MISSOURI HOSPITAL ASSOCIATION

in association with Lathrop & Gage LLP

Physician Bona Fide Employment CONTRACTING GUIDE

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We would like to acknowledge the invaluable contributions that Julie A. Roth RHIA, MHSA, JD made to the Missouri Hospital Association in authoring this document.

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1. Introduction

1.1 Trend Towards Hospital Employment of Physicians

Over the past several years, increasing numbers of physicians – generalists and specialists alike – have been seeking employment with hospitals rather than maintaining their own private practices. From a physician's standpoint, this transition is largely motivated by unfavorable physician reimbursement policies and increasing costs for malpractice insurance, implementation of electronic health records, effective billing and collection systems and compliance with ever changing laws and payer policies. Today, many physicians are willing to trade the independence of private practice for the certainty provided for under an employment arrangement with a hospital.

Likewise, hospitals are feeling the effects of increasing health care system costs, competition, and changing government payment policies. From a hospital's standpoint, employing physicians can be an effective means for hospitals to monitor and improve quality, lock in support of profitable inpatient and outpatient service lines, and be positioned to take advantage of government incentives that are tied to clinical integration.

1.2 Role of the Employment Agreement

A natural tension exists in the relationship between physicians and hospitals. Physicians are trained to be autonomous whereas hospitals operate around organizational mission and values, and desire adherence to hospital rules and policies. With payers increasingly tying both hospital and physician payments to performance on quality measures and compliance with other payment polices, it has become increasingly important for hospitals and their employed physicians to maintain a collaborative relationship in which each party plays a role in providing efficient, high quality healthcare.

The written employment agreement serves as the guide for navigating the employer-employee relationship between a hospital and a physician and co-exists with other organizational documents governing the physician-hospital relationship, such as the Medical Staff Bylaws and Rules and Regulations. Ideally, the employment agreement should be structured to effectively address the variety of issues that may arise in the course of an employment relationship. For example, what happens if a physician is not maintaining the schedule or seeing the volume of patients that were expected when the physician was hired? What if the physician does not want to perform administrative duties requested by the hospital or cooperate with the hospital's documentation policies? The parties' recourse in these challenging situations often lies in the content of the physician employment agreement.

1.3 Purpose of this Guide

By the time a hospital has offered an employment agreement to a physician, the hospital has likely invested significant time and resources in identifying, interviewing, and recruiting the physician. Early in the process, the hospital should secure a market survey or fair market value of the compensation. NO OFFER OF EMPLOYMENT SHOULD BE MADE WITHOUT THIS DATA. Physician compensation data is available through companies such as Medical Group Managers Association, Sullivan Cotter, and HayGroup, to name a few. The overall success of the relationship depends, in part, on how well the parties' expectations and responsibilities have been addressed under the employment agreement.

The purpose of the guide is to provide a resource for hospitals to use in identifying the core components of a physician employment agreement and in understanding how issues of particular importance in a hospital-physician relationship can be effectively addressed through the employment agreement.

Because the circumstances surrounding each employment relationship are unique, this guide is not intended to include an exhaustive discussion of issues that may need to be addressed by the hospital and physician. The issues that arise when hiring a group of physicians under a practice acquisition, for example, will be different than the issues associated with hiring a single physician directly from a residency program. The group of physicians may be more focused on bonus opportunities or call-sharing responsibilities, whereas the resident may be focused on recruitment incentives such as a sign-on bonus or student loan assistance. Some employment relationships, such as those involving a physician under a J-1 Visa Waiver program, are subject to unique legal restrictions with regard to duration of the agreement and working hours.

The remainder of this Guide provides a discussion of important components of a physician employment agreement and for some terms, offers sample contract language. Sample language is not intended to be used verbatim. Language in a true employment agreement should be tailored to fit the unique circumstances and negotiations of each individual physician and hospital. Appendix A contains a "Physician Employment Agreement Checklist," which supplements this Guide. A hospital should tailor the checklist as necessary, to meet the hospital's unique needs and processes.

1.4 Regulatory Considerations - STARK

Before describing the "business" considerations that are involved with an employment agreement, it is important to understand the regulatory environment that surrounds a physician employment arrangement. Perhaps the most important law to consider when structuring a physician employment arrangement is the Federal Physician Self-Referral Statute, commonly referred to as the "Stark Law."

The Stark Law, which is enforced by the Centers for Medicare & Medicaid Services ("CMS"), prohibits a physician from making referrals for certain designated health services ("DHS") payable by Medicare (e.g. inpatient or outpatient hospital services) to an entity (e.g. a hospital) with which the physician (or an immediate family member) has a financial relationship. Unless an exception applies, the entity is prohibited from presenting or causing to be presented claims to Medicare for those referred services.

The Stark Law has an exception for bona fide employment arrangements between hospitals and physicians. Specifically, any amount paid by an employer to a physician (or immediate family member) who has a *bona fide* employment relationship with the employer for the provision of services meets the "employment exception" if the following conditions are met[1]:

(1) The employment is for identifiable services.

(2) The amount of the remuneration under the employment is (i) consistent with the fair market value of the services; and (ii) except with respect to remuneration in the form of a productivity bonus based on services personally performed by the physician (or immediate family member of the physician), is not determined in a manner that takes into account (directly or indirectly) the volume or value of any referrals by the referring physician.

(3) The remuneration is provided under an agreement that would be commercially reasonable even if no referrals were made to the employer.

The employment exception to the Stark Law will be discussed throughout this Guide. At the outset, however, hospitals should be aware that the Stark Law is a "strict liability" statute. This means that even technical non-compliance can expose a hospital to significant penalties for billing services to Medicare that were referred by a physician under a non-Stark compliant employment relationship.

A hospital should also note the Anti-Kickback statute and regulations, which contain a bona fide employment safe harbor. We focus on the Stark law because *generally* speaking, an arrangement that meets the conditions of the Stark law will not violate the Anti-Kickback law. A central component of both laws is that compensation cannot be tied to the volume or value of Medicare referrals. When in doubt, consult a competent healthcare attorney such as a member of the Missouri Society of Healthcare Attorneys.

[1] 42 CFR 411.357(c)

2. The Employment Agreement: Introductory Terms

2.1 The Parties

The legal names of the parties should be presented at the beginning of the employment agreement. If a hospital is part of a health system, consideration should be given to what legal entity will employ the physician – the parent or subsidiary. This can be of particular importance in the event that a parent-entity makes organizational changes that affect the operations of the subsidiary or necessitate assignment of the agreement to a different entity.

> *This Physician Employment Agreement ("Agreement"), made and effective at _____, Missouri, as of the ___ day of _____, 20__ (the "Effective Date") by and between _____ (hereinafter referred to as the "Hospital"), and _____, M.D. [or D.O.] (hereinafter referred to as the "Physician").*

Unless the physician is not yet licensed in the state, the Missouri State Board of Healing Arts will have the physician's full legal name and the current status of the physician's license.

2.2 The "Effective Date" Versus "Commencement Date"

The "Effective Date" is typically the date that the contract is signed by the parties, and represents the date upon which the terms of the contract become binding upon the parties. The Effective Date may be distinguished from the "Commencement Date," which is the date upon which a physician actually is to begin providing services under the employment contract. Sometimes, there is a substantial period of time between an agreement's "Effective Date" and the "Commencement Date," especially when a hospital has recruited a physician who is still completing a residency.

2.3 The Recitals

The "Recitals" are background statements that "set the stage" for the employment relationship. They typically contain a statement that the hospital's governing board has determined that there is a need to employ a physician in the employed physician's specialty and that the physician is qualified to meet this need. Such a "needs" assessment should be part of a well-managed physician recruitment plan. If the hospital intends that the physician practice be part of a particular "Clinic," the Clinic may be identified in the recitals as well.

It is not uncommon for defined terms that will be used throughout the contract to be introduced in the Recitals. Such terms may include, for example, a description of the hospital's "Service Area" and the physician's "Specialty." If terms are defined within the Recitals, care should be taken that the definitions provided are sufficiently descriptive in nature. For example, if a physician's "Specialty" is "family practice," it may be important to specifically state whether such family practice includes OB services. This specificity is important when compensation

under the employment agreement is tied to compensation reported for various specialties under commercial physician compensation surveys. Further, in the event that a contract includes a non-competition clause that prohibits a physician from providing services in the Specialty on behalf of competitors, it is important that the Specialty be adequately defined.

Because binding contracts require "offer," "acceptance," and "consideration," the Recitals conclude with a statement that in consideration of the mutual covenants and agreements contained herein, the parties agree to the terms and conditions described within the employment agreement.

> ***WHEREAS**, Hospital operates inpatient and outpatient health care facilities in _____, Missouri, for the purpose of serving health care needs for the citizens of _____ County, Missouri, and the surrounding area (the "Service Area"); and*
>
> ***WHEREAS**, the Board of Trustees of Hospital has determined that the health care needs of the citizens of the Service Area would be better served by employing a physician with skills in _____ (the "Specialty") to perform the physician duties, responsibilities, and obligations set forth in this Agreement; and*
>
> ***WHEREAS**, Physician is duly licensed to practice medicine in the State of Missouri, and desires to perform services in the Specialty at those facilities designated by Hospital, including but not limited to the hospital's _____ clinic (the "Clinic"), as a Hospital employee on the terms and conditions set forth herein.*
>
> ***NOW, THEREFORE**, in consideration of the mutual covenants and agreements contained herein, it is understood and agreed by and between the parties hereto as follows:*

3. The Employment Agreement: Body

3.1 Statement of Employment

The employment agreement should contain a statement that the hospital employs the physician, and the physician accepts employment with the hospital, subject to all terms and conditions set forth in the employment agreement. The agreement should also indicate whether the physician's employment is on a full-time or part-time basis and, unless the hospital intends otherwise, that the employment is "exclusive."

> *Employment. Subject to the terms and conditions set forth herein, Hospital hereby agrees to employ Physician on a full-time basis to exclusively provide services in the Specialty on behalf of Hospital, and Physician hereby*

accepts such full time exclusive employment as a physician specializing in the Specialty.

In an exclusive employment arrangement, a physician is generally prohibited from performing medical activities, paid or unpaid, on behalf of any other hospital or entity without receiving the prior written permission of the hospital. Physician requests for "outside medical activities" or "moonlighting" often come up when a physician would like to volunteer in a charitable clinic or perhaps provide services in the emergency department of a different hospital at night or on weekends. In determining whether to allow a physician to perform outside medical activities, a hospital should consider whether such activities will disrupt the physician's duties under the employment agreement or potentially expose the hospital to liability. Careful attention should be paid to insurance coverage for these "moonlighting" activities and the hospital should always seek evidence of additional insurance before approving such activities. Further, if the hospital wishes to allow a physician to engage in outside medical activities, the hospital should confirm that the professional liability insurance maintained for the physician covers such activities and should also confirm whether the activities will change the hospital's liability coverage premium. Finally, as further discussed below, the hospital should also consider whether it would require the physician to reassign any reimbursement that physician receives for the performance of outside medical activities to the hospital.

Exclusive Employment. Physician agrees to devote Physician's professional efforts and all professional time and attention exclusively to the pursuit of a highly professional, cost-effective and efficient medical practice affiliated with Hospital, exclusive of such vacation periods and other time off as provided by this Agreement, and except as may be otherwise approved in advance by the Administration of Hospital. Nothing in this section is intended to be, nor shall be construed as, limiting or restricting Physician's right to engage in any activity unrelated to the practice of medicine, so long as such unrelated activity does not interfere with Physician's responsibilities under this Agreement.

3.2 Term of Employment

The actual work or medical services begin upon the "Commencement Date," which is the date upon which the hospital expects the physician to begin providing such services. Because a physician cannot provide services without a license to practice medicine and appropriate medical staff privileges at the hospital, the employment contract may specify that the Commencement Date is the date when the physician obtains medical staff membership and clinical privileges at the hospital. The hospital should also reserve the right to terminate the agreement in the event that the physician fails to obtain appropriate medical staff privileges by a specified deadline.

The term of employment may be for any period desired by the hospital, but if it is less than one (1) year, the circumstances surrounding the agreement should be scrutinized for any compliance concerns. If a hospital expects that it may take a few years for a physician to become

profitable, there is an advantage to establishing an initial term of employment of at least three (3) years, so the hospital can recognize the "return on its investment" in the physician. Another advantage to a longer term of employment is that a physician's services may be "locked in," which is particularly important when a hospital is relying on the physician to build or maintain a hospital service-line or practice.

Conversely, a hospital may wish to set a shorter initial term of employment, especially in situations where there may be uncertainty as to how the physician will integrate with the hospital's culture or operations, or whether the practice of the physician will be successful.

A hospital should also consider whether it will include a provision for the automatic renewal of the agreement at the end of the initial term. At the expiration of the initial term, an automatic renewal provision serves to renew the agreement under the same terms and conditions that applied during the initial term, without the need for the parties to enter a new signed agreement. An automatic renewal provision may renew the agreement for the same duration as the initial term (e.g. two (2) years), or each renewal period can be set for a different duration, such as one (1) year.

The inclusion of an automatic renewal provision can be beneficial for assuring that the parties do not inadvertently allow the agreement to expire, which can become an issue if the parties later desire to enforce some provision of the expired contract. At times, however, the parties may intentionally exclude an automatic renewal provision for purposes of forcing renegotiation of the agreement at the end of the initial term.

In some cases, the agreement may be structured to allow a party to terminate the agreement by giving a thirty (30), sixty (60), or ninety (90) days advance notice, prior to the end of the initial term or any renewal term. Such a provision is similar to a "without-cause" termination provision, which will be discussed later. The difference between this type of provision and a "without cause" provision is that this provision may only be exercised thirty (30), sixty (60), or ninety (90) days before the end of a term whereas a no-cause termination provision can generally be exercised at any time during a term.

Term. This Agreement is effective the date first above written; however, the term of employment shall begin on the ___ day of _____, 20__ (the "Commencement Date"), and continue through the ____day of _____, 20__ (the "Term"). Unless otherwise terminated as provided herein, this Agreement shall automatically renew for successive ____ (___) year periods, each referred to as a "Renewal Term."

Any term less than one (1) year should be vetted by a competent healthcare attorney for compliance issues.

3.3 Physician Duties

The contract should establish the identifiable services and duties that a physician is to perform. In order to provide the flexibility to modify the agreement as necessary, the agreement should include a statement that all duties of the physician are subject to the hospital's general direction, control and supervision, and that the hospital may assign additional duties to the physician from time-to-time.

3.3.1 Clinic/Working Hours

If a physician will be staffing a clinic, a hospital may wish to specify the particular days per week and times that the physician be available to take clinic patients, subject to change as determined necessary by the hospital. Such a requirement helps the hospital assure that services are available to its patients and also justifies a physician's compensation. Likewise, if a physician will be "hospital-based," such as a hospitalist, the hospital should define the number and length of the shifts to be worked by the physician each week.

> *Working Hours. Physician shall be available to provide services in the Specialty in the care of patients of the Clinic and shall work in the Clinic not less than ___(_) days per workweek, ____ (_) hours per full workday, which shall result in no less than ____ (_) office hours for appointments with patients.*

3.3.2 Practice Location

The physician employment agreement should describe the locations where a physician will provide services. The practice location may include the Clinic and any other locations where the hospital anticipates that the physician will provide services. It is a good idea for the hospital to reserve the right to change the physician's practice location, especially if the hospital anticipates that it will build or acquire new physician office space in the future.

> *Practice Location. Physician shall provide services in the Specialty at the Hospital and Clinic located at _____ (the "Practice Location"). Hospital shall have the right to add or redirect Physician to other practice locations within the same general market as may be established by Hospital during the term of this Agreement and Physician hereby agrees to move Physician's Practice Location, as directed by the Hospital.*

3.3.3 On-Call Obligations

No issue is more thorny than call coverage. Clarity will avoid future conflicts. Although a hospital's Medical Staff Bylaws or Rules and Regulations will address the on-call obligations of a physician for purposes of compliance with the Emergency Medical Treatment and Labor Act ("EMTALA"), on-call obligations must be addressed in the employment agreement to avoid misunderstandings.

An on-call provision may simply state that the physician will perform on-call duties as set forth in the Medical Staff Bylaws and Rules and Regulations of the hospital, or the on-call provision may specifically set forth the days and times that the physician is expected to be on-call. Establishing the specific call expectations in the employment agreement can be particularly important when the hospital exclusively employs a group of specialists who will be sharing call responsibility.

Because of difficulties in maintaining adequate call coverage, some hospitals separately compensate employed physicians for taking call.[2] In such cases, the employment agreement should specify the additional compensation provided for on-call services. Alternatively, the hospital may wish to execute a separate on-call payment agreement. A separate agreement allows the hospital to make changes to or terminate the on call agreement without the need to change the physician's employment agreement. In either case, the agreement should address how the physician is paid (if at all) when the physician is actually called. Further, any call pay should be taken into account when considering the total fair market value of the physician's compensation.

An example of a simple "on-call" requirement follows:

> *Call Coverage. Physician shall be on call to provide care and consultations for Hospital patients on weekends, evenings, nights, and holidays as reasonably assigned by Hospital and in accordance with Hospital's Medical Staff Bylaws, Rules & Regulations, and Hospital policies.*

But, hospitals should also consider specifying the minimum number of physicians in a practice area necessary to provide call coverage.

3.3.4 Referral Requirements

Most hospitals desire that employed physicians make all referrals for services to the hospital or to entities affiliated with the hospital as a condition of employment. Such a referral restriction is subject to certain restrictions under the Stark Law. Specifically, CMS has provided that a referral restriction imposed on an employed physician will not violate the "volume and value of referrals" standard in the Stark Law if the agreement is written and: (i) the referring physician is compensated at fair market value for services performed in an arrangement that otherwise fits within the employment (or another) Stark Law exception; (ii) the referral restriction relates solely to the physician's services covered by the scope of the employment or contract and is reasonably necessary to effectuate the legitimate purposes of the compensation relationship; and (iii) referrals are not required (directly or indirectly) when the patient expresses a different choice, when the patient's insurer determines the provider, or when the referral is not

[2] Although independent contractors are not the subject of this paper, it should be noted U.S. Department of Health & Human Services Office of Inspector General closely scrutinizes on call payments to independent physicians. See e.g. OIG Advisory Opinion 12-15.

in the best medical interest of the patient in the physician's judgment. Additionally, the compensation paid under the arrangement must be set-in-advance for the term of the agreement.

Due to the potential compliance issues created by the "set-in-advance" requirement, some hospitals no longer include express referral restrictions in their employment agreements. Any requirement in an employment agreement that a physician refer all services to the hospital should be carefully reviewed by legal counsel to be certain that it adequately addresses the exceptions described above.

3.3.5 Medical Record Documentation

Historically, physician employment agreements have given little attention to a physician's obligation to complete medical records, other than to require a physician to complete charts in accordance with professional standards or hospital policy. Charting primarily occurred in a paper-based system and physicians dictated their reports and notes for transcription into the chart.

Over the past several years, however, the paper-based system has given way to the electronic health record ("EHR") system. This transition is due in large part to the desire of hospitals to receive incentive payments available under Centers for Medicare & Medicaid Services ("CMS") Medicare and Medicaid EHR Incentive Program, commonly referred to as the "Meaningful Use" program. In order to be eligible for payments under the Meaningful Use program, and to avoid later reimbursement reductions, hospitals must adopt certified EHR technology, and "attest" to compliance with various "core" and "menu set" objectives for the use of that technology. In the case of physicians, the core and menu set objectives generally revolve around gathering certain data and meeting certain clinical quality measures.

While many physicians are accustomed to using EHRs and accept the documentation requirements and processes that are associated with Meaningful Use compliance, other physicians are resistant to the use of EHR technology or may use the EHR in a manner that does not comply with Meaningful Use standards primarily because implementation can slow the delivery of care to patients. A physician's non-compliance with the Meaningful Use standards may cost a hospital the ability to successfully attest to Meaningful Use compliance and receive incentive payments. Balancing the physician's interest and that of the hospital can present a challenge.

Similarly, governmental and commercial third-party payers condition payment for services on timely documentation that supports the medical necessity of the services provided. When this documentation is missing or insufficient, a hospital may not be able to bill for services provided or may be required to refund reimbursement for services received, sometimes with interest and penalties.

Because payments to hospitals for services ordered or performed by physicians is so closely tied to documentation, an employment agreement should clearly establish the physician's responsibilities in complying with documentation standards that meet standards for Meaningful Use (to the extent applicable to the hospital) and other payer standards. Because of the myriad of situations presented, no "template" language is suggested here. Instead, consider formulating such text in collaboration with your employed physicians.

3.3.6 Quality Standards

Similar to the payments tied to "Meaningful Use" of certified EHR technology, payments to hospitals are now being held financially accountable for the quality of care provided to patients under various "pay-for-performance" programs. For example, under the provisions of the Patient Protection and Affordable Care Act (the "ACA"), CMS has implemented a "Hospital Value Based Purchasing Program." Under this program, CMS makes value-based incentive payments to acute care hospitals, based either on how well the hospitals perform on certain quality measures or how much the hospitals' performance improves on certain quality measures from their performance during a baseline period. Under CMS's "Readmissions Reduction Program," also required under the ACA, CMS penalizes inpatient prospective payment system hospitals with excess readmissions for patients who were hospitalized for certain conditions.

Because many of the measures against which hospitals are measured are directly tied to the orders or care provided by a physician, it is important that a physician participate in or otherwise cooperate with hospital quality programs designed to meet the performance standards set by CMS and other payers.

> *Quality Assurance. Physician shall cooperate and participate in quality assessment, utilization management, and peer review processes as established from time-to-time by Hospital. Physician's responsibilities shall include, without limitation, participation in Hospital's quality assurance committees, meetings, programs and initiatives.*

3.3.7 Reassignment of Reimbursement

As a general rule, Medicare does not pay amounts that are due a physician under an assignment to any other person under reassignment, power of attorney, or any other direct arrangement. One exception to this rule is that Medicare may pay physician's employer if the physician is required, as a condition of employment, to turn over to the employer the fees for physician's services.

Based upon this requirement, the employment agreement should expressly state that the physician is required to turn over to the hospital all fees for physician's services provided on behalf of the hospital and to designate the hospital as the physician's lawful billing agent. Additionally, because Medicare and commercial payers require the execution of multiple forms

in order for a physician to be credentialed with a plan and to reassign physician's reimbursement rights under the plan, the employment agreement should expressly require the physician's agreement to cooperate in the timely completion of any forms or other documentation required for enrollment in the plan and reassignment of reimbursement rights. Further, the hospital must condition continued employment on the physician's continued participation in third party payor networks.

The hospital may also wish to include a provision that addresses how reimbursement received by a physician from other entities for the performance of approved outside medical activities will be handled.

> *Reassignment. All fees or reimbursement received or realized as a result of Physician's performance of professional medical services and other activities during the term of this Agreement shall belong to and be paid and delivered to Hospital. Physician hereby reassigns all such fees and compensation to Hospital and designates Hospital as physician's lawful billing agent. Physician agrees to promptly execute and deliver to Hospital all documents, forms, and assignments as may be necessary and requested by Hospital, so that Hospital may bill for, collect, and keep all said fees and reimbursement.*

3.3.8 Administrative Responsibilities & Other Duties

Because it is likely that the hospital will wish to assign an employed physician administrative responsibilities from time to time, the employment agreement should include the types of "administrative" responsibilities to be performed by the physician. Administrative responsibilities may include, for example, participating in the hospital's clinic outreach programs, reviewing and approving public education materials, assisting in the recruitment of new physicians, participating in the hospital's quality improvement and performance measurement activities, and participating in hospital's programs related to the proper use and implementation of EHR.

The employment arrangement should separately identify any administrative responsibility for which the physician will be separately compensated. Such responsibilities might include, for example, medical directorship responsibilities or supervision of mid-level providers. These responsibilities may be integrated into the physician employment agreement or may be addressed in a separate agreement.[3] The benefit of addressing such responsibilities in a separate agreement is that it allows the parties to adjust or terminate those responsibilities without having to open up the employment agreement for re-negotiation. If a separate agreement is used, however, it is

[3] The contents of a collaborative practice agreement must meet the Collaborative Practice statute (RS Mo 334.104) and the regulations jointly issued by the Missouri State Board of Nursing and the Missouri State Board of Healing Arts.

important to factor in the compensation provided under that separate agreement into the total fair market value analysis, which will be discussed later.

3.4 Physician Representations & Warranties and Covenants

"Representations & warranties," are the statements of fact upon which a hospital has relied in entering an employment agreement with a physician. Representations & warranties typically include, for example, statements representing that the physician:

(1) has never been subject to adverse licensure action or investigation by any medical board;

(2) has not been sanctioned on excluded from any federal healthcare program;

(3) has not been convicted of any crimes punishable as a felony or are crimes of moral turpitude;

(4) has disclosed to the hospital all malpractice judgments awarded against the physician; and

(5) is not bound by the terms of a non-competition agreement with a third party that would affect the physician's ability to fulfill physician's employment with the hospital.

"Covenants" are promises made by physician in connection with performing the physician's responsibilities under the employment agreement. Important covenants include, for example, that the physician will:

(1) maintain unrestricted licenses, registrations, and Medical Staff Privileges necessary to perform the services under the employment agreement;

(2) refrain from engaging in any conduct that would subject a physician to discipline or sanctions under any state or federal authorities;

(3) comply with all Medical Staff Bylaws, Rules & Regulations, and Hospital policies;

(4) refrain from any conduct or behavior that in the Hospital's reasonable interpretation adversely affects or may adversely affect the delivery of patient care and/or the effective operation of the Hospital;

(5) perform all Physician Services in a non-discriminating manner without regard to patients' race, color, creed, religion, national origin, age, sex, sexual preference, disability, or marital status; and

(6) notify the Hospital immediately of certain events, such as any investigation involving the physician by a state or federal authority and any modification to or termination of any license or registration held by the physician.

The "termination" provisions of the employment agreement should permit the hospital to terminate the agreement if the physician has violated a representation and warranty or covenant.

3.5 Practice Restrictions - Covenant Not to Compete

A "covenant not to compete" or a "noncompetition clause" is a contractual provision that prohibits a former employee from competing with an employer either through working independently or for another entity after the termination or expiration of the employee's employment with the employer. A covenant not to compete must be tied to an employer's protectable interest and is typically stated in terms of a defined time period (e.g. one (1) year after employment) and geographic area (e.g. ten (10) miles, fifty (50) miles, etc.).

3.5.1 Protectable Interest

If a hospital wishes to include a covenant not to compete in its agreement, the hospital must have a "protectable interest" that justifies the need for the covenant. Missouri courts have recognized that a patient base is a "protectable interest" with respect to a covenant not to compete.[4]

3.5.2 Scope and Duration

Whether a covenant not to compete will be enforced by a court depends upon (i) the scope of the covenant and (ii) whether the covenant is tied to a "protectable interest." The "scope" of a covenant not to compete refers to its geography and time. Missouri courts require that both the geographic area covered by the covenant and the time period in which it is in effect be reasonable.[5] This is a *fact-specific inquiry* that is tied to the employer's "protectable interest." For example, a fifty (50) mile geographic area might be reasonable in a rural setting where the hospital draws its patients from a wide geographic area. A fifty (50) mile geographic area might *not* be reasonable in an urban area where a hospital draws it patient base from a densely populated smaller geographic area.

3.6 Hospital's Duties

3.6.1 Base Compensation

Hospitals may take a variety of approaches in establishing a physician's base compensation under an employment agreement. Common approaches include providing a

[4] *Washington County Mem. Hosp. v. Sidebottom,* 7 S.W.3d 542 (Mo. App. E.D. 1999)

[5] *Washington County Mem. Hosp. v. Sidebottom*, 7 S.W.3d 542 (Mo. App. E.D. 1999)

guaranteed base salary, a work Relative Value Unit ("RVU") productivity compensation model, or a base salary with quarterly or bi-annual upward or downward adjustments, based upon the physician's work RVU production. Whichever method the hospital chooses, you may assume all employed physicians will eventually learn how others are compensated. We recommend transparency in this process.

The particular method of compensation will depend on the unique circumstances of hospital and physician involved. With respect to a physician who is new to the area, a hospital may elect to pay a guaranteed base salary for the first few years of the agreement in order to allow the physician to establish a practice, and then transition the physician to a "work Relative Value Unit (wRVU)" productivity model of compensation. For a physician who already has an established practice, the hospital may pay the physician on a productivity model from the outset, based upon the physician's anticipated wRVU production. If the physician is hospital-based, such as a hospitalist, the hospital may decide to pay a base salary with additional payments for additional shifts worked by the physician.

Regardless of its approach to physician compensation, the formula or methodology used should not be so complex that the hospital cannot administer the payments correctly. In that regard, hospital administrators are encouraged to vet the terms of an employment contract with payroll staff BEFORE submitting a contract to the recruit. This will avoid inconsistencies between human resources benefit policies and physician employment agreements. If the hospital does not administer the method or formula correctly, the physician may have grounds for a breach of contract claim, and the hospital may have a compliance issue with the Stark Law.

The Stark Law requires, in part, that compensation paid to an employed physician be consistent with fair market value of the services and that it be commercially reasonable even if no referrals were made to the hospital by the physician. "[Fair] market value" means the value in arm's-length transactions, consistent with the general market value. 'General market value' means . . . the compensation that would be included in a service agreement as the result of bona fide bargaining between well-informed parties to the agreement who are not otherwise in a position to generate business for the other party, . . . at the time of the service agreement.

CMS has stated that an arrangement "will be considered 'commercially reasonable' in the absence of referrals if the arrangement would make commercial sense if entered into by a reasonable entity of similar type and size and a reasonable physician of similar scope and specialty, even if there were no potential DHS referrals."[6]

In determining whether compensation is consistent with "fair market value," a hospital needs to identify the *total* compensation that is being paid to a physician, including the physician's base salary, any bonuses (discussed below), any other payments made to the physician for administrative responsibilities (also discussed below), and any other agreed upon

[6] 69 Fed. Reg. (Mar. 26, 2004), p. 16093.

compensation or financial support. In determining whether total compensation is consistent with fair market value with respect to a particular physician, the hospital may consider factors such as the physician's specialty, years in practice, and whether the physician is board certified or otherwise has special training or unique skills. The hospital should document the sources used to verify that the total compensation paid to an employed physician is consistent with fair market value. Such sources may include, for example, commercial survey data or an opinion by a third party valuation expert. Further, a "compensation cap" can be written into the agreement, as a means of assuring that the total compensation paid to the physician does not exceed what the hospital has determined to be the upper limit of fair market value.

A hospital may demonstrate the "commercial sense" of an arrangement by, for example, conducting a community needs assessment that demonstrates a shortage of physicians in the employed physician's specialty.

Making an informed decision about the extent to which a physician's compensation is consistent with fair market value and commercially reasonable is becoming increasingly important, as demonstrated by hospitals recent settlements with the government. For example, in 2009, Covenant Medical Center in Waterloo, Iowa entered into a $4.5 Million Dollar settlement with the government to resolve allegations that it submitted false claims to Medicare by having financial relationships with five (5) employed physicians that involved "commercially unreasonable compensation, far above fair market value."[7] According to the Department of Justice, these physicians were among the highest paid hospital-employed physicians not just in Iowa, but in the United States.

On May 8, 2013, a federal jury found that Tuomey Healthcare System ("Tuomey") in Sumter, South Carolina violated both the Stark Law and the False Claims Act because it submitted claims to Medicare based upon the referrals of nineteen (19) physicians whose part-time employment arrangements did not comply with the "employment exception" to the Stark Law. Under the part-time employment agreements, each physician was (i) paid a base salary; (ii) provided a significant benefits package; (iii) eligible for a productivity bonus; and (iv) eligible for a quality bonus. The bonuses were to be calculated as a percentage of the collections for the physicians' personally performed services. The government demonstrated that the total compensation actually paid to the physicians exceeded the physicians' collections for services personally performed pursuant to the agreement, and alleged that this was evidence that the agreements took into account the volume or value of the physicians' referrals to Tuomey. The jury agreed and assessed a $39,313,065.00 damage award against the hospital.

[7] Covenant Medical Center to by U.S. $4.5 Million to Resolve http://www.justice.gov/opa/pr/2009/August/09-civ-849.html

3.6.2 Bonuses

To incentivize physicians' productivity and quality performance, many hospitals also pay productivity and quality bonuses to physicians. A productivity bonus is paid when a physician's wRVU production exceeds the RVU threshold for base salary. When wRVU based productivity bonuses are available, it becomes very important to define what kinds of services will generate a wRVU. For example, a physician who uses a certain technology may request that wRVUs be heavily weighed to provide credit to that physician's use of technology. A physician who has undertaken responsibilities in championing a new EHR system may request that wRVUs be assigned to the physician's time and efforts in the implementation of the EHR system.

It is important to note that the Stark Law prohibits compensation from being determined in a manner that takes into account (directly or indirectly) the volume or value of any referrals by the physician. A narrow exception to this rule allows compensation to be paid in the form of a productivity bonus based on services *performed personally* by the physician. According to CMS, the Stark Law contemplates that "employed physicians can be paid in a manner that directly correlates to their own personal labor, including labor in the provision of DHS. What the statute does not permit are payments for an employee's productivity in generating referrals of DHS performed by others (66 FR 876). Except as permitted under the group practice definition for employees of group practices, ''incident to'' DHS may not be the basis for productivity bonuses paid to employed physicians."

It is therefore very important that any bonus formula be structured to comply with this requirement. On May 1, 2013, two (2) Montana hospitals agreed to pay $3.95 million dollars to the government to resolve allegations that the hospitals paid several physicians incentive compensation that impermissibly took into account the volume or value of their referrals by improperly including certain DHS in the formula for calculating physician incentive compensation.

Hospitals are increasingly making quality bonuses available to physicians who meet certain quality benchmarks which facilitate the hospitals' compliance with pay-for-performance initiatives. Here, it becomes very important to identify the measures and how the physician's success in meeting the measures will be determined. Because the hospital may need to modify the quality measures from time to time based upon modifications to pay-for-performance programs, it would be difficult to include the specific quality measures within the employment agreement. A hospital, therefore, may require that physicians meet quality measures approved by a designated hospital committee in order to be bonus eligible. Any such committee should be composed both of physician and hospital administrative representatives.

3.6.3 Compensation for Administrative Services

A hospital may wish to carve out payments for non-clinical services such as medical directorships or supervision of mid-level practitioners, either in the employment agreement or

through a separate agreement. In setting compensation for administrative services, whether it is a flat hourly rate or based upon the development of "administrative" wRVUs, the hospital should be sure that administrative services are appropriately valued. CMS has taken the position that "the rate paid for clinical work is fair market value for the clinical work performed and the rate paid for administrative work is fair market value for the administrative work performed." In other words, CMS specifically recognizes that the fair market value of administrative services may differ from the fair market value of clinical services.

3.6.4 Recruitment Incentives

In addition to the compensation described above, hospitals may pay a physician one or more recruitment incentives. Such incentives can take a variety of forms, such as sign-on bonuses, relocation assistance, or student loan assistance. Particularly with respect to sign-on bonuses, hospitals need to consider whether the bonus will actually be paid upon "signing" the agreement or whether it will only be paid upon the date that the physician actually commences employment with the hospital. If the hospital pays the sign-on bonus prior to the physician's first day of services under the agreement, the hospital is taking a risk that the physician may not actually commence employment. In that case, the hospital would likely have to sue the physician for recovery of the bonus. On the other hand, physicians – particularly those who are coming out of a residency program – are likely to press for payment of the sign-on bonus at signing and may walk away from a potential agreement if the sign-on bonus is not made immediately available.

Regardless of when a sign-on bonus or other recruitment incentive is paid, the employment agreement should require the physician to repay all or a pro-rata portion of the incentive if the physician fails to commence employment or does not complete the initial term of employment. Further, prior to making any incentive payment to the physician, the hospital should verify that the physician is not excluded from participation in any federal or state healthcare programs. If the physician was subject to any such exclusion, they would not be eligible to commence employment at the hospital and the hospital could face a compliance issue by having made a payment to an excluded provider.

A repayment provision might state the following:

> *Repayment of Sign-On Bonus. In the event Physician fails to remain employed at the Hospital for _____ (_) years, Physician shall repay to the Hospital all amounts of the Sign-On Bonus received plus interest at a rate per annum (on a 360-day a year basis) which shall be equal to the prime rate of interest announced in the Wall Street Journal, Midwest Edition, on the date of the Hospital's payment of the Signing Bonus, plus two percent (2%) (i.e., 200 basis points) accruing from the date of Hospital's payment of the Sign-On Bonus. The amount of repayment shall be prorated based upon the following formula: the number of complete months the Physician maintains employment at the Hospital*

shall be divided by _____ (___),[insert the number of months that the physician was required to remain employed, as specified in the first sentence above] the product of which shall equal the percentage by which the Sign-On Bonus will be reduced.

The obligation to repay the Sign-On Bonus described in this Agreement shall not apply if the termination of the Physician's employment is due to (a) the Physician's death, (b) the Physician's disability as described in this Agreement, (c) the Hospital's breach of any provision of this Agreement subject to the right to cure described in this Agreement, or (d) the Hospital's termination of the Physician without justifiable cause, as described in this Agreement.

3.6.5 Benefits/Practice Related Expenses

3.6.5.1 Insurance and Retirement

The types of benefits that a hospital makes available to an employed physician and reimbursable practice related expenses will vary from hospital to hospital, but generally include health, life, and disability insurance as well as the opportunity to participate in retirement plans. One important point to reiterate here is the need to coordinate agreement terms with the hospital's Human Resources benefit staff, and to provide flexibility to change benefits in the future.

Insurance. Unless otherwise stated herein, Physician shall be entitled to participate in Hospital employee benefit plans for which Physician is eligible under the terms of such plans. Nothing contained herein shall be construed to require Hospital to establish, or shall preclude Hospital, in its absolute discretion, from changing, altering, or amending, adding to, in whole or in part, discontinuing or revoking, any one (1) or more of such employee benefit plans or from providing Physician with additional benefits, subject to excess benefit transaction regulations and fair market value limitations.

Any time a hospital desires to deviate from its regular policies or benefit plans offered to all employees with respect to an individual physician, the hospital should also work closely with its Human Resources benefit staff to assure that the deviation does not violate the terms of any plan or have other unintended consequences.

3.6.5.2 Paid Time Off

Because physicians typically do not have a fixed schedule of hours and do not generally punch a time clock, they don't easily fit the standard hourly employee model of vacation and holiday pay. Hospitals should consider working with qualified benefits counsel to establish a model for physician time off from work that differs from that applied to other hospital staff.

In determining the amount of "paid time off" ("PTO") [also called "earned time off" ("ETO")] granted to a physician, the hospital should consider whether the PTO will be inclusive of vacation time, major holidays, sick leave, and time off for continuing medical education ("CME"). The employment agreement should require the physician to obtain advance approval of PTO, and might also require the physician to provide patient coverage during the physician's absence. In cases where a physician is using PTO due to an illness, the hospital administration should coordinate with the Human Resources Director on issues related to the Family Medical Leave Act and Americans with Disabilities Act.

Additionally, the employment agreement should specify whether PTO may be accrued from year to year, and the circumstances, if any, under which PTO will be paid out to a physician upon termination of the agreement.

> *Paid Time Off. Physician shall be entitled to receive _____ (___) hours of paid leave each year for vacation, illness, bereavement leave, seminars, conventions, and accredited CME ("PTO"). Unused PTO, if any, will be paid or accrued in accordance with Hospital's established policies; provided, however, any unpaid PTO will be forfeited upon the termination of this Agreement. Additionally, Physician shall be entitled to all holidays identified in Hospital's employee manual. Physician shall notify and coordinate with Hospital's designee Physician's absences for PTO and shall provide appropriate coverage of patients during such absences.*

3.6.5.3 Continuing Medical Education - "CME"

With respect to CME, the hospital should specify the CME allowance, if any, that will be provided to the physician. Some hospitals provide a physician with an up-front lump sum payment for CME, while other hospitals will retroactively reimburse a physician's CME expenses up to an annual limit. An example of the latter approach follows:

> *CME Allowance. Hospital shall reimburse up to _____ and No/100 Dollars ($_____) per year for Physician's actual expenses related to attendance at pre-approved CME courses pertinent to Physician's specialty (including registration fees and reasonable travel expenses) and Physician's actual professional dues and memberships (excluding Medical Staff fees). Such reimbursement shall be conditioned on Physician's presentation of adequate documentation to support such expenses. Such annual reimbursement amount shall be prorated for any partial calendar year and if, upon the termination of Physician's employment, Physician has been reimbursed more than the prorated amount of such reimbursement allowance through the date of such termination of employment, Physician shall promptly refund to Hospital the amount of such excess reimbursement. There shall be no payment for unused funds in any one (1) year. In the event Hospital requests Physician to attend a*

particular CME meeting, Hospital shall reimburse Physician for expenses actually incurred for attendance to such program in addition to the allowance provided above.

3.6.5.4 Professional Liability Insurance

Hospitals typically cover malpractice insurance costs for employed physicians. In many cases, hospitals also cover the costs of "tail coverage," although this is a business decision to be made by the hospital.

Malpractice Insurance. At all times during the term of this Agreement, Hospital shall provide medical professional liability insurance covering Physician in the amounts designated by the Hospital's Board of Trustees, which amounts shall be at least the minimum amounts required by law. Upon the termination of Physician's employment with Hospital, for any reason, Hospital shall pay for necessary "tail coverage" for Physician for claims that arise following termination of this Agreement from services furnished by Physician during the term of this Agreement.

3.7 Termination

You cannot pay too much attention to the termination provision of an employment agreement. When a physician's employment ends is not the optimum time to determine an exit strategy.

An employment agreement should clearly identify the grounds or "cause" for termination. Some grounds may allow for "immediate" termination while other grounds may allow for a "cure period." Additionally, the parties may wish to include a "without-cause" termination provision that would allow both the hospital and the physician, to terminate the agreement for no reason, upon a specified advance notice period.

3.7.1 Immediate Termination

Common grounds for "immediate" termination include:

(1) Revocation of suspension of a physician's license to practice medicine in the State or revocation of the physician's DEA or BNDD registration;

(2) Suspension or revocation of the physician's active medical staff membership or clinical privileges at the hospital that result in the physician's inability to perform services under the agreement;

(3) The physician is finally adjudicated guilty or pleads guilty or nolo contendere to a felony or crime involving moral turpitude;

(4) The physician becomes ineligible to participate in the Medicare or Medicaid programs or becomes included on the Missouri Employee Disqualification List;[8] or

(5) The death of the physician.

3.7.2 Opportunity to Cure

When a ground for termination allows for an "opportunity to cure," the physician is typically allowed some period of time (e.g. ten (10) days) in which the physician must correct the ground for termination after receiving a written notice of the issue from the hospital.

Common grounds for termination, with an opportunity to cure include:

(1) The physician breaches any provision of the employment agreement, including but not limited to any representation and warranty or covenant, which is not corrected by the physician within ten (10) days after receiving written notice from the hospital.

(2) The physician neglects physician's duties or violates the Medical Staff Bylaws, Medical Staff Rules & Regulations, or Hospital Bylaws, rules, regulations, or policies, which is not corrected by the physician within ten (10) days after receiving written notice from the hospital.

(3) The hospital determines, in good faith, that the physician is not providing adequate patient care or that patient safety is jeopardized by continuing the physician's employment. Here, a physician should be provided with written notice of the determination and provided a period of time to demonstrate improvement. It is important to note that termination of employment is different than termination of Medical Staff Privileges. As discussed below, a hospital should consider how actions taken under the employment agreement affect the Medical Staff Bylaws.

(4) Conduct by the physician which, in the opinion of the hospital, demonstrates the physician's inability to work with and/or relate to patients, other medical staff members, members of other health disciplines, the hospital administration, employees or the Board of Trustees in a cooperative, professional manner, if such

[8] The Employee Disqualification List (EDL) is maintained by the Missouri Department of Health & Senior Services and is a listing of individuals who have been determined to have, among other offenses, abused or neglected a patient. Hospitals and several other provider types are prohibited from employing a person, in any capacity, whose name appears on the EDL. Employee Disqualification List http://health.mo.gov/safety/edl/

conduct is not correct by the physician within ten (10) days after receiving written notice.

While it can be beneficial to allow a physician a period of time to "cure" impermissible conduct or behavior, a "cure period" can become difficult to administer when the physician repeatedly engages in the same conduct or behavior. For example, a hospital may decide to provide a disruptive physician with a notice that the physician has ten (10) days in which to correct the disruptive behavior or face termination. What happens if the physician "cures" the behavior only to repeat the same behavior six (6) months later? Is the physician entitled to a new notice and cure period? A hospital will need to carefully consider what grounds for termination will be afforded a cure period, and also consider whether a physician will only be afforded one (1) opportunity to cure the same conduct or behavior.

3.7.3 Without Cause Termination

A "without cause" termination provision generally allows either party to terminate the employment agreement upon some written notice period, usually ranging from thirty (30) days to ninety (90) days.

From a hospital's standpoint, this type of clause can provide a more simple approach to ending an agreement with a physician who just isn't working out. The hospital may wish to reserve the right to "accelerate" the notice period, and simply pay the physician the compensation that would have been due had the physician been allowed to work during the notice period. If the hospital intends to apply this pay-out approach, it should be certain that it correctly calculates the compensation that would have been due the physician for working during the notice period – this can present difficulties when the physician is on a productivity or other incentive-based compensation model.

From a physician's standpoint, a "without cause" termination clause creates uncertainty. A physician is likely to view an agreement with a ninety(90)-day "without cause" termination provision to be a "ninety (90)-day agreement." Especially in cases where a physician would need to move several miles to work at the hospital, the reality that the hospital could terminate the agreement at any time may deter the physician from initially accepting employment at the hospital. One way to deal with this issue is to draft the "without cause" termination provision to take effect only after the first year of the agreement is completed.

3.7.4 Effect of Termination

It is important that each party understand the effect of termination with respect to each party's rights and responsibilities. Unless the employment contract and Medical Staff Bylaws allow otherwise, the termination of a physician's employment does not automatically result in the termination of a physician's medical staff membership and clinical privileges at the hospital. Under some circumstances, a hospital may desire that a physician previously under contract

remain on the hospital's medical staff as an independent practitioner. If the termination of a physician's employment does result in termination of the physician's medical staff membership, the hospital will need to consider how the physician's later reapplication for medical staff membership will be handled.

Additionally, the hospital should consider whether the termination of the physician will ultimately lead to any mandatory reports to state or federal agencies. Missouri law, for example, requires hospitals to report to the appropriate health care professional licensing authority any disciplinary action against any health care professional (e.g. a physician) or the voluntary resignation of any health care professional against whom any complaints or reports have been made which might have led to disciplinary action.[9] "Disciplinary action" means any final action taken by the board of trustees of a hospital (or by certain other health care entities) to reprimand, discipline or restrict the practice of a health care professional.[10] Only such reprimands, discipline, or restrictions in response to activities which are also grounds for disciplinary actions according to the professional licensing law for that health care professional are to be considered disciplinary actions.[11]

Reporting obligations to the National Practitioner Databank (NPDB) apply when, based upon a physician's professional competence or conduct, a professional review action adversely affects the physician's clinical privileges for a period of more than thirty (30) days.[12] A NPDB report is also required when there has been an acceptance of a physician's surrender or restriction of clinical privileges while under investigation for possible professional incompetence or improper professional conduct in return for not conducting an investigation or reportable professional review action.[13]

When a physician's termination of employment is tied to quality issues, professional misconduct or disruptive conduct, it is important that the hospital evaluate all of the surrounding circumstances, including requirements under the medical staff bylaws, to determine whether a mandatory report is necessary.

3.7.5 Post Termination Responsibilities

Upon termination of the agreement, each party will have certain rights and responsibilities. As an employee, a physician is entitled to all compensation that would have been due the physician up through the date of termination and will also enjoy the rights of any other employee post-employment, such as COBRA benefits. The hospital should, however,

[9] RS Mo 383.133.1

[10] RS Mo 383.133.1

[11] RS Mo 383.133.1

[12] 42 U.S.C. 11133(a)

[13] 42 U.S.C. 11133(a)

determine whether the physician will be subject to any contractually obligated repayment obligations with respect to any sign-on bonus or other recruitment incentive, and calculate and notify the physician of the same.

With respect to the transition of patient care, the employment agreement should provide that any notice sent to patients regarding the change must be drafted or pre-approved by the hospital. The agreement should also require the physician to cooperate with the hospital on timely completion of any outstanding charts. A hospital should avoid the temptation to withhold a physician's final paycheck until charts are completed, as this practice would violate Missouri wage-hour law.[14]

Additionally, certain provisions of an employment agreement by their nature "survive" termination. These provisions include, for example, covenants not to compete and confidentiality clauses.

4. The Employment Agreement: Critical "Boiler Plate" Provisions

An employment agreement typically closes with what are sometimes referred to as "Boiler Plate" or "Miscellaneous" provisions. These provisions are often overlooked by the parties, but address important topics such as confidentiality and ownership of records, where notices are sent, how amendments to the agreement may be made, whether the agreement can be assigned retention of books, and what law will govern any disputes regarding the agreement. Examples of common "boiler plate" provisions follow:

4.1 Confidentiality and Ownership of Records

Although an employment agreement will generally require a physician to abide by the hospital's policies, which would include HIPAA Privacy and Security policies, it is important to address the physician's obligations to maintain confidentiality of patient information as well as the hospital's proprietary information within the employment agreement. Such a clause is particularly important under circumstances where a physician, who is not subject to a covenant not to compete, has left the hospital for employment with a competitor.

> *Confidentiality Covenant. Physician acknowledges that, in connection with this Agreement and the services provided hereunder, Physician will be acquiring and making use of confidential information and trade secrets of Hospital which include, but are not limited to, management reports, marketing studies, marketing plans, financial statements, internal memoranda, reports, patient records, patient lists and other materials or records of a proprietary nature ("Confidential Information"). Therefore, in order to protect such Confidential Information, Physician agrees that Physician will not, after the date*

[14] RS Mo 290.110

hereof for so long as such Confidential Information may remain confidential, use such Confidential Information except in connection with the performance of Physician's duties pursuant to this Agreement unless Hospital consents in writing to such use or disclosure, and except if required to make such disclosure by order of a court of proper jurisdiction after reasonable prior notice to Hospital. The terms of this provision shall survive the expiration or termination of this Agreement.

Physician further covenants and agrees to maintain the confidentiality of individually identifiable health information in compliance with applicable state and federal laws and regulations and Hospital policies and procedures, including, but not limited to, the privacy and security standards of the Health Insurance Portability and Accountability Act of 1996 set forth at 45 C.F.R. parts 160, 162, and 164 (collectively, "HIPAA") and HITECH, as amended from time to time.

Ownership of Records. All Confidential Information, shall belong to Hospital, as shall all case records, case histories, medical records, and other individually identifiable health information concerning patients of Hospital or patients who have been treated by Physician; provided, however, that, to the extent permitted or required by state and federal law governing the confidentiality of medical records, Physician shall have access to, and may obtain copies of, all medical records where services were rendered by Physician if such access is necessary for the defense of litigation, third-party payor audits, licensure examinations or similar purposes. Such access to records shall survive the termination or expiration of this Agreement.

4.2 Notices

Especially when serving a physician with a notice of termination or other adverse communication under the employment agreement, it is important to deliver the notice as described in the "Notices" provision of the employment agreement. If, for example, the hospital is providing the physician with a notice of a breach of the agreement with a ten(10)-day cure period, but fails to deliver the notice as specifically required in the notice provision, the physician might claim that the cure period does not begin running until the hospital has provided notice as described in the agreement. A good practice is to personally deliver notices to a physician with a copy via certified mail, return receipt requested.

Notices. All notices by either party required by this Agreement shall be in writing and sent by certified mail, return receipt requested, or delivered in person to the other party and notice shall be effective upon personal receipt, or in the case of certified mail on the date of refusal to accept the certified letter or the first date of notice of certified mail from the U.S. Postal Service as follows:

If to Hospital:

_____

_____

_____

If to Physician:

At the last address shown
in the physician's credential
file at the hospital

4.3 Amendments

Amendments to the agreement, particularly those related to compensation, should always be reduced to writing and signed by the parties. A written amendment demonstrates that there was a "meeting of the minds" as to what modification the parties are making to the agreement.

> *Amendments. This Agreement supersedes all prior negotiations and agreements between the parties hereto relative to the transaction contemplated by this Agreement, which contains the entire understanding of the parties hereto. This Agreement may only be modified or amended by a writing signed by both Hospital and Physician; provided that if Hospital deems modification necessary to comply with any applicable federal or state law or regulation, Hospital may immediately terminate or modify this Agreement to the extent necessary to comply with such law or regulation notwithstanding any other provision of this Agreement.*

4.4 Assignment

To account for potential changes in a hospital's structure or ownership, it is advisable to have an "assignment clause" that permits the hospital to assign the agreement to entities that are acquiring the hospital or entities in which the hospital will have a controlling interest. If such a clause is not included in the agreement, each physician's separate written consent will need to be obtained prior to assignment of the agreement. Especially where hospitals have a large number of employed physicians, this can be a burdensome process.

> *No Assignment by Physician, Binding Effect. Physician shall not assign this Agreement to any other party or parties without the prior written consent of Hospital. Hospital may assign this Agreement without the consent of Physician to any entity acquiring Hospital, or to any entity in which Hospital will have a controlling ownership interest. This Agreement shall inure to the benefit of and*

be binding upon the parties hereto and their respective successors and permitted assigns.

4.5 Compliance with Law/Books & Records

For purposes of demonstrating that the Stark Law and Anti-Kickback laws were considered in entering the employment arrangement, many employment agreements include a provision expressly stating the parties' intent to comply with these laws. Further, employment agreements typically contain a "books and records" provision for purposes of complying with federal recordkeeping requirements.

Fair Market Value. Notwithstanding any unanticipated effect of any of the provisions herein, no party intends to violate the federal Medicare and Medicaid Anti-Kickback Statute and/or the federal Ethics in Patient Referrals Act as such provisions are amended from time to time. The parties intend that this Agreement meet the requirements of: (a) the employment exception to the Medicare and Medicaid Anti-Kickback Statute which is set forth in 42 U.S.C. §1320a-7b(b)(3)(B), and (b), the bona fide employment relationship exception to the Ethics in Patient Referrals Act which is set forth in 42 U.S.C. §1395nn(e)(2), and the corresponding regulations. This Agreement shall be construed consistent with compliance with such statutes and regulations.

Books and Records. The parties hereby agree to make available for a period of four (4) years after furnishing of services under this Agreement, upon written request of the Secretary of the U.S. Department of Health and Human Services, or upon request of the Comptroller General, or any of their duly authorized representatives, this Agreement, and any of the parties' books, documents, and records that are necessary to certify the nature and extent of costs incurred by Hospital pursuant to this Agreement. Further, if the parties carry out any of their duties under this Agreement through subcontract with a value and cost of Ten Thousand and No/100 Dollars ($10,000.00) or more over a twelve (12) month period with a related organization, such contract must contain a clause to the effect that the related organization shall furnish its books, documents and records upon request as described above to verify the nature and extent of this cost.

4.6 Governing Law

An employment agreement should specify what state law will govern the agreement.

The laws of the State of Missouri shall govern the validity, construction, interpretation, and effect of this Agreement.

5. Conclusion

An effectively written physician employment agreement is only the first step in the physician-hospital employment relationship. The next step is for each party to consistently follow the terms of the employment agreement. For example, the physician should maintain the required clinic schedule and the hospital should carefully follow the compensation methodology set out in the agreement. If the parties decide that a change needs to be made to the terms of the agreement, the change should always be made through a written amendment, signed by each party. While much of the success of an employment relationship also lies with the professionalism of the physician, hospital and medical staff, a well-planned employment agreement lays the groundwork for a successful relationship and supports the delivery of efficient, high quality healthcare.

APPENDIX A

Physician Employment Agreement
Checklist for Key Terms

☐ **Physician Name & Credentials (e.g. M.D., D.O.)**_____

_ Specialty _____

_ Board Certified or Board Eligible?_____

_ Years in Practice _____

☐ **Actual or Projected Compensation (Check all that apply and include amounts)**

_ Base Salary_____

_ Productivity Bonus _____

_ Quality Bonus _____

_ Sign-On Bonus _____

_ Relocation-Expense _____

_ Other (e.g. medical director)_____

_ Other _____

_ Total Compensation _____

_ Compensation Cap _____

☐ **Fair Market Value: Demonstrated Through: (check all that apply)**

_ Independent Market Survey conducted (attach copy)

_ Commercial survey data _____
Name & year of publication/survey percentile

_ Other Source/Justification _____

_____

_____

☐ **Term**

_ Commencement Date _____

_ Contingent Upon (check all that apply)

_ License

_ Board Certified or Eligibility for Board Certification

Certifying body_____

_ Acceptance by Malpractice Carrier

_ Acceptance on Medical Staff with Privileges in _____

_ Length of Term _____

_ Automatic Renew Provision? _____

_ Length of Renewal Term (e.g. 1 year, 3 years, etc) _____

_ Outside Medical Activities Allowed? _____

☐ **Termination**

_ "Without Cause" provision? _____

_ If yes, when may it be exercised? (e.g. only after 1st year) _____

☐ **Malpractice Insurance**

☐ **Tail Coverage**

_ Hospital Pays _ Physician pays

☐ **Benefits (Note any difference from "standard benefits)**

_ Health, Life, Disability_____

_ Retirement _____

_ PTO _____

_ Does PTO Accrue? _____

_ Is PTO "paid out" upon termination? _____

☐ **Restrictive Covenants**

_ Covenant Not to Compete _____
(describe geographic and duration restriction)

_ Other _____