Avoiding Stark Law and AKS Violations, Overcoming Restrictive Covenant Enforceability Challenges, Anticipating Other Legal Pitfalls

TUESDAY, MARCH 17, 2015
1pm Eastern | 12pm Central | 11am Mountain | 10am Pacific

Today’s faculty features:

Ericka L. Adler, Partner, Kamensky Rubinstein Hochman & Delott, Lincolnwood, Ill.
Lucia Francesca Bruno, Principal Shareholder, Physicians’ Legal Group, Philadelphia

The audio portion of the conference may be accessed via the telephone or by using your computer’s speakers. Please refer to the instructions emailed to registrants for additional information. If you have any questions, please contact Customer Service at 1-800-926-7926 ext. 10.
**Tips for Optimal Quality**

**Sound Quality**
If you are listening via your computer speakers, please note that the quality of your sound will vary depending on the speed and quality of your internet connection.

If the sound quality is not satisfactory, you may listen via the phone: dial **1-866-927-5568** and enter your PIN when prompted. Otherwise, please send us a chat or e-mail **sound@straffordpub.com** immediately so we can address the problem.

If you dialed in and have any difficulties during the call, press *0 for assistance.

**Viewing Quality**
To maximize your screen, press the F11 key on your keyboard. To exit full screen, press the F11 key again.
For CLE purposes, please let us know how many people are listening at your location by completing each of the following steps:

- In the chat box, type (1) your company name and (2) the number of attendees at your location
- Click the SEND button beside the box

If you have purchased Strafford CLE processing services, you must confirm your participation by completing and submitting an Official Record of Attendance (CLE Form).

You may obtain your CLE form by going to the program page and selecting the appropriate form in the PROGRAM MATERIALS box at the top right corner.

If you’d like to purchase CLE credit processing, it is available for a fee. For additional information about CLE credit processing, go to our website or call us at 1-800-926-7926 ext. 35.
If you have not printed the conference materials for this program, please complete the following steps:

- Click on the ^ symbol next to “Conference Materials” in the middle of the left-hand column on your screen.
- Click on the tab labeled “Handouts” that appears, and there you will see a PDF of the slides for today’s program.
- Double click on the PDF and a separate page will open.
- Print the slides by clicking on the printer icon.
Pre-drafting considerations

- Before drafting, make sure that the proposed recruiting package will not violate the Stark Law or Anti-Kickback Statute.
- Stark and the Anti-Kickback Statute impose specific parameters on recruitment arrangements that must be incorporated into the written recruitment agreement.
- Key questions before drafting include:
  - Who may recruit the physician?
  - What type of physician may be recruited?
  - What types of benefits can and cannot be offered?
  - Is the recruited physician relocating an existing practice or just finishing training?
Who may recruit?

**Stark Law Exception**

- Hospitals
- Federally Qualified Health Centers
- Rural Health Clinics

**AKS Safe Harbor**

- Any “entity”
- Includes hospitals and any other type of provider
- Includes non-providers (e.g. ACOs, HMOs)
- More expansive AKS safe harbor is useful if recruiting entity does not furnish DHS and Stark is not otherwise implicated
Who may be recruited?

*Stark Law Exception*

“Physicians” as defined in 42 C.F.R. § 411.351

- Medical doctor
- Osteopath
- Doctor of Dental Surgery
- Podiatrist
- Optometrist
- Chiropractor
Who may be recruited?

AKS Safe Harbor

- Any type of “practitioner”, including non-physician practitioners
- Practitioners must primarily serve patients in a
  - Health Professional Shortage Area
  - Medically Underserved Area
  - Medically Underserved Population
- HPSAs are only designated for
  - primary care
  - dentistry
  - mental health
- Recruitment of specialists does not enjoy safe harbor protection (see OIG Advisory Opinion 01-04)
What benefits can be offered?

**Stark Law Exception**

- Remuneration that is:
  - Paid directly to a physician
  - Intended to induce the physician to relocate to the hospital’s service area
  - Not based on the volume or value of actual or anticipated physician referrals or other business generated between the parties
- Actual costs incurred by a physician practice to recruit the physician
- Actual additional incremental costs incurred by a physician practice to add the recruited physician
What benefits can be offered?

**AKS Safe Harbor**

- Any payment made to induce a practitioner to locate his or her primary practice location in a HPSA served by the recruiting entity
- Benefits limited to a maximum of 3 year period
- Benefits may not vary (or be renegotiated or adjusted) based on the volume or value of expected referrals or business generated by the practitioner
- Payments may not directly or indirectly benefit a third party in a position to make or influence referrals to the recruiting entity
What benefits CANNOT be offered?

- Benefits lasting more than 3 years (AKS)
- Reimbursement to a physician practice for allocated overhead, unless (Stark)
  - the recruit is replacing a physician in a rural area or HPSA who has retired, relocated or died,
  - in which case the costs reimbursed to a practice can be the lower of 20% of the practice’s aggregate costs or a per capita allocation
Is the physician relocating or completing training?

- A recruited physician must either be
  - relocating from an existing practice outside of the recruiting entity’s service area
  - or establishing a new practice after completing training

**Stark Exception**
- Relocation requirement satisfied if physician moves at least 25 miles, or
- 75% of revenues at new practice derive from new patients
- Relocation does not apply if physician coming from practice at federal or state bureaus of prisons, Department of Defense or V.A., or Indian Health Services

**AKS Safe Harbor**
- Relocation measured based on revenue derived from patients not seen at prior practice (75% from new patients)
Drafting the Recruitment Agreement

• Magic language provisions from the Stark Exception and AKS Safe Harbor
  ◦ Include a statement that physicians are not required to make referrals to the recruiting hospital / entity
  ◦ Grant express permission for physician to obtain medical staff privileges at other hospitals
  ◦ If practice restrictions are included, include an acknowledgement that those restrictions do not “unreasonably restrict the recruited physician’s ability to practice medicine” in the hospital’s service area
  ◦ Include a requirement that the physician treat patients insured by federal health care programs in a non-discriminatory manner
Drafting the Recruitment Agreement

- Recruitment Benefits
  - Income guarantee
    - Based on monthly submission of statement of physician collections by practice, or
    - Stipend/credit line, subject to monthly and overall maximums, on which the physician can draw each month/periodically
  - Moving expenses
    - Either a set stipend or
    - A maximum amount reimbursed upon submission of receipts
  - Signing / commencement bonus
    - Payment upon execution, or
    - Commencement of practice, or
    - Completion of licensure/credentialing, or
    - Portions of total bonus paid for milestones above
Drafting the Recruitment Agreement

- Recruitment Benefits
  - Student loan repayment
    - One time repayment or paid over time
    - Include provision clarifying no obligation of hospital to make a payment if the total debt has been satisfied
    - Include provision expressly stating that hospital is not guaranteeing payment of student loans
  - Check that the sum of all recruitment benefits provided to the physician in a given year is not excessive
    - Depends partly on consistency of employment agreement compensation with FMV
Drafting the Recruitment Agreement

- Repayment Provisions
  - Recruitment benefits typically treated as a forgivable loan to the physician
    - Loan forgiven over a period of time if physician remains in service area and otherwise complies with terms of agreement
    - Forgiveness period typically between 2 to 4 years
    - Loan and forgiveness are NOT regulatory requirements, but rather the prevailing practice
    - Determine whether to amortize / forgive the loan in monthly amounts or whether entire years of service required for forgiveness
  - Consider waiving repayment obligations if the physician dies or is permanently disabled
Drafting the Recruitment Agreement

**Repayment Provisions**

- Helpful to include spreadsheet / example calculation showing benefits paid over time and forgiveness
  - Particularly if benefits are paid at the same time the loan is being forgiven
- Loan repayment triggered by
  - Physician leaving service area before expiration of commitment period
  - Defined events of default, such as loss of license, Medicare/Medicaid exclusion, felony conviction, etc.
- Evidence loan by promissory note
- Secure loan with a security agreement
- Include the physician practice as a security interest grantor because it will have control/title to the physician’s accounts receivable
- File UCC statements
Drafting the Recruitment Agreement

Practice Restrictions

◦ Cannot prevent physician from joining other hospitals’ medical staffs
◦ Cannot impose unreasonable practice restrictions on the physician’s ability to practice medicine in the geographic area served by the hospital
◦ What is unreasonable?
  • No bright line guidance
  • Stark Phase III regulations opened the door to reasonable practice restrictions
◦ CMS Advisory Opinion 2011-01
  • approved 25 mile / 1 year tail non-compete
  • that complied with state non-compete law
◦ Consider having the practice restrictions not apply during the term of the agreement, but trigger only upon termination/breach
Drafting the Recruitment Agreement

- **Reps, Warranties and Covenants**
  - Full time practice in hospital’s service area
  - Unrestricted medical staff membership at recruiting hospital
  - State medical license, DEA registration in good standing
  - Medicare and Medicaid participation
  - Not excluded in OIG/GSA/LEIE databases
  - Participating provider with key payors
  - Board certification or eligibility
  - Maintenance of malpractice insurance
Drafting the Recruitment Agreement

Other Drafting Points

- Precisely define hospital service area
- Define full time practice
- Include blue pencil provision for any practice restrictions
- Attach employment agreement as exhibit to recruitment agreement
Sample Provisions

• **Non-Discrimination:** “Physician shall see and treat in Physician's medical practice patients receiving benefits or assistance under any federal or state health care program, including, without limitation, the Medicare and Medicaid programs, and shall treat such patients in a non-discriminatory manner. “

• **Practice Restrictions:** “The parties hereto intend that this Agreement shall comply with all applicable governmental rules and regulations and agree that there is no requirement that Physician or any physician member of the Group Practice make any referrals to or otherwise generate business for Hospital or the Hospital, and that Physician is not restricted from establishing medical staff membership or clinical privileges at or referring patients to any other entity. “
Sample Provisions

- **Practice Restrictions:**
  “The parties expressly acknowledge and agree that nothing in this Agreement shall be interpreted as unreasonably limiting or restricting the right of Physician to engage in the practice of medicine, subject to appropriate laws, regulations and reasonable policies and procedures of Hospital. Hospital will not impose additional practice restrictions, [except as provided in Section X, if restrictions are included] on Physician other than conditions related to quality of care as required by Hospital and Hospital’s Medical Staff Bylaws.”

- **Service Area:**
  “Hospital is committed to preserving and promoting the availability of medical care in the community represented by the following [zip codes] or [counties]: (the “Service Area”).”
Sample Provisions

- **Loan forgiveness:**
  
  “Beginning one month after the Commencement Date, for each month during the Service Period: either (x) Physician shall repay that portion of the Loan then outstanding, plus Accumulated Interest, resulting from the Formula (defined below); or (y) if Physician has continuously maintained an active medical practice in the Service Area and no Event of Default has occurred during the preceding month, then Hospital shall forgive that portion of the Loan then outstanding, plus Accumulated Interest, resulting from the Formula: 

  
  
  \[
  \text{Formula} = \left( \text{Sum of all recruitment benefits provided to date under Section X-Y, plus Accumulated Interest} \right) - \left( \text{Sum of all amounts forgiven during all preceding months} \right) \times \left[ \frac{1}{36 - \text{number of months since commencement date}} \right]
  \]

  (the “Formula”).”
Relationship Between Recruitment and Employment Agreements

- Ensure that there is no inconsistency in the following provisions:
  - Term
  - Malpractice Insurance
  - Salary / Income Guarantee
  - Practice Restrictions
  - Representations, Warranties and Covenants

- Include restrictive covenants in employment agreement

- Negotiate and execute employment and recruitment agreements simultaneously
PRECONDITIONS TO EMPLOYMENT

- Licensure in state, DEA registration (state and federal)
- On staff at hospitals, other facilities
- Board Eligible or Board Certified
- Enrolled with Medicare/Medicaid or particular payors
- Malpractice Insurance in place

Practice Alert:
The representation that the pre-conditions are satisfied should apply as of the date the employment commences and not the effective date of the Agreement. Doctors often sign the Employment Agreement months before the start date.
DUTIES AND RESPONSIBILITIES

- What is exact job description? Is it accurate?

  (a) Hours and schedule to be worked/call to be taken
  (b) Attendance at meetings
  (c) Perform certain marketing tasks
  (d) Supervision of allied health workers (RN, PA, APN)
  (e) Completion and timely submission of medical records
  (f) Follow all rules and regulations

PRACTICE ALERT:
Make sure all references to rules and regulations require that they be in writing and actually provided to the physician. The employer should be sure to provide copies of all referenced policies/handbooks to physicians that might impact physician understanding of the job. Physician’s counsel should make sure copies are requested and obtained.
LOCATION OF WORK

Where will work be performed?

- Physician perspective: try to include exact locations and limit Employer’s ability to send physician anywhere that expands covenant or requires a commute.

- Employer perspective: maintain ability to send physician anywhere, protect covenant area by leaving Employer’s rights open.

Special Considerations:

- Watch out for sweeping language that allows the physician to be sent “anywhere designated by the Employer”

- Consider mutual agreement for new/future locations to which the employer may want to send the physician
LOCATION OF WORK

- Limit locations by mileage, if appropriate (e.g. 20 miles)
- Remember that location of services can impact covenant
- Example: “Physician shall perform services at such locations as may be designated by Employer from time to time; provided, however, Employer may not require Physician to render services at a location that is more than twenty (20) miles from [DESIGNATED HOSPITAL OR OFFICE] without Physician’s agreement.”
CALL COVERAGE

- Specify weekend, evening and holiday call coverage, if applicable. There is no reason not to include what the physician has verbally been promised.

- Call should be spelled out or should be “equal” or “equitable” among similar specialty physicians. Sometimes seniority plays a role but equal is most common.

- Does the physician have any say in the call schedule?

- Is there pay for call?

- Differentiate between group call and call that may be required by hospital
CALL COVERAGE

Drafting Consideration: Be specific but allow the parties flexibility:

“Employer and Physician will cooperate with other physicians in the group in developing a call schedule that is reasonably equal, taking into account the scheduling needs of Employer and the professional sharing call.”
EXCLUSIVITY

- Clinical Services: Patient care/medical services
  - Is moonlighting allowed?
  - Impact on malpractice insurance?
  - Consent required?
  - Ability to retain income?
  - Carve-out from covenant may be needed

- Outside Services: Non-patient care services that use physician’s knowledge and experience
  - May include expert witness testimony, lecturing, writing, teaching, etc.
  - Is consent required?
  - Can income be retained? Shared?
  - Separate malpractice coverage?
EXCLUSIVITY

Special Considerations:

◦ If income is retained by Employer, is it counted as part of Physician’s income (Recruitment Agreement issue; productivity compensation)

◦ Watch out for incentive payments

◦ Language should at least be limited to medical-related outside services. Physician’s business endeavors should not belong to Employer (investments, children’s book, restaurant ownership)

◦ Consider ownership/patent/trademark issues

If there is a written Employer policy, provide it to the physician with the employment documents so the issue is clear!
EXCLUSIVITY

“Physician further agrees that Physician shall provide exclusive services on behalf of Employer’s patients and that all compensation received by Employer from all professional sources, including, but not limited to, salaries or income from the practice of medicine, shall be delivered to Employer and deposited in Employer’s account and shall be treated as income of Employer. For the purposes herein, income from “professional sources” shall include any payments, incentives and/or rebates attributable to Employee’s use or adoption of any electronic health record system (“Incentive Program”). Employee agrees to cooperate with Employer to allow Employer to enroll Employee in, or otherwise qualify Employee for, any such Incentive Program and retain all income therefrom. Notwithstanding the foregoing, Physician shall be permitted to engage in indirect medical-related activities that do not involve the delivery of patient care services such as teaching, lecturing, publishing and expert witness and other legal consultations (“Permitted Activities”) as long as the Permitted Activities do not conflict or interfere with the obligations of Physician to Employer hereunder. Any income that may be earned by Physician from the Permitted Activities may be retained by the Physician.”
EXCLUSIVITY

Drafting Considerations:

- Make the process of how a physician gets approval clear via policy

- Clarify the difference between clinical and non-clinical outside services are handled, if applicable

- Clarify what happens to income if approval is granted. In some cases, employment agreements have language that require income earned by a physician to be turned over to the Employer in a different section of the document. This conflict needs to be corrected.

- Make any expectations known: malpractice insurance, credit to Employer on published materials, no interference with work, etc.
TERM OF AGREEMENT

- Finite Period or Self-Perpetuating (Evergreen)
- Time period linked to Recruitment Agreement/Partnership
- Notice to Terminate Without Cause
  - Applying during first year?
  - What time period? Is it the same for both parties? (Avg. 90 days)
  
  EMPLOYER SHOULD PAY COMPENSATION AND BENEFITS DURING NOTICE PERIOD. PREPARE AN APPROACH IF PHYSICIAN IS COMPENSATED ON PRODUCTION.
TERM OF AGREEMENT

Drafting Consideration: There is an unfair trend to allow the Employer to immediately terminate a Physician who has provided appropriate notice in order for Employer to avoid paying any compensation or benefits to the Physician. This is generally unfair, though it certainly benefits the Employer.

- For cause termination:
  - Extended Disability
    - Total disability vs. partial disability
    - Impact on compensation/benefits
    - Disability Insurance
TERM OF AGREEMENT

- Censored or sanctioned by a professional society
- Suspension or revocation of license, DEA registration
- Loss of staff privileges
- Loss of Board Certification
- Conviction of felonious crime (Note: avoid “arrest” language)
- Bankruptcy or assignment for the benefit of creditors (unfair?)
- Inability to obtain or maintain professional liability insurance
- Substance/alcohol abuse (program offered?)
- General neglect of professional responsibility
- Material breach of agreement; right to cure (one-time only?)
TERM OF AGREEMENT

Practice Note: It is fair to allow a physician a right to cure an alleged breach. Make sure there is some process for this ability to cure.

“Physician’s employment may be terminated upon thirty (30) days’ prior written notice, subject to the opportunity to cure the alleged breach to the Employer’s reasonable satisfaction during the notice period.”

Less clear grounds for termination:

• Employer goes bankrupt or reorganization/out of business, loses hospital contract. Note to Physician counsel: Try to require notice to be provided to physician, watch that this provision is not “for-cause” that would trigger tail obligation.

• Violation of the “canons of medical ethics”

• Subjective grounds for termination: reputation, getting along with others, etc.

• Violation of rules/regulations (right to cure?)

• Note: Employer should use good faith/reasonableness. Use of a committee or outside reviewer is useful as well
TERMINATION CONSIDERATIONS

- Accrued Wages/PTO
- Accrued Bonus (prorated bonus payable upon termination?)
- Unused PTO
- Patient Records and Right to Notify
- Accounts Receivable (“run out” in production model)
- Forfeiture of unvested retirement benefits
- Severance (if owner)
RESTRICTIVE COVENANTS

• Generally enforceable in most states if reasonable
  ◦ Duration
  ◦ Geographic Scope
  ◦ Activity Restriction
  ◦ “Clean Hands Doctrine”

• Enforcement Provisions
  ◦ Liquidated Damages
  ◦ Injunctive Relief

• Impactive Case Law
  ◦ Every state different
  ◦ Work for 2 years before covenant enforceable unless consideration paid
RESTRICTIVE COVENANTS

Questions to Consider:

• Should covenant apply if termination without cause by Employer, or for cause by Physician?

• Limited or no covenant if recruitment agreement. Can covenant go into place once loaned funds paid/forgiven?

• What to do with extremely large covenant area—challenge it?

• Who should pay the legal fees for covenant enforcement?
NON-SOLICITATION

- Prevent terminated physician from soliciting referral sources, staff and patients
- Reasonable in time and duration
- Avoid language that prevents the doctor from treating a patient. Patients always have the right to choose their own physician
- Cannot generally charge more than law allows to transfer records (HIPAA)
- No charging “goodwill” to doctor when patient elects to transfer without solicitation
- General advertisements/mailing to postal codes generally OK
NON-DISPARAGEMENT

• These provisions prevent bad-mouthing of the other party following termination.

• Can protect discussion of internal matters with third parties during employment as well (disputes, etc.)

Example: “Physician and Employer agree that during the term of Physician’s employment by Employer, and at all times subsequent thereto, Physician and Employer shall maintain a professional relationship and shall conduct themselves with office staff, Hospital personnel and other third parties with whom they come into contact, whether in a direct or indirect professional capacity, in a professional manner and specifically agree not to disparage one another or otherwise discuss practice-related internal matters of Employer of any kind with any third party. Physician hereby agrees that this covenant shall be in force during the term of this Agreement and forever subsequent thereto.”
Entire Agreement Provision

- An “entire agreement” provision means that everything the parties have discussed should be in the document

- No oral discussions, e-mails, side letters, etc., will be applicable unless properly included in the document itself

Letter of Intent

- Negotiable?

- Binding?
Factors That Influence Physician Compensation

- Geographic Location of Practice
- Population/Demographics
- Doctor-Patient Ratio
- Size of Group
- Productivity of Group or Hospital
- Fellowship Training
- Board Certification
- Specialty (Electrophysiology v. Internal Medicine)
Before Negotiating Compensation:

**Do Your Homework**
- Practice Size
- Doctor Patient Ratio
- Reimbursement Rate

**Know Your Client’s Worth**
- MGMA
- AMA
- AMGA

**Criteria for Productivity Bonuses**
Must be based on reasonable, objective, and identifiable factors set in advance
### Six Models of Physician Compensation

<table>
<thead>
<tr>
<th>MODEL</th>
<th>PROS</th>
<th>CONS</th>
</tr>
</thead>
<tbody>
<tr>
<td>Base Salary</td>
<td>▪ Easy to administer</td>
<td>▪ Discourages entrepreneurial spirit</td>
</tr>
<tr>
<td>Base Salary + Bonus</td>
<td>▪ Fosters a sense of security</td>
<td>▪ Large percentage of income based on “subjective” standards</td>
</tr>
<tr>
<td></td>
<td>▪ Allows physicians to increase income through performance</td>
<td></td>
</tr>
<tr>
<td>Equal Sharing</td>
<td>▪ Simple to arrange</td>
<td>▪ Lacks productivity incentive</td>
</tr>
<tr>
<td></td>
<td>▪ Discourages overutilization</td>
<td>▪ Discourages high performers</td>
</tr>
<tr>
<td></td>
<td></td>
<td>▪ Allows marginal performers to coast</td>
</tr>
</tbody>
</table>
## Six Models of Physician Compensation

<table>
<thead>
<tr>
<th>MODEL</th>
<th>PROS</th>
<th>CONS</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Productivity (wRVUs)</strong></td>
<td>▪ Encourages peak performance&lt;br&gt;▪ Rewards professional effort</td>
<td>▪ Requires substantial accounting management&lt;br&gt;▪ Encourages overutilization&lt;br&gt;▪ Discourages activities not directly related to patient care</td>
</tr>
<tr>
<td><strong>Productivity + Capitation</strong></td>
<td>▪ Encourages efficiency&lt;br&gt;▪ Recognizes different revenue streams of a practice</td>
<td>▪ Complicated to administer&lt;br&gt;▪ Can create differential treatment levels based on patients’ payment stream</td>
</tr>
<tr>
<td><strong>Capitation</strong>&lt;br&gt;Common in HMO intensive markets (CA, MN and Northeast)</td>
<td>▪ Distributes health plan payments among physicians in an equal manner or based on a formula</td>
<td>▪ Requires complex data tracking&lt;br&gt;▪ Physicians perform fewer services</td>
</tr>
</tbody>
</table>
1. Physician Compensation Base Salary:

   a. Base Salary. Physician shall receive an annual salary of Two Hundred and Eight-Five Thousand and 00/100 Dollars ($285,000) (the “Base Salary”). Effective as of the second year of the Agreement, the Physician’s Base Salary shall increase to Three Hundred and Five Thousand and 00/100 Dollars ($305,000). Notwithstanding anything in this section 5.a. to the contrary, Physician compensation under this Agreement shall always remain consistent with fair market value as required by applicable law. Employer shall deduct federal, state and other withholding taxes, social security and other sums required by law.

2. Physician Compensation Base Salary + Bonus

   (a) Base Salary. For the first year of employment, Employer shall pay Employee an annual salary of Two Hundred and Eighty-Five Thousand and 00/100 Dollars ($1285,000) (“the Base Salary”). Employee’s Base Salary during the second year of employment shall be Three Hundred and Five Thousand and 00/100 Dollars ($305,000)

   (b) Incentive Compensation. In addition to Base Salary Physician shall be eligible to receive incentive compensation of up to Seventy-Five Thousand and 00/100 Dollars ($75,000) (“Incentive Compensation”) to be paid, if at all, within sixty (60) days of the end of each one (1) year period of employment in accordance with ____ annual performance goals and objectives and payment methodology then in place (“Performance Objectives”) which may include, without limitation, productivity with respect to personally performed services, patient satisfaction measures, patient safety measures, quality of care standards, efficiency indicators, citizenship objectives, _______duties and cardiac service line management services.
3. **Physician Compensation Base Salary – WRVU Component**

   a. **Base Salary.** Physician will be paid Four Hundred Thousand and 00/100 Dollars ($400,000.00) per annum (based on a three hundred sixty five [365] day year) for full-time employment, payable in bi-weekly payments on every other Friday of the year.

   b. Move to _________Medical Group Compensation Plan. The parties agree that during the initial term of this Agreement Physician may request a review by the Group Operations Director and Group Medical Director of Physician’s productivity for their consideration of changing Physician from the compensation described in this Employment Agreement to compensation paid in accordance with the compensation principles established for physicians in the Medical Group (“______Physician Compensation Plan”) for Physician’s specialty and location. Physician may request such review once the following conditions have been met:

   c. The total cumulative monthly average Work Relative Value Units (“WRVUs”) generated by Physician (at all _____ facilities) from the commencement of Physician’s employment for the services described in this Agreement equals or exceeds 713; and

   d. Physician’s monthly productivity at Physician’s primary care facility equals or exceeds 713 per month, for at least two (2) consecutive months, and such productivity level at Physician’s primary care facility is likely to be maintained and sustained in the future, (“likely to be sustained” to be determined upon the mutual agreement of Physician and the Group Medical and Operations Directors). Group Operations Director.

   e. WRVUs are the Work Relative Value Units of the _____Resource Based Relative Value System, which is based in part on the RBRVS published by the Health Care Financing Administration as adapted by _____for use in _____ facilities. WRVUs are not assigned to administrative or ancillary services.
Trends in Hospital Compensation

- For physicians, earning power is greater in a hospital-based setting than private practice.
- High-paid specialties to watch include noninvasive cardiology, ophthalmology, general orthopedic surgery, neonatal medicine pediatrics and neurosurgery.
- Work Relative Value Units (wRVUs) and bonus models continue to be favored over fixed salaries.
- Hospitals are emphasizing value over productivity.
- Compensation arrangements between hospitals and physicians involve quid pro quo elements.
Fringe Benefits

Health, Life and Disability Insurance

*Negotiate*
- Cost Sharing - % of Contribution
- Covered Individuals - Employee + Spouse, Children

Dues, Subscriptions and CME

*Negotiate*
- Tuition and Travel Expenses
- Reimbursement Amount
- Average = $2,000 annually

Retirement Benefit

- 401 (k) Plans
- 403 (b) Plans
- Profit Sharing

Miscellaneous Reimbursement

*Negotiate*
- Moving Expense or Reimbursement
  (Average = $15,000) (Taxable Income)
- Cellular Phone
- Automobile Allowance
Sample Contractual Language

**Employee Fringe Benefits.** Employer will make available to Physician health, dental, accident, life, and disability insurance plans then in effect for physicians employed under contract in the Medical Group in accordance with the terms and conditions of those plans. Such plans require all or part of the premium (depending on the insurance) to be paid by Physician through a payroll deduction. Physician will be eligible for such benefits the first of the month following thirty (30) days of employment with ____________.

**Continuing Medical Education.** Physician may have up to ten (10) business days (or such other period as may be established by the Medical Group or approved by the Group Medical Director) education leave time each contract year, and up to Three Thousand Five Hundred and 00/100 Dollars ($3,500) each contract year reimbursement, as approved by the Medical Group, for actual, documented expenses incurred for the purpose of attending professional seminars, conventions, meetings, or educational programs.

Such leave must be coordinated in advance through the Group Medical Director to assure adequate clinical coverage in the Center. Education funds may also be used for professional journals, books, and computer software programs. Unused education funds may be carried over one (1) year. In special circumstances (where approved in advance and in writing by the Group Medical Director and/or Group Operations Director) education funds may be advanced one (1) year.
**Moving Expenses.** In consideration for Physician relocating his family and household goods, Employer shall reimburse Physician up to Fifteen Thousand and 00/100 Dollars ($15,000) for actual documented moving expenses with a moving company approved by and/or arranged through ________________, and for reasonable documented travel expenses directly associated with the relocation of Physician's family and household goods from his ________________ residence directly to ________________ as approved by Employer.

Amounts reimbursed by Employer or paid on behalf of the Physician by Employer for expenses which are not considered “tax deductible” by the Internal Revenue Service will be considered taxable income to Physician. In order for the Physician to obtain reimbursement for such expenses, the Physician shall submit documentation, including original receipts, to Employer.
Malpractice Insurance

- **Occurrence Coverage** - Preferred by physicians because the purchase of extended reporting endorsement ("tail") is not required at the end of the policy.

- **Claims Made Coverage** - The most common type of insurance coverage offered by employers. Tail coverage is required.
**Sample Contractual Language**

**Malpractice Insurance.** During the term of this Agreement, Physician shall be provided with claims made or occurrence medical malpractice insurance coverage under primary or excess policies in the appropriate amounts as determined and agreed to by Employer and Physician. Employer shall have no responsibility for providing coverage for Physician’s acts prior to the effective date of the Definitive Agreement.

-or-

**Professional Liability Insurance.** Employer agrees to obtain and maintain at its expense professional liability insurance on behalf of Physician during the term of this Agreement in a form and in amounts not less than those required by law. Specifically, Employer shall, or shall cause a corporate affiliate to, issue Physician a mature claims made professional liability insurance policy with prior acts coverage, the provision of which will be subject to such tax withholding and other tax reporting as may be applicable. Employer shall, at its sole expense, obtain an extended reporting period (i.e., tail coverage) upon termination or non-renewal of Physician’s employment for any reason covering services provided by Physician pursuant to this Agreement.
Tail Coverage

- Also known as, “Extended Reporting Endorsement”

- Tail provides "seamless" coverage for alleged acts of malpractice that occurred while a claims made policy was in effect and for which coverage has expired

- Must be purchased within 60-90 days of termination, depending on the jurisdiction

- Tails is most frequently required upon:
  a. Separation from a practice due to relocation, termination, or buy-out of physician-shareholder
  b. Switching from a “claims made policy” to an “occurrence policy”

**CAUTION:** Tail typically costs between 150% to 200% of the price of a mature claims-made policy
**Professional Liability Insurance.** Employee shall provide Employer with proof of professional liability insurance coverage for the period of time before he or she began work for Employer. During the term of this Agreement.

Employer shall provide Employee with *claims made* medical malpractice coverage of equal coverage to other physician-employees of Employer. Upon the termination of this Agreement for whatever cause and cessation of all work for Employer.

Employee shall procure “*tail*” insurance to cover Employer and Employee for Employee activities under this Agreement. Instead of “*tail*” insurance, Employee may obtain professional liability insurance that covers prior acts (*Nose Coverage*) to the effective date of this Agreement.

If the insurance Employer provides required a surplus deposit, an amount equal to such deposit shall be repaid to Employer. If Employee fails or refuses to pay for such tail coverage or prior acts coverage or the surplus deposit, then in such event, Employee authorizes and directs Employer to withhold from his or her last paycheck any monies to purchase such insurance or to reimburse such deposit.
Nose Coverage

- Also known as “retroactive coverage” or “prior acts coverage”

- Does the same thing as tail coverage, but you don't pay a separate premium for it *(Refer to specific carrier)*

- Nose coverage must be purchased at the *same* time “claims made” coverage is purchased from a *new* carrier

- Nose coverage covers alleged acts of malpractice or omissions that occurred before the beginning of the new insurance relationship, but for which *no* claim has been made
Negotiation Strategy

Negotiating Tail Coverage

- **Employer pays full cost of tail after physician works X number of consecutive years** (RARE)
- **Tail is paid by the employer if termination is without cause or Physician leaves the practice for cause**
- **Cost of tail is divided evenly between the employer and the physician**
- **Physician pays full cost of tail** (MOST COMMON)
Paid Time Off (PTO)

PTO

- Vacation = Average 15 days 1\textsuperscript{st} year, 20 days 2\textsuperscript{nd} & subsequent years
- Sick Time = Average 5 days
- CME = Average 5 days

\textit{Sample Contractual Language:}

Employee agrees that he/she shall not be absent from the offices of Employer for more than ten (10) consecutive working days without Employer's prior written consent. Employee agrees to coordinate with Employer his/her time off for vacation and continuing medical education and shall promptly notify Employer when he/she is sick. Written requests for time off must be given to Employer within a minimum of ten (10) days advance notice. Priority for time off will be based upon the seniority of employment of physician-employees with Employer.

\textbf{Caution:} Don’t get over zealous with PTO. Maybe perceived as “difficult” or “high-maintenance.”
PTO - Continued

- **Disability**

*Sample Contractual Language:*

If Employee is unable to perform his/her duties hereunder because of a physical, emotional, and/or psychological condition for a period of more than thirty (30) days during any twelve (12) month period, the employment of Employee shall, thereupon, **terminate**.

Employee shall be paid to date of such disability, plus any accrued vacation and sick leave. Employment may be reinstated at the sole discretion of the Board of Directors of Employer.

If Employee suffers a **partial** disability which restricts him/her from providing the same services that were provided before such disability, then in such event Employer agrees that Employee may continue to work for Employer with the understanding that the compensation shall be **modified** so that it is commensurate with the services provided by Employee in relation to his/her productivity and profitability.

- **Maternity**

  - Average PTO for Maternity = 4/6 weeks
  - Family Medical Leave Act (FMLA) up to 12 weeks job-protected **unpaid** medical leave
Future Equity Interest – Buy-In Provisions

- Physicians future right to purchase an equity interest in the practice
- Time frame, conditions precedent, valuation, and payment terms should be expressly stated in the Agreement

**Example of Conditions Precedent:**
- Continuous Employment *for 2-3 Years (Average 2.5 years)*
- Satisfactory performance reviews by senior physicians
- Ability to develop and maintain referral source of business
- Entrepreneurial interest in the Practice
Valuing Equity Interest

Important Questions to Ask:

- How the purchase price will be computed?
- How will the buy-in be structured?
- What are the potential costs based on prior equity acquisitions?

Valuation Methodologies to Consider:

- Book value of tangible assets
- Fair market value of all assets (tangible and intangible)
- Discounted present value of net revenue stream (percentage of expected future receipts)
Payment Terms

Payment in Full

*Note:* If the purchasing physician is required to pay the total purchase price up front, he/she will be personally responsible for obtaining the necessary funding through bank loans or other sources.

Installment Payments

*Note:* If the purchasing physician is permitted to make installment payments, he/she may be required to sign a *promissory note* in which the payee is the practice and the note is secured by a security interest in the equity granted to the physician. In the event that the physician fails to make the installment payments, the practice can recover the equity interest.
**Negotiation Strategy**

Will physician-client be treated identically to other owners following the buy-in with respect to:

<table>
<thead>
<tr>
<th>PTO</th>
<th>Income Division</th>
<th>Call Coverage</th>
</tr>
</thead>
<tbody>
<tr>
<td>Vacation</td>
<td>Net Income Equally Distributed</td>
<td>Fair &amp; Equitable or Seniority Based</td>
</tr>
<tr>
<td>Sick Time</td>
<td>Combination Equality + Productivity % of Collections</td>
<td></td>
</tr>
<tr>
<td>CME</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>
Contact Info

Ericka L. Adler
Kamensky Rubinstein Hochman & Delott
eadler@kr-law.com

Lucia Francesca Bruno
Physicians’ Legal Group
lbruno@physicianslegalgroup.com