copy of this license
at the beginning of this Agreement, at least annually thereafter, and upon
request.

 - b. Employee will notify Employer within two days of any matter pending or
under investigation before any state Board of Medical Practice, any
hospital credentialing committee or any professional society, which, if
shown to be true, could affect Employee's license to practice medicine.

 - c. Employee will obtain or keep the following credentials during the term of
the Agreement.

 - d. Employee will obtain and maintain hospital privileges at the following
hospitals or such other hospitals as are deemed necessary by Employer.

- e. Employee will not be convicted of a felony or other crime affecting the physician's fitness to practice medicine.
- f. Employee assigns all revenues from billings for services performed for Employer.
- g. Employee agrees he/she will not during the term of this Agreement acquire any business interest or relationship that would constitute a violation of state or federal fraud and abuse laws, or Stark I or Stark II or any other regulation governing the business relationships of physicians that is adopted during the term of this Agreement.
- h. (optional) Employee will maintain an office in Employee's home for the convenience of Employer.

3.5 Employee acknowledges that failure to meet any of these conditions may be grounds for immediate termination of this Agreement.

4. Employer Responsibilities. Employer will provide:

- 4.1 Office space, phones, supplies, instruments, medicines, pagers, nursing and support staff, reasonably necessary to practice medicine.
- 4.2 Employer will do all billing and receivable collections.
- 4.3 Employer will provide a performance evaluation within the first three months of employment and then annually thereafter with additional reviews as deemed necessary in the opinion of Employer.

5. Compensation.

5.1 Employee will initially be paid as follows:

5.2 Following the successful completion of _____ year(s) of employment, the Employee will be compensated as follows:

5.3 Employee will be eligible for benefits offered by Employer to its Employees from time to time. The benefits available on the date of this Agreement are as follows:

- a. Family health insurance coverage and dental coverage
- b. Short-term and long-term disability insurance

- c. An allowance of up to \$_____ per employment year for CME costs, professional dues and memberships, and licensure fees, to be prorated for any partial year of employment;
- d. Paid vacation/Paid Time Off of _____ days per employment year.
- e. Other:

Benefits in this paragraph are (are not) prorated for partial years of employment.

These benefits may change from time to time without notice. This general description of benefits does not create a contract to provide benefits exactly as described.

- 6. General and Professional Liability Insurance. Employer will provide professional liability insurance for Employee in the amount of at least \$1,000,000/\$3,000,000.

If Employee leaves employment during the first two years of employment, Employee will be responsible for providing his or her own “tail” coverage. If employee leaves after two full years of employment, “tail” coverage or an extended reporting endorsement will be paid by Employer as follows:

- During year three: 25%
- During year four: 50%
- During year five: 75%
- After five years: All

- 7. (*Optional:*) Non-Compete. Employee agrees that for one year after leaving the company Employee will not become a shareholder, member, owner, Employee or manager of a competing organization that provides services within a five-mile radius of the location(s) where Employee regularly provided services. Employee also agrees that for the period of one year following termination of this Agreement, that Employee will not provide medical services to patients or former clients of Employer, or solicit patients or former patients of Employer unless Employee already provided the patients medical services prior to the effective date of this Employment Agreement.

If Employee breaches this paragraph, Employee agrees to pay the sum of _____ as liquidated damages and will pay Employer’s attorneys fees in enforcing this Agreement. Employee agrees that Employer’s remedies at law may be inadequate, and agrees that Employer may seek injunctive relief to prevent breach of the non-compete Agreement.

- 8. (*Optional:*) Non-solicitation. Employee agrees that he will not solicit patients of Employer directly or indirectly for one year after separation from Employer. Employee agrees that this entire paragraph survives the termination of this Agreement.

9. Confidentiality. Employee agrees that when Employee leaves employment, Employee will not take any patient lists or confidential materials with him, and agrees to return all of Employer's property to Employer prior to the end of his/her employment, and agrees to pay Employer's attorney's fees and costs in enforcing this confidentiality Agreement.

10. Termination. This Agreement may be terminated by either party before the end of the term, with or without cause, by giving 60 days written notice. In addition, this Agreement will terminate immediately if any of the following happen:
 - a. Death of Employee;
 - b. Disability of Employee that prevents Employee from performing his/her duties for a period of more than two calendar months;
 - c. Revocation, suspension or placing of conditions on Employee's license to practice medicine by any jurisdiction;
 - d. Expulsion, suspension or imposition of discipline or conditions on Employee's membership by any professional organization or medical facility for any reason other than non-payment of dues;
 - e. Resignation of Employee from any organization while under investigation or threat of discipline;
 - f. Employee is convicted, pleads guilty or enters a plea of non contendere to any crime punishable as a felony or involving moral turpitude or immoral or unethical conduct;
 - g. Withdrawal of staff appointment at any hospital at which Employee is to perform services;
 - h. Employee is prohibited, for cause, from participating as a provider of services in any program or indemnity arrangement maintained by a private or governmental third-party payer upon which Employer relies, including but not limited to Medicare, Medicaid and MinnesotaCare;
 - i. Employer is unable to obtain, at reasonable rates, adequate professional liability insurance coverage or health insurance coverage for both Employer and Employee;
 - j. Failure to perform duties in a manner satisfactory to Employer; or
 - k. Insolvency or bankruptcy of Employer.

11. Other Employment. Employee may not provide medical services that interfere with, detract from, or otherwise adversely affect the quality of services Employee provides to patients of the Employer. Employee will not divert business from Employer by providing independent services to any individual patient or facility.
12. Medical Records. Employee agrees that all records created in the course of employment are the property of Employer and will remain with Employer both during and after employment. After employment is terminated, Employer will provide Employee with reasonable access to records necessary for Employee to defend claims concerning Employee's practice during employment. This includes claims asserted by patients, the Board of Medical Practice, insurers and payers.
13. Ownership of Research and Writing. Employee will retain ownership of any research, books, publications or other materials generated during the course of employment.
14. *(Optional):* Recruitment Incentives. Employer will provide the following incentives to the Employee:
15. Resolving Disputes. Any matters concerning this Agreement that the parties cannot resolve themselves will be resolved through Arbitration, using the rules of the American Arbitration Association. Costs and attorneys fees will be awarded to the non-prevailing party.
16. Miscellaneous Provisions.
 - a. This Agreement will be construed under the laws of Minnesota.
 - b. If any portion of this Agreement is found to be invalid, the remainder of this contract will be valid.
 - c. Captions are for convenience only, and do not alter the meaning of the Agreement.
 - d. Failure to require strict compliance with the terms of this Agreement will not be considered a waiver or modification of this Agreement.
 - e. This is the entire Agreement between the parties regarding Employee's employment, and it may be only amended by a written Agreement signed by both parties. If there is a conflict between this Agreement and the Employer's personnel or other policies, this Agreement will govern.

Signed this ____ day of _____, 20__.

Employee:

Employer:

M.D.