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## **Physician Employment Agreements**

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# Physician Employment Agreements

Sheryl T. Dacso and Patrick Owens\*

## I. INTRODUCTION

Physician employment agreements play an important role in establishing the legal, operational, financial and philosophical parameters of a physician's medical practice. Too often, these agreements are prepared by attorneys who are unfamiliar with the unique issues associated with physician employment arrangements. This paper discusses material provisions frequently included in or considered in connection with a written employment agreement entered into between an employer entity and an individual Texas physician for professional medical services.

Although there are many types of employment and contractual arrangements that a practicing physician may enter into, this paper concentrates on the employment of a physician by a medical group practice. Because Texas has a prohibition against the corporate practice of medicine, only certain types of entities can employ physicians in Texas. *Appendix A* lists certain types of entities that can legally employ a Texas physician. It also lists selected federal and Texas statutes and regulations that impact physician employment arrangements. A detailed discussion of those statutes and regulations is outside the scope of this paper; however, each can have a material impact on the structure and legality of any proposed physician employment arrangement. It is important that the applicability of, and restrictions under, those statutes and regulations be reviewed carefully as a part of drafting any physician employment agreement.

The objective of this paper is to provide a practical analysis of the various components of a typical physician employment agreement and highlight the reason for certain contract provisions. Various provisions are discussed in general terms below, and in many instances sample provisions are included in italics following that general discussion. Readers should keep in mind that "one size does not fit all" and each employment arrangement should be structured to fit the particular practice, roles and responsibilities of the parties as well as financial and legal requirements, including those imposed by third parties such as hospitals. Accordingly, the sample provisions included in this paper should be viewed as starting points that will likely require revision depending on the circumstances.

## II. CERTAIN MATERIAL PROVISIONS OF A PHYSICIAN EMPLOYMENT AGREEMENT

### A. Preamble and Recitals

The introductory paragraphs of the employment agreement usually contain basic information about the parties and the background and purpose of the agreement. The preamble should state the exact legal name of each party and, in the case of a party that is an entity, the type and jurisdiction of formation of that entity. The preamble typically also states the agreement's "execution date" (the date on which the agreement is signed) and, depending on the

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circumstances, it may establish an “effective date” for the agreement that is different than the execution date. *See also* “Term of the Agreement” at Section J below.

Recitals are often included immediately following the preamble, to set forth background information regarding the parties and the purpose of the employment agreement and to provide relevant information to put the terms of the employment agreement in proper context. The recitals usually conclude with a brief statement affirming the intention of the parties to be bound by the agreement. Recitals can demonstrate intent of the parties if there is an ambiguity in the agreement, but they will not be used to determine if an ambiguity exists unless expressly made part of the agreement. Sometimes, the recitals are incorporated by reference as material terms of the agreement.

An example of a preamble and recitals is set forth below:

**PHYSICIAN EMPLOYMENT AGREEMENT**

*This Physician Employment Agreement (this “Agreement”) is entered into on \_\_\_\_\_, \_\_\_\_\_ (the “Execution Date”), but effective as of \_\_\_\_\_, \_\_\_\_\_ (the “Effective Date”), by and between Large Texas Medical Group, P.A., a Texas professional association (“Employer”), and Joan Q. Physician, M.D. (“Physician”).*

**Recitals**

*WHEREAS, through its employed and contracted physicians, Employer conducts a medical practice at \_\_\_\_\_ in \_\_\_\_\_, Texas; and*

*WHEREAS, Physician is duly licensed to practice medicine in the State of Texas; and*

*WHEREAS, Employer desires to employ Physician to render medical services as an employed physician of Employer, and Physician desires to accept such employment, all as stated in this Agreement.*

*NOW, THEREFORE, in consideration of the mutual terms and conditions set forth in this Agreement, the parties, intending to be legally bound, agree as follows:*

**B. Agreement to Employ and Acceptance**

The employment agreement should state that the employer employs the physician, and the physician accepts employment with the employer, in each case on the terms and subject to the conditions set forth in the employment agreement. A sample provision is set forth below; for discussion regarding the commencement date of employment, see “Term of Agreement” at Section J below:

***Agreement Regarding Employment.*** *On the terms and subject to the conditions stated in this Agreement, (a) Employer hereby employs Physician, and (b) Physician hereby accepts such employment by Employer.*

### **C. Physician's Employment Status and Duties**

The employment agreement should state whether the physician is employed on a full-time or part-time basis. It may also state a minimum number of hours the physician is required to work each week or month. Both the employer and the physician may have a vested interest in the agreement expressing the minimum number of hours or shifts. The employer will likely want the agreement to require the physician to work the number of hours foreseeably necessary to cover patient needs and to justify the physician's compensation. The physician may want to ensure that he or she is afforded enough hours or shifts to achieve productivity-based compensation goals, if applicable. Conversely, the physician may desire to cap the required work hours to ensure that he or she is not asked to work more hours than expected at the commencement of the agreement without additional compensation.

The professional and administrative services that the physician is to provide pursuant to the employment agreement should be specified in reasonable detail in the agreement. The physician's duties under the agreement will typically be expressed in list form and include tasks such as patient care responsibilities, completing and submitting to the employer in a timely manner complete and accurate records of all patient care and other services rendered by the physician pursuant to the agreement, adhering to compliance or quality assurance standards or procedures, abiding by professional and legal standards and requirements, attending CME courses, supervising physician assistants, nurses or other medical personnel, and complying with policies, procedures, compliance plans and other rules and regulations adopted from time to time by the employer.

A common issue affecting the physician is "on call" coverage requirements, which are shared obligations of all physicians in a practice but are often disproportionately assigned to the new physician to help grow his or her practice. Coverage responsibilities may be based on an equitable division among physicians, seniority of physicians in the practice, the employer's need to ensure that adequate physician coverage is available, or other factors. Call schedule and assignments, including with respect to evenings, weekends and holidays, should be clearly addressed in the employment agreement. Call coverage provisions should address the locations the physician will cover and how on-call coverage responsibilities will be determined.

The parties may desire for the employment agreement to specify in reasonable detail where the physician's duties will be performed. For example, if an employer has multiple locations within a large geographic area, the physician may want to restrict primary responsibilities to a select number of locations or a certain area of town. Conversely, the employer may desire to retain the right to require the physician to render services at any of the employer's locations and also at hospitals or other health care facilities specified by the employer from time to time. This may become an issue when defining the scope of post-termination restrictive covenants in relation to locations where the physician treated patients on behalf of the employer.

Often, the employment agreement will include a “catch all” provision stating that the physician agrees to perform all duties requested or assigned by the employer, and to perform his or her duties under the direction of the employer. The physician will usually want to state that the employer’s ability to direct and/or control the duties of the physician will not interfere with the physician’s professional judgment or independent medical decision making.

The employment agreement should also state whether and under what circumstances the physician is permitted to perform other “outside services” (such as *pro bono* services, speaking engagements or experts witness consultations), who (the employer or the physician) is entitled to any income derived from those activities, and whether the physician is to be restricted specifically from engaging in certain specified outside activities. These types of provisions often allow the physician to engage in limited outside activities as long as those activities are approved in advance by the employer and do not interfere with the performance of the physician’s duties under the agreement.

An example of provisions addressing issues discussed above in this section is set forth below:

### ***Services and Other Duties of Physician***

(a) ***Full-Time Employment.*** Pursuant to this Agreement, Physician is employed as a full-time employee of Employer. Physician shall devote her best efforts and skills, on a full-time basis, to the performance of her duties hereunder exclusively for and on behalf of Employer. For purposes of this Agreement, “full-time” means a minimum of forty (40) hours each week (plus such additional hours, if any, as Employer may require consistent with the demands of its medical practice) attending to patients of Employer. During the Term, Physician shall not, directly or indirectly, on behalf of herself or any other person, firm, partnership, corporation or other business entity: (i) engage in the practice of medicine other than as an employee of Employer pursuant to this Agreement; (ii) conduct any professional practice or activity, other than the professional practice and activities conducted as an employee of Employer pursuant to this Agreement; or (iii) be involved in any other duties or pursuits for monetary gain which interfere with the performance of Physician’s duties and responsibilities on behalf of Employer pursuant to this Agreement.

(b) ***Duties.*** Pursuant to this Agreement, Physician shall practice medicine as a physician in the specialty of \_\_\_\_\_ and shall perform the professional, administrative and other duties and services described below, all as and when requested by, on behalf of and under the general direction, control and supervision of, Employer:

(i) interviewing and evaluating the medical needs of patients of Employer specified by Employer; and providing medical services and treatment to such patients if, in the reasonable discretion of Physician, such services are in the medical best interests of the patient;

(ii) *participating in such call coverage programs as Employer may implement from time to time to satisfy patient coverage needs. Physician agrees to cooperate with the other physicians and employees of Employer to provide such coverage services in accordance with the policies established by Employer from time to time, including, without limitation, coverage during and after office hours, and on weekends and holidays. Physician acknowledges and agrees that while Employer will endeavor to rotate coverage assignments in an equitable manner among the physicians and employees of Employer, Employer retains the exclusive right to set and modify the coverage assignments from time to time. Physician further acknowledges and agrees that coverage assignments will be established to provide the availability of a physician to patients of Employer on a twenty-four (24) hours per day, seven (7) days per week basis;*

(iii) *supervising health care services provided by physician assistants or nurse practitioners to patients who are evaluated and, as necessary, treated by physician assistants or nurse practitioners of Employer;*

(iv) *generating and completing in a timely manner, and maintaining in the location specified by Employer, adequate, legible and proper medical and other records (clearly documenting all procedures and interpretations) in form and content consistent with policies and procedures of Employer established by Employer from time to time, for all patients treated by Physician while employed by Employer;*

(v) *assisting Employer in billing for all services provided by Physician pursuant to this Agreement;*

(vi) *participating in any quality assurance, utilization review, and risk-management programs required by Employer from time to time;*

(vii) *participating in marketing programs developed or implemented by Employer from time to time;*

(viii) *documenting to Employer all complaints relating to any services provided by Physician (including, without limitation, all patient complaints) and participating in the resolution of complaints and problems as specified by Employer; and*

(ix) *performing such other services and duties as are required by any other provision of this Agreement or as may from time to time be assigned to Physician by Employer.*

(c) **Other Requirements.** *In connection with this Agreement and her performance of services under this Agreement, at all times Physician shall:*

(i) *maintain a valid and unrestricted license to practice medicine in the State of Texas issued by the Texas Medical Board;*

(ii) *possess all appropriate certifications, registrations and approvals from the Federal Drug Enforcement Administration, the Texas Department of Public Safety and any other applicable federal or state agency necessary to prescribe and dispense drugs under applicable federal and state laws and regulations, in each case without restriction;*

(iii) *be duly enrolled as a physician in the federal Medicare program and the Texas Medicaid program and eligible to seek reimbursement under such programs for covered services rendered by Physician to beneficiaries of such programs;*

(iv) *maintain full, active medical staff memberships and clinical privileges at all hospitals and other health care facilities specified by Employer from time to time, including, without limitation, as determined by Employer to be necessary or advisable in connection with participation in contracts with third-party payors negotiated by Employer or on Employer's behalf;*

(v) *render services to patients of Employer in a competent, professional and ethical manner and in accordance with prevailing standards of practice, and otherwise act in a manner consistent with all applicable professional and ethical requirements and standards established by applicable federal, state and local licensing or accrediting agencies and bodies and professional associations;*

(vi) *comply with all applicable federal, state and local laws and regulations;*

(vii) *assist Employer where appropriate in maintaining compliance with all applicable professional and ethical requirements and standards established by applicable federal, state and local licensing or accrediting agencies and bodies and professional associations;*

(viii) *comply with the certificate of formation, bylaws, policies, procedures, standards, requirements, compliance plans, and other rules and regulations of Employer as may be established from time to time by Employer;*

(ix) *maintain Physician's skills through continuing education and training, including, without limitation, by participating in any programs designated by Employer from time to time;*

(x) *maintain eligibility for insurance under the professional liability policy or policies at a commercially reasonable cost, as*

*determined by Employer, carried by or on behalf of Employer with respect to Physician's specialty;*

*(xi) promptly disclose to Employer the commencement or pendency of any action, proceeding, investigation or disciplinary proceeding against or involving Physician, including, without limitation, any medical staff investigation or disciplinary action;*

*(xii) provide Employer with prompt written notice of any threat, claim or legal proceeding against Employer that Physician becomes aware of, and cooperate with Employer in the defense of any such threat, claim or proceeding and enforcing the rights (including rights of contribution or indemnity) that Employer may have against other parties or through its insurance policies;*

*(xiii) not discriminate against a patient based on race, creed, national origin, gender, sexual orientation, disability (including, without limitation, the condition(s) for which the patient seeks professional services from Physician), ability to pay or payment source;*

*(xiv) perform Physician's duties (including, without limitation, relations with patients, other members of the medical staff of Employer, and Employer personnel, visitors, vendors, and contractors) in a diligent, faithful, harmonious, cooperative, and courteous manner. Physician shall not act, or omit to act, in a manner which would be disruptive to Employer, or which would jeopardize the health or safety of any patient or other person. Physician shall not engage in any verbal or physical personal conduct that affects patient care negatively, or any disruptive behavior that interferes with one's ability to work with Employer personnel, other members of the medical staff of Employer or any person providing medical, administrative, maintenance or other services of any kind to, for or on behalf of Employer, whether employed, serving as volunteers, or working as independent contractors; and*

*(xv) satisfy such other reasonable requirements as are established from time to time by Employer.*

**(d) Control and Direction by Employer.** *Physician shall be subject to the Employer's general direction, control and supervision with respect to all activities on behalf of Employer, including, without limitation, the assignment of patients to be evaluated and possibly treated by Physician, the setting of work hours, the times during which Physician will be on call, the determination of location(s) where Physician is to provide services pursuant to this Agreement, the setting of vacation and leave, and the establishment of professional policies and procedures. Without limiting the generality of the immediately preceding sentence, Employer shall have the exclusive authority to establish the hours during which Physician is to perform services pursuant to this Agreement, to*

*specify the location(s) at which such services are to be performed, and to determine the patients of Employer who are to be evaluated and possibly treated by Physician.*

*(e) **Independent Medical Judgment of Physician.** Notwithstanding the preceding provisions of this Section \_\_ or anything in this Agreement to the contrary, Physician will be free to exercise her own independent medical judgment regarding the treatment of any particular patient to be evaluated and treated by her pursuant to this Agreement, in accordance with the standards of good medical practice.*

*(f) **Other Activities of Physician.** Notwithstanding subsection (a) above, this Agreement shall not be construed to prohibit Physician from: (i) engaging in any charitable, civic, political or community activity or membership in any professional organization, including, without limitation, the rendering of medical services to patients at medical offices, clinics or other health care facilities (other than pursuant to this Agreement) on a charitable and/or indigent basis without the collection of any fees, salary or other compensation therefor; or (ii) acting as a speaker or consulting as an expert witness for compensation; provided, however, that Physician first obtains the written approval of Employer to participate in any such activities and such activities do not interfere with any of Physician's obligations and duties under this Agreement. Subject to such prior approval from Employer, Physician may retain any income derived from such activities described in the immediately preceding clause (ii) so long as such activities were performed without the use of any equipment, supplies or other property of Employer or any other personnel of Employer.*

#### **D. Physician Compensation**

Compensation arrangements are varied. They can range from a fixed "base compensation" plus incentive to production-based compensation formulae. The employment agreement should clearly specify the methodology for determining the amount of the compensation to be paid by the employer to the physician for his or her services rendered pursuant to the employment agreement. Compensation arrangements will often vary depending on a variety of factors, including the physician's specialty, the type of employer, whether or not compensation is based on a physician recruitment agreement, and consideration of the factors listed in the attached *Appendix A*.

The American Medical Association has stated that a well-designed compensation plan for physicians should achieve the following: (a) provide compensation that is consistent with recognized benchmarks for the physician's experience and specialty and is also competitive enough to attract the best doctors; (b) provide adequate compensation to retain valued physicians; (c) offer a sufficient base salary to promote income security; (d) establish incentives that promote physician productivity and efficiency; (e) maintain the financial viability of the organization; (f) be based on objective criteria that are easily understood by physicians subject to the plan; (g) promote a sharing of risk between the physician and the organization; (h) recognize different incentives for capitation and other risk-based payment versus fee-for-service; (i)

provide a mechanism for performance measurement and feedback to the physician; (j) distribute bonus or incentive compensation on a periodic basis; (k) promote a long term commitment between the physician and the organization; and (l) promote physician involvement in the overall direction of the organization. See American Medical Association, *Physician Employment, Compensation, Contract Benefits and Incentives* (2004), available at [http://www.ama-assn.org/ama1/pub/upload/mm/34/compensation\\_benefit.pdf](http://www.ama-assn.org/ama1/pub/upload/mm/34/compensation_benefit.pdf) (last visited March 26, 2009).

Several alternatives are typically considered when structuring the employed physician's compensation arrangement, including a fixed base salary, a discretionary bonus, a productivity-based incentive or bonus payment, or a combination of a fixed base salary and a discretionary bonus or productivity-based payment.

The fixed base salary provision generally states the physician's annual compensation as a fixed amount that will be paid periodically throughout the employment period, regardless of the physician's productivity. While this type of arrangement is easily understood and implemented, the employer may be concerned that the fixed, guaranteed salary will not provide motivation for increased productivity on the part of the physician. Whether this approach is acceptable or appropriate for the physician, on the other hand, may depend on the physician's particular circumstances. For example, a physician nearing retirement may prefer a guaranteed salary that does not vary, while a younger physician may prefer an arrangement under which he or she is rewarded for increased productivity.

Although in some cases a simple fixed compensation amount will be appropriate, more often than not the compensation provisions are structured to be more complex as a result of the varied objectives of the parties. In such instances, the employment agreement may simply provide for a discretionary bonus to the physician in addition to a stated base salary amount, or it may provide for a payment to the physician if he or she achieves certain productivity-based targets stated in the agreement which payment may be in lieu of or in addition to a base salary payment. The employer may perceive that a productivity-based arrangement will encourage and reward a physician's extra effort and productivity, thereby increasing not only the physician's compensation but also the overall performance of the employer organization. However, payment structures of this kind may also create an environment of competition within the group, which the physician may or may not desire.

The discretionary bonus provision generally allows the employer to decide the amount (often up to a stated dollar amount or a stated percentage of the physician's base salary) and timing of the bonus payment and whether or not the physician receives a bonus payment at all.

Under a productivity-based compensation arrangement, the physician's pay, or a substantial portion of it, is based on performance factors such as the employer's charges or collections for the physician's services in a specified period. Such a provision may provide for a bonus payment equal to a stated dollar amount or percentage of the physician's base salary or of other specified amounts (such as the employer's cash collections from services rendered by the physician) if a certain level of productivity is achieved. The provision may also be tiered to provide for increasing levels of compensation as increased levels of productivity are met by the physician. This hybrid compensation plan allows the physician to be sure of the guaranteed base salary payment while also providing incentives for increased production that benefit the

employer. Regardless of the approach used, when dealing with productivity-based payment arrangements, it is important to establish and set forth in the employment agreement how productivity will be calculated, what is included in the calculation and when payment will be disbursed.

A physician employment agreement may be entered into in connection with a separate physician recruitment agreement and include an income guarantee from a local hospital for the physician's initial period of practice. These arrangements require careful review and scrutiny since they add external conditions on the employer/employee relationship, such as (a) reporting of financial information to the hospital and (b) limitations on how recruitment subsidies are allocated within the practice. Under the federal Stark Law, funds from these types of subsidies generally may be applied towards practice overhead attributable to the new recruit, but the costs allocated by the employer to the new recruit for this purpose are expressly limited to "the actual additional incremental costs attributable to the recruited physician." Also, hospitals will often seek to impose on the employer certain obligations such as a guaranteed repayment of the recruitment subsidy if the physician defaults, or to impose a security interest on the accounts receivable attributable to the services of the recruited physician. Often, the employment agreement will take into account the planned expiration date of the income guarantee by reducing the physician's base salary upon such expiration and thereafter providing for a compensation methodology based more on the physician's productivity than on a base salary.

A sample provision providing for the physician to receive a fixed base salary is set forth below:

***Base Salary.*** Employer shall pay Physician a fixed salary of (a) One Hundred Thousand Dollars (\$100,000) for the first year of the Term, and (b) One Hundred Twenty Five Thousand Dollars (\$125,000) for the second year of the Term. Such amounts for each year shall be paid in equal installments (less applicable required deductions, including payroll taxes required to be withheld) on the fifteenth and last day of each calendar month, and shall be subject to proration for any partial employment year.

Set forth below is a sample provision under which the physician's compensation is based solely on a specified percentage of his or her productivity for a specified period (as indicated above, such a productivity-based payment may also be made in addition to a stated base salary):

***Possible Productivity Payment.*** On or before the 15th day of each calendar month, Employer shall pay Physician \_\_\_\_% of Physician's "productivity" for the immediately preceding calendar month. For purposes of the immediately preceding sentence, Physician's "productivity" for any calendar month shall mean (a) the aggregate amount of all charges charged to patients of Employer for services personally performed by Physician in such calendar month pursuant to this Agreement, as evidenced by Physician's entries on the charge slips regularly used by Employer but as adjusted by any contractual allowances, plus (b) the aggregate amount of all teaching fees and other revenue received by Employer in such calendar month, or earned and payable to Employer, based on writing or speaking activities conducted by Physician in such calendar month.

Set forth below is a sample tiered productivity-based compensation provision (as indicated above, this productivity-based payment may be the only compensation paid by the employer to the physician, or it may be in addition to a stated base salary):

***Possible Productivity Payment.*** *Not later than fifteen (15) days after the commencement of each calendar quarter during the term of this Agreement, Employer shall pay Physician a productivity bonus, as additional compensation, based on Collected Revenues for the immediately preceding calendar quarter, in accordance with the following:*

(a) *“Collected Revenues” means all fees and charges charged or assessed by Employer to any patient of Employer for professional services personally performed by Physician pursuant to this Agreement, but only to the extent payment therefor is actually received by Employer in such preceding calendar quarter.*

(b) *There will be no productivity bonus paid on the first \$675,000.00 of Collected Revenues for such preceding calendar quarter.*

(c) *If the amount of Collected Revenues for such preceding calendar quarter exceeds \$675,000.00, the productivity bonus for such calendar quarter shall be (i) forty percent (40%) of the amount of such Collected Revenues between \$675,000.00 and \$700,000.00, plus (ii) sixty percent (60%) of the amount, if any, of such Collected Revenues between \$700,000.00 and \$725,000.00, plus (iii) eighty percent (80%) of the amount, if any, of such Collected Revenues that exceed \$725,000.00.*

## **E. Employee Benefits and Related Matters**

The employment agreement should specify the benefits the physician will receive from the employer. These benefits may be described in the agreement itself, or by reference to other documents such as the employer’s employee benefits manual.

The employment agreement will typically state the parties’ agreement regarding the amount of paid time off (usually a specified number of days or weeks per year) that the physician may be away from work due to vacation, illness or attendance at CME courses. Often, time off may be subject to the prior approval of the employer. The agreement should state what amount, if any, of the unused permitted days off can be carried over to the following year.

The employment agreement will often provide: (a) that the physician will be eligible to participate in the employee benefit or welfare plans the employer makes available from time to time to its other full-time physician employees, subject to the terms of each such plan; (b) for payment or reimbursement by the employer of specified or approved business expenses incurred by the physician; and (c) for the employer to provide or make available the facilities, support staff, equipment, supplies and other items that the employer considers to be necessary for the performance of the services the physician is required to perform pursuant to the agreement.

The employment agreement should also address any professional liability insurance coverage that will be required to be maintained with respect to the physician, as well as which party will be responsible for acquiring and paying for the coverage. If the professional liability insurance coverage maintained pursuant to the agreement is a “claims made” policy (a claims made policy generally provides coverage only for covered claims that are first made or asserted during the policy period), the agreement should also provide for the provision of “tail coverage” after termination. Tail coverage provides liability insurance for covered claims first made or asserted after the end of the original insurance policy period. Depending on the terms of the employment agreement, the employer or the physician may be obligated to obtain (and pay for) the tail coverage. Alternatively, as shown in the sample provision set forth below, the party responsible for paying for tail coverage may depend on the circumstances surrounding the termination of the employment relationship. It is common for the employer to obtain prior authorization from the physician to apply a portion of the final payment towards the purchase of tail coverage. From the physician’s perspective, a termination of the physician “without cause” may be a basis for requiring the employer to cover the cost of tail coverage.

An example of provisions addressing issues discussed above in this section is set forth below:

***Other Benefits.***

(a) ***Vacation Benefits.*** *During each agreement year of the Term, Physician shall be entitled to (i) ten (10) working days of paid vacation, (ii) five (5) working days of paid continuing medical education (“CME”) leave, and (iii) paid days off on the working days on which she takes American Board of \_\_\_\_\_ examinations during such year. Vacation leave and CME leave shall be taken only at times approved by Employer, which approval shall not be unreasonably withheld.*

(b) ***Employer Plans.*** *During the Term, Physician shall be entitled to participate in such employee benefit plans as Employer provides to all of its regular full-time physician employees generally (including coverage for Physician, her spouse and children, under any group health insurance policy maintained by Employer from time to time during the Term, with the premiums due for such coverage being paid by Employee), to the extent and so long as Physician otherwise meets the eligibility requirements of such plans.*

(c) ***Expenses; Continuing Medical Education.*** *During the Term, Employer shall pay, or reimburse Physician for, the amount of: (i) Physician’s medical staff dues and related fees at hospitals and other health care facilities where Employer requires Physician to obtain and maintain medical staff privileges; (ii) Physician’s Texas medical licensure costs and Drug Enforcement Administration registration fees; (iii) out-of-pocket costs incurred by Physician for CME taken by Physician during the Term, and for travel costs incurred by Physician in connection with American Board of \_\_\_\_\_ examinations taken by Physician during the Term, in the annual aggregate maximum amount of \_\_\_\_\_ Thousand Dollars (\$\_\_\_\_\_) for any agreement*

year under this clause (iii); (iv) costs of one cell phone and one pager incurred by Physician for business purposes hereunder during the Term; and (v) any other costs and expenses that Employer, in its sole discretion, determines are reasonably necessary to the performance of Physician's services hereunder.

(d) **Working Facilities.** Employer shall furnish Physician with an office, technical help, supplies, equipment, support personnel and other facilities, items and services suitable to Physician's position and reasonably necessary to the performance of Physician's duties pursuant to this Agreement, all as determined by Employer in its sole discretion.

(e) **Professional Liability Insurance and Tail Coverage.** Employer shall provide professional liability insurance coverage for patient care services performed by Physician within the scope of Physician's duties under this Agreement. Employer shall obtain such coverage from such insurers as Employer may from time to time determine. The coverage limits of such insurance shall not be less than \$500,000 per occurrence and \$1,000,000 annual aggregate. Physician may obtain, at her sole expense, such primary, supplemental or additional professional liability insurance coverage as Physician desires. If (i) Physician voluntarily terminates this Agreement, or (ii) Employer terminates this Agreement for cause, and in either such case professional liability coverage for Physician has theretofore been provided by Employer on a "claims made" basis, Physician (at her sole cost and expense) shall obtain extended reporting coverage ("tail coverage") to continue and maintain coverage protection of Employer for acts or omissions committed by Physician during her employment under this Agreement. If (1) Employer terminates this Agreement prior to its scheduled expiration, other than a termination for cause, or (2) this Agreement expires without early termination, and in either such case professional liability coverage for Physician has theretofore been provided by Employer on a "claims made" basis, Employer may obtain tail coverage, and if it so chooses to obtain such tail coverage, Employer shall pay the applicable premium for such coverage. If the premium for tail coverage is paid by Physician, Physician shall provide Employer with evidence of such tail coverage.

## **F. Billing and Collecting for Services of the Physician**

The employment agreement should state that the employer has the exclusive right to establish the amount of the fees to be charged for the professional services rendered by the physician pursuant to the agreement. The agreement should also state that the employer owns and has the exclusive right to bill and attempt to collect all such fees, and that the physician assigns to the employer the right to do so and further agrees not to bill or attempt to collect any such amounts. Under reassignment rules, a group practice may bill and collect for an employed physician's services provided to a patient. Medicare specifically recognizes the ability of an employer, under such a reassignment, to bill Medicare for covered services rendered by a physician employee of the employer.

An example of a provision addressing issues discussed above in this section is set forth below:

***Amount and Ownership of Professional Fees; Billing and Collecting for Physician Services.*** *Employer has the exclusive right to establish and modify from time to time the amount of all fees to be charged for professional services rendered by Physician under this Agreement. All such fees shall be charged on behalf of and in the name of Employer, and all such fees shall be the sole property of Employer. As a condition of Physician's employment hereunder, Physician hereby assigns to Employer any current and future right Physician might have from time to time to bill and receive payment from any individual patient or other third-party payor, including, without limitation, any managed care payor and the Medicare and Medicaid programs, for professional services rendered by Physician under this Agreement. Physician is hereby precluded from billing for any of Physician's professional services under this Agreement unless required by a third-party payor, in which event Physician shall bill such services only if and to the extent Employer directs in writing that Physician do so and with the understanding that all fees generated from such billings shall belong to and be remitted to Employer.*

#### **G. Ownership of and Access to Records**

As indicated above, the employment agreement will likely include a requirement that the physician complete and submit to the employer in a timely manner complete and accurate records of all patient care and other services rendered by the physician pursuant to the agreement. The agreement should also specifically address ownership of and access to those records both during the term of the agreement and after termination. Typically, these provisions will state that all of the records are the property of the employer, and require the physician to return all such records to the employer upon termination of the agreement and at any other time upon demand of the employer. An example of such a provision is set forth below:

***Ownership of and Access to Records.*** *All case records, case histories, x-ray films, and other files or records concerning patients consulted, interviewed, examined, treated or cared for by Physician during Physician's employment with Employer shall belong to and remain the property of the Employer, and Physician hereby assigns to Employer all right, title and interest, if any, of Physician therein. Upon termination of this Agreement, and at any other time upon demand by Employer, Physician will deliver to Employer all such records, histories, films or files that are, directly or indirectly, in her possession or under her control; provided, however, that upon the expiration or any termination of this Agreement, Physician shall have the opportunity to reproduce at a reasonable cost to Physician and at times agreeable with the Employer, any of such records, histories, films or files, subject to applicable Texas and federal confidentiality and/or privacy requirements.*

See "Restrictive Covenants" at Section L below for a discussion of a Texas statute that states requirements relating to patient-related records, and requirements that must be addressed

in a covenant not to compete with a Texas-licensed physician in order for that covenant to be enforceable.

#### **H. Participation by Physician in Managed Care Contracts**

A physician employment agreement will often provide that the employer has the exclusive right to negotiate, amend and terminate managed care contracts (e.g., with HMOs, PPOs or IPAs), including in the name of the physician, and require the physician to participate in managed care contracts specified by the employer. An example of such a provision is set forth below:

*Participation in Managed Care Contracts. Physician grants to Employer an irrevocable power of attorney to negotiate, enter into and amend managed care contracts in the name of Physician. Employer shall make all reasonable efforts to obtain membership for Physician in all health maintenance organizations (HMOs), preferred provider organizations (PPOs), independent practice associations (IPAs) and other managed care organizations or payor networks that Employer contracts with or participates in during the Term. Physician agrees to comply with the provisions of all managed care contracts that Employer is bound by during the Term, and to sign and deliver any such contracts or related documents to the extent directed by Employer.*

#### **I. Representations and Warranties of the Physician**

A physician employment agreement usually includes representations and warranties regarding matters that are considered basic and fundamental to the employer's decision to employ the physician, including representations that: (a) the physician is duly licensed as a physician by the applicable state licensing authority; (b) the physician is enrolled in the Medicare and applicable state Medicaid programs and has never been excluded from participation in those programs or any other federal health care program; (c) the physician has never had his or her medical staff privileges at any hospital or other facility involuntarily suspended, restricted or terminated; (d) the execution, delivery and performance of the employment agreement by the physician does not and will not violate or constitute a breach of any other agreement to which the physician is a party or by which the physician is bound (including, without limitation, any covenant not to compete or other restrictive covenant binding on the physician); and (e) other matters. These provisions are typically coordinated with the termination provisions of the agreement to provide that the employer has the right to terminate the agreement for cause if any such representation or warranty was untrue when made or becomes untrue during the term of the agreement.

An example of provisions addressing issues discussed above in this section is set forth below:

*Representations and Warranties of Physician. Physician represents and warrants to Employer as follows:*

*(a) Physician holds a valid and unrestricted license to practice medicine in the State of Texas issued by the Texas Medical Board. Physician has*

*never had any physician license held by her limited, withdrawn, suspended, curtailed or revoked in any state or jurisdiction, nor has Physician ever been placed on probation by any medical licensing board;*

*(b) Physician possesses all appropriate certifications, registrations and approvals from the Federal Drug Enforcement Administration, the Texas Department of Public Safety and any other applicable federal or state agency necessary to prescribe and dispense drugs under applicable federal and state laws and regulations, and no such certification, registration or approval now or previously held by Physician has ever been limited, withdrawn, suspended, curtailed, placed on probation or revoked;*

*(c) Physician is duly enrolled as a physician in the federal Medicare program and the Texas Medicaid program and eligible to seek reimbursement under such programs for covered services rendered by Physician to beneficiaries of such programs. Physician's enrollment in and eligibility to participate in any such program or in any other third-party payment system has never been curtailed, suspended, revoked or otherwise been the subject of any proceeding which can result or could have resulted in the same;*

*(d) Physician is not now listed by a federal agency as excluded, debarred, suspended or otherwise ineligible to participate in any federal program, including Medicare and Medicaid, and is not now listed, nor has any current reason to believe that during the Term she will be listed, on the HHS-OIG Cumulative Sanctions Report or the General Services Administration List of Parties Excluded from Federal Procurement and Non-Procurement Programs. Physician shall give Employer immediate notice if Physician is listed on the HHS-OIG Cumulative Sanctions Report or on the General Services Administration List of Parties Excluded from Federal Procurement and Non-Procurement Program. Any such notice shall be communicated to Employer orally and followed with written notice as provided in this Agreement;*

*(e) Physician is a member of the active medical staff of those health care facilities listed on Exhibit "A" to this Agreement, and she holds at such respective facilities the clinical privileges listed on such Exhibit. Physician has never been denied medical staff membership or reappointment to medical staff membership at any health care facility. No medical staff membership now or previously held by Physician has ever been limited, suspended, curtailed, revoked, placed on probation or withdrawn as a result of action (whether formal or informal) initiated by the health care facility or its medical staff, nor has any such membership ever been the subject of any proceedings which can result or could have resulted in the same;*

*(f) Physician has never been convicted of a felony or any crime involving moral turpitude;*

(g) *Physician has never been a party to or the subject of any litigation relating in any way to medical services provided or omitted by Physician. To the best of Physician's knowledge, there is no litigation, investigation or proceeding, whether civil, criminal or administrative in nature, pending against Physician as of the Effective Date; and*

(h) *None of the execution, delivery or performance of this Agreement by Physician will violate, conflict with or constitute a breach or default under any agreement (whether written or oral) to which Physician is a party or by which Physician is bound.*

## **J. Term of the Agreement**

The employment agreement should clearly state the scheduled term of the agreement, including the beginning date of the term, any provisions for renewal of the agreement (either automatic renewal or renewal at the option of a party) and the scheduled expiration date. Typically, the agreement will describe the term as beginning on a stated "effective date" and continuing until the earlier of a specified expiration date or the date on which the agreement is terminated early pursuant to termination provisions stated in the agreement.

However, the employment agreement may refer to and distinguish between three relevant dates: (a) the "execution date" (the date the agreement is signed); (b) the "effective date" (the date on which the agreement becomes effective); and (c) the "start date" (the date on which the physician is to begin providing professional or administrative services on behalf of the employer). Often, these dates are identical; however, any differences should be specifically stated in the agreement. In any event, it is important to have the employment commencement date clearly identified.

The distinction between the "effective date" and the "start date" may be important to the performance of the employment agreement. In many instances, an employer will agree to provide financial support toward the physician's continued education, training or relocation or other expense allowances or reimbursements, before the physician begins providing any professional or administrative services for the employer. Similarly, an employer may require the physician to obtain a particular level of training or privileges at a particular hospital or other facility before beginning work. If either party is required to perform any other obligations under the agreement prior to the date on which the physician is to commence providing professional or administrative services, it will be important to distinguish clearly between the effective date of the agreement and the start date for those services and to ensure that the effective date is prior to when those other obligations are to be performed.

The length of the term of the employment agreement will vary depending on the circumstances, including needs and desires of the parties and the extent and nature of the relationship between them. The agreement may be structured to cover only a short-term staffing need of the employer or, alternatively, either a longer stated term or a series of shorter terms that automatically renew absent an affirmative action taken by either party to terminate or prevent renewal of the agreement.

The sample preamble provision shown under “Preamble and Recitals” at Section A above defines “Execution Date” and “Effective Date.” The following is a sample term provision:

***Term of Agreement.** The term of this Agreement shall commence on the Effective Date and shall continue until the earlier of (a) the close of business on \_\_\_\_\_, \_\_\_\_\_, or (b) the date on which this Agreement is terminated pursuant to Section \_\_ or Section \_\_ below; provided, however, that upon the expiration of each then existing scheduled term of this Agreement, this Agreement shall automatically renew for an additional one year term (subject to earlier termination as stated in Section \_\_ and Section \_\_ below) unless either party delivers written notice to the other, not less than ninety (90) days prior to the scheduled expiration date of the then existing term, of such party’s election for this Agreement not to renew upon the expiration of such scheduled term. The period commencing on the Effective Date and ending on the date on which the term of this Agreement (including all renewal terms) expires or is terminated is referred to herein as the “Term.” Notwithstanding the foregoing, the first date on which Physician is permitted or required to provide professional or administrative services on behalf of Employer pursuant to this Agreement shall be \_\_\_\_\_, \_\_\_\_\_ (the “Start Date”).*

#### **K. Termination**

The provisions of the employment agreement addressing expiration or termination of the employment relationship between the employer and the physician are often some of the most important in the agreement. This will be particularly true in those situations where the relationship does not develop and proceed as planned and a dispute arises between the parties. It is important to give careful consideration, in advance, to the various circumstances or events that may result in expiration or termination of the agreement, and the effect of any expiration or termination on the various rights and obligations of the parties, and to accurately state in the employment agreement the agreements of the parties regarding those matters. In the case of an agreement that automatically renews for successive terms, there should be a sufficient advance notice provision that will enable the agreement to expire in an orderly manner, as termination provisions can often be the basis for challenge since they affect important rights related to compensation and sometimes restrictive covenants.

As mentioned in the prior section, an employment agreement will usually provide for a scheduled “expiration” date, or the date on which the agreement will end absent an automatic renewal of the term or some other action by one or more of the parties to renew the agreement or terminate it prior to the scheduled expiration date. The employment agreement will also typically provide for the possibility of an early termination of the agreement prior to its scheduled expiration date, either automatically, “without cause” or “for cause.”

Physician employment agreements often provide for automatic termination upon the occurrence of specified events such as death of the physician or dissolution of the employer entity. Other circumstances that the parties might agree will cause automatic termination of the employment agreement include material adverse legislative or administrative changes or permanent disability of the physician.

Provisions for termination of an employment agreement “without cause” commonly permit the termination to be initiated by a specified party or parties “for any or no reason,” typically after the terminating party has given the other party advance written notice (often 60 or 90 days) of termination. The parties should carefully consider whether they want to include a “without cause” termination provision in the employment agreement, as such a provision effectively means that the party or parties with the right to terminate the agreement early under that provision has the power to avoid the longer scheduled term regardless of whether or not the other party has performed its obligations under the agreement.

The employment agreement will typically provide that a party may terminate the agreement “for cause” if certain circumstances occur as a result of an act or omission by the other party. For example, the agreement might state that the employer has the right to terminate the agreement if: (a) the physician fails to maintain an unrestricted license to practice medicine in the state where the employer’s practice is conducted; (b) the physician fails to maintain membership on the medical staff of specified hospitals or other facilities with clinical privileges to perform certain procedures at each such hospital or facility; (c) the physician is excluded from participation in Medicare or other health care payment programs or plans; (d) the physician breaches any provision of the employment agreement; or (e) the physician commits or omits to take certain other specified actions. Similarly, the agreement might state that the physician has the right to terminate the agreement if the employer fails to pay in a timely manner the compensation due to the physician under the agreement or breaches any other provision of the agreement. In any of the specified circumstances, the agreement might provide that the termination will occur automatically upon the occurrence of the specified event, or only if the terminating party sends the other party notice of termination, or only if the circumstance giving rise to the possible termination is not cured or remedied within a specified time period (or within a specified time period after the terminating party gives notice of the breach or other act or omission that would give rise to the possible termination).

The parties and their counsel should carefully consider the acts, omissions or occurrences that may give rise to a “for cause” termination of the employment agreement, and the means by which the termination is to be effected (*i.e.*, whether the termination will be automatic upon occurrence of the specified events or will require a notice of termination from the terminating party, or may occur only after notice and an opportunity to cure). Each employment relationship is different and unique, and the “for cause” termination provisions in any employment agreement should be tailored to the specific desires and needs of the parties to that agreement.

Regardless of the basis on which the employment agreement expired or was terminated early, the agreement should specify the effect of the expiration or termination on the obligations of the parties thereunder. For example, the agreement might confirm the obligation of the employer to pay the physician for all base salary earned (on a prorated basis) through the termination date as well as all unreimbursed business expenses incurred by the physician to that date and owed by the employer under the terms of the employment agreement, negate any obligation on the part of the employer to pay any prorated portion of any bonus that the physician might have earned had he or she remained employed until the scheduled bonus payment date or the scheduled expiration date of the agreement, require the employer to make specified severance payments to the physician in certain circumstances (such as in the event of termination of the agreement by the employer without cause) or require the physician to repay to

the employer in certain circumstances (such as in the event of termination of the agreement by the physician without cause before a certain date) placement or recruiting fees, signing bonuses or other amounts incurred by the employer in connection with its employment of the physician. The agreement should also specify the obligations thereunder that will survive and continue to be performable after the termination date (including the obligation to cooperate with the employer in connection with the defense of claims or lawsuits against the employer, and covenants not to compete, confidentiality covenants and other post-termination restrictive covenants).

If the employer under the employment agreement is a hospital affiliate, or a physician group that has an exclusive services contract with one or more health care facilities, the employment agreement may include a requirement that upon termination of the agreement the physician will voluntarily resign medical staff membership at that hospital or those facilities.

An example of provisions addressing issues discussed above in this section is set forth below:

### ***Termination***

(a) ***Termination Without Cause.*** *This Agreement and Physician's employment hereunder shall automatically terminate "without cause" upon the occurrence of one or more of the following events, without the necessity of delivery of any notice of termination or any other action except as expressly otherwise stated below in this subsection (a):*

(i) ***Mutual Consent.*** *Employer and Physician agree in writing to terminate this Agreement;*

(ii) ***Death.*** *Physician dies;*

(iii) ***Dissolution of Employer.*** *Employer is dissolved or the business of Employer is otherwise terminated or wound up;*

(iv) ***Incapacity/Disability.*** *Chronic illness, disability or failing health of Physician which (1) prevents Physician from performing her duties and responsibilities under this Agreement for thirty (30) consecutive days, or forty-five (45) days in any six-month period, or (2) is determined by a majority of the members of a panel of three (3) independent physicians (one selected by Employer, one selected by Physician, and one selected by the other panel members) to constitute a permanent disability of Physician that shall permanently prevent Physician from performing on a full-time basis as contemplated by this Agreement services as a physician in the specialty of \_\_\_\_\_. The effective date of the termination under this clause (iv) shall be the end of the applicable thirty (30) day or six-month period referred to in (1) above, or the date on which the final determination of the panel is issued pursuant to (2) above, as applicable; or*

(v) **Written Election.** Employer or Physician gives written notice to the other of the termination of this Agreement pursuant to this clause (v), in which case such termination shall be effective on the later of the termination date specified in such notice or the ninetieth day after such notice is given.

(b) **Termination by Employer For Cause.** At the election of Employer, the occurrence of one or more of the following events shall constitute grounds upon which Employer may immediately terminate this Agreement and Physician's employment hereunder "for cause" effective upon the giving of written notice of termination to Physician:

(i) **Disqualification.** Physician ceases to be licensed to practice medicine in the State of Texas, or any medical license, permit, registration or other license or certification of Physician (including, without limitation, certification of Physician by the Medicare program or the Texas Medicaid program) is suspended, restricted, revoked or canceled, or Physician is otherwise subject to professional discipline or censure, or any representation made by Physician herein is at any time false or inaccurate;

(ii) **Loss of Staff Privileges.** Physician's medical staff membership or privileges at any hospital or other health care facility where Physician provides any services or where Employer requires Physician to obtain and maintain medical staff membership and privileges are denied, revoked, lost, restricted or suspended;

(iii) **Quality of Service.** Employer determines in good faith that Physician is negligent in the performance of health care services;

(iv) **Bad Acts.** Physician commits or permits any act or conduct which, in the good faith determination of Employer: (1) endangers the health, life or safety of any patient, co-worker or other person; (2) may place Employer into public ill-repute or in noncompliance with any federal, state or other law, rule or regulation; (3) adversely affects, or is likely to adversely affect, Employer's relationship with any payor, hospital or other health care facility or patient, or with any third party contracting with Employer; or (4) constitutes professional misconduct, or fraudulent, oppressive or criminal behavior, or alcoholism or substance abuse;

(v) **Failure to Qualify for Insurance Coverage.** Physician fails for any reason to qualify, at reasonable premium rates, for the professional liability insurance coverage required by this Agreement, as offered through a commercial insurance carrier licensed in the State of Texas;

(vi) **Failure to Comply With Employer Policies.** Physician fails to substantially comply with any of the certificate of formation, bylaws, policies, procedures, standards, requirements, compliance plans, or other rules and regulations of Employer as may be established from time to time by Employer;

(vii) **Failure to Satisfy Performance Goals.** Physician fails to satisfy the performance and productivity goals established for Physician by Employer and communicated to Physician; or

(viii) **Breach.** Physician breaches any term or provision of this Agreement, and the breach, if curable and not otherwise cause for immediate termination pursuant to this Section \_\_, is not cured to the reasonable satisfaction of Employer within ten (10) days after written notice of the breach is given to Physician.

(c) **Termination or Amendment For Law Changes.** Employer shall have the right to terminate or unilaterally amend this Agreement, without liability, to comply with any legal order issued, or proposed to be issued, by a federal or state agency or to comply with any provision of law or requirement of accreditation, participation or licensure which: (i) invalidates or is inconsistent with the provisions of this Agreement; or (ii) would cause a party hereto to be in violation of the law. If Employer deems it necessary to amend this Agreement as provided in this subsection and the amendment is unacceptable to Physician, Physician may choose to terminate this Agreement without liability. Any termination of this Agreement pursuant to this subsection shall be deemed to be a termination “without cause.”

(d) **Termination by Physician For Cause.** Physician may immediately terminate this Agreement and Physician’s employment hereunder “for cause” effective upon the giving of written notice of termination to Employer, if: (i) Employer fails to pay any base salary payment due to Physician hereunder and such failure continues for more than five (5) days after the scheduled due date of such payment; or (ii) Employer breaches any other term or provision of this Agreement, and the breach, if curable and not otherwise cause for immediate termination pursuant to this subsection, is not cured to the reasonable satisfaction of Physician within ten (10) days after written notice of the breach is given to Employer.

(e) **Effect Of Expiration or Termination.** Unless otherwise expressly provided herein or in any applicable notice of termination, the expiration or any termination of this Agreement and Physician’s employment hereunder shall be effective from and after the expiration of any curative or notice period expressly stated herein or therein or when the termination notice is deemed given, whichever is applicable. Upon the expiration or any termination of this Agreement, Physician shall be entitled to all base salary earned up to the expiration or termination date pursuant to Section \_\_\_\_\_ of this Agreement

*(prorated by days), and any outstanding and unpaid expense reimbursements owed to Physician hereunder. Upon payment of such amounts payable to Physician as provided in the immediately preceding sentence, Employer shall have no further liability or obligation of any kind to Physician hereunder or as a result of the expiration or termination of this Agreement or the termination of the employment of Physician pursuant to this Agreement; provided, however, that it is expressly agreed that: (i) the provisions of Sections \_\_\_\_ and \_\_\_\_ shall survive the expiration or any termination of this Agreement; and (ii) the expiration or termination of this Agreement shall not affect the liability of either party for any breach of this Agreement.*

#### **L. Restrictive Covenants**

The employment agreement will typically contain provisions restricting the physician's use and disclosure of confidential and proprietary information of the employer, including, without limitation, the identity of the employer's patients, information contained in the employer's patient and medical records, the employer's charges for its services, terms of the employer's managed care contracts, information regarding the employer's personnel, methods of practice, business and financial information, and the like. Related provisions often address the parties' obligations, pursuant to the federal Health Insurance Portability and Accountability Act of 1996 and the regulations thereunder, to not disclose protected health information.

As discussed under "Physician's Employment Status and Duties" at Section C above, the employment agreement should include provisions specifying whether or not the physician is required to work exclusively for the employer during the term of the agreement or is allowed to engage in certain "outside activities" during the term. Further, the agreement will often include restrictions prohibiting the physician from engaging in certain activities in a specified area and for a specified period after termination; these latter types of restrictions may include a covenant not to compete and/or nonsolicitation covenants prohibiting the physician from soliciting patients, referral sources or certain contractors (such as hospitals), or employees of the employer.

Section 15.50 of the Texas Business and Commerce Code (the "Texas Statute") generally provides that a covenant not to compete is enforceable if it is ancillary to or part of an otherwise enforceable agreement at the time the agreement is made to the extent that it contains limitations as to time, geographical area, and scope of activity to be restrained that are reasonable and do not impose a greater restraint than is necessary to protect the goodwill or other business interest of the promisee. However, the Texas Statute further provides that in order to be enforceable against a person licensed as a physician by the Texas Medical Board, a covenant not to compete (a) must not deny the physician access to a list of his patients whom he had seen or treated within one year of termination of the contract or employment; (b) must provide access to medical records of the physician's patients upon authorization of the patient and any copies of medical records for a reasonable fee as established by the Texas Medical Board under Section 159.008 of the Texas Occupations Code; (c) must provide that any access to a list of patients or to patients' medical records after termination of the contract or employment shall not require such list or records to be provided in a format different than that by which such records are maintained except by mutual consent of the parties to the contract; (d) must provide that the physician will not be prohibited from providing continuing care and treatment to a specific patient or patients during

the course of an acute illness even after the contract or employment has been terminated; and (e) must provide for a buy out of the covenant by the physician at a reasonable price or, at the option of either party, as determined by a mutually agreed upon arbitrator or, in the case of an inability to agree, an arbitrator of the court whose decision shall be binding on the parties.

An example of provisions addressing issues discussed above in this section is set forth below:

***Confidentiality, Non-Competition and Other Restrictive Covenants***

(a) ***Confidential And Proprietary Information.*** *As used in this Agreement, (i) the term “Confidential Information” means any and all information (in whatever form, whether written, oral, electronic or otherwise) of Employer relating to Employer or Employer’s medical practice or business, including, without limitation, the name and address of any patient of Employer, patient records, medical records, charts, files, books, records, fee schedules, methods of operation, business plans, strategies, strategic plans, software, databases, existing or contemplated managed care or other payor contracts or the terms thereof or other relationships with payors, financial information, trade secrets, employee matters and any other information of any kind of Employer relating to Employer or Employer’s medical practice or business, and (ii) the term “Proprietary Information” means any and all trademarks, trade names, service marks and copyrighted or patented materials (including, without limitation, Employer’s names and/or logos associated therewith) acquired by Employer or used in the medical practice or business of Employer. Employer promises to furnish and disclose Confidential Information to Physician during the Term in the course of performance of this Agreement. Physician agrees: (1) that the Confidential Information and the Proprietary Information are vital to the business and financial success of Employer and that unauthorized disclosure or use of same would seriously and adversely affect the medical practice and business of Employer; (2) that all Confidential Information and all Proprietary Information are and shall remain the sole property of Employer and that Physician does not and shall not have any ownership interest therein; (3) that all of the Confidential Information is confidential to, and trade secrets of, Employer; (4) to maintain the confidentiality of all Confidential Information and not to disclose, divulge, communicate, or otherwise use any Confidential Information or any Proprietary Information except solely as necessary for the performance of Employee’s duties under and in accordance with the terms of this Agreement or as otherwise expressly consented to in writing by Employer; and (5) that if a dispute or controversy arising from or relating to this Agreement is submitted for adjudication to any court, arbitration panel or other third party, the preservation of the secrecy of Confidential Information or Proprietary Information may be jeopardized and, accordingly, all pleadings, documents, testimony and records relating to any such adjudication will be maintained in secrecy and will be available for inspection by Employer, Physician and their respective attorneys and experts, who will agree, in advance and in writing, to receive and maintain all such information in secrecy, except as may be limited by them in writing.*

(b) **HIPAA Compliance.** Physician agrees not to use or disclose any protected health information or individually identifiable health information (as defined in 45 CFR Part 164) (collectively, the “Protected Health Information”) concerning any patient of Employer (whether or not Physician renders services to such patient) other than as expressly permitted by this Agreement and the requirements of the federal privacy regulations and security standards as contained in 45 CFR Part 164. Physician further agrees to comply with all policies, procedures and directives of Employer regarding the use and disclosure of Protected Health Information.

(c) **Covenant Not To Compete.** In consideration of the terms of this Agreement (including, without limitation, the provisions hereof requiring Employer to furnish Confidential Information to Physician), Physician agrees that, during the \_\_\_\_ (\_\_\_) year period immediately after the end of the Term, Physician shall not engage in any business or practice that competes with the business of Employer. For the purposes of this Agreement, (i) the phrase “engage in any business or practice that competes with the business of Employer” means and includes Physician engaging in the practice of medicine: (1) as an individual practitioner anywhere (whether at a physician office, a hospital, an ambulatory surgical center, any other facility or elsewhere) in the Restricted Area (hereinafter defined), or (2) directly or indirectly as a proprietor, owner, partner, principal, agent, member, director, manager, employee, consultant, independent contractor, service provider, lender, affiliate or stockholder of any entity, group or person that comprises or engages in a medical practice anywhere (whether at a physician office, a hospital, an ambulatory surgical center, any other facility or elsewhere) in the Restricted Area, whether directly or indirectly through one or more parent, subsidiary or other entities; and (ii) the term “Restricted Area” means the following: (1) the physician office location currently utilized by Employer at \_\_\_\_\_, Texas \_\_\_\_\_, and all areas within a five (5) mile radius of such physician office, irrespective of whether Employer hereafter ceases to conduct operations at such office or within such areas at any time during the Term or thereafter, and (2) any other physician office location hereafter established by Employer at any time during the Term, and all areas within a five (5) mile radius of any such physician office hereafter established by Employer at any time during the Term, irrespective of whether Employer ceases to conduct operations at any such office or within any such areas after such office is established by Employer. Notwithstanding the preceding provisions of this paragraph, Physician shall have the option to buy out of the covenants made by such Promisor in this paragraph by paying Employer a lump sum cash payment in an amount equal to Two Hundred Thousand Dollars (\$200,000); and if Physician acts in violation of any provision contained in this paragraph without first having paid such amount to Employer, Employer shall be entitled to preliminary and permanent injunctions restraining Physician from such violations as well as all other remedies available at law or in equity.

(d) **No Solicitation of Patients, Employees or Contractors.** Physician shall not, directly or indirectly, during any portion of the Term or the \_\_\_\_ (\_\_\_)

*year period immediately after the end of the Term: (i) call on or solicit, or attempt to call on or solicit, any of Employer's past, present or prospective (as of the date of the expiration or any termination of this Agreement) patients in any manner which is competitive with Employer's business as conducted as of the expiration or any termination of this Agreement; or (ii) solicit, employ or otherwise engage as an employee, independent contractor or otherwise, any person who is or was an employee or independent contractor of Employer at any time during the Term or in any manner induce or attempt to induce any such employee or independent contractor of Employer to terminate his or her employment or engagement as such with Employer.*

*(e) **Limitations on Restrictive Covenants.** Notwithstanding anything to the contrary in this Section \_\_, upon the expiration or any termination of this Agreement:*

*(i) Employer shall grant Physician access to the following:*

*(1) a list of patients whom Physician has seen or treated pursuant to this Agreement within one year of the effective date of expiration or termination; and*

*(2) the medical records of patients treated by Physician pursuant to this Agreement upon authorization of the patient and any copies of medical records for a reasonable fee as established by the Texas State Board of Medical Examiners.*

*(ii) The list and records described in the immediately preceding clause (i) shall be in the form and format in which such records are maintained by Employer at the time of such request for access by Physician, unless otherwise agreed by mutual consent of Employer and Physician.*

*(iii) Physician shall not be prohibited from providing continuing care and treatment to a specific patient or patients during the course of an acute illness even after this Agreement or Physician's employment hereunder has been terminated.*

*(f) **Acknowledgments of Physician.** Physician acknowledges and agrees that the covenants of Physician in this Section \_\_: (i) are ancillary to the other provisions of this Agreement, all of which other provisions are valid and enforceable; (ii) are essential elements of this Agreement; (iii) contain limitations as to time, geographical area, and scope of activity to be restrained that are reasonable and do not impose a greater restraint than is necessary to protect the goodwill or other business interest of Employer; and (iv) are independent covenants (and that the existence of any claim by Physician against Employer, under this Agreement or otherwise, will not excuse Physician's breach of any covenant of Physician in this Section \_\_). Physician further acknowledges and*

*agrees that, without Physician's agreement to comply with her covenants set forth in this Section \_\_, Employer would not have entered into this Agreement or employed Physician.*

*(g) **Reformation.** If a court determines that any provision of this Section \_\_ is unreasonably broad, such provision shall not be declared invalid but rather shall be modified by such court to the extent necessary to cause it to be reasonable and lawful.*

*(h) **Remedies in the Event of Breach.** Physician acknowledges and agrees that a breach or violation of any covenant contained in this Section \_\_ will have an irreparable, material and adverse effect upon Employer and that damages arising from any such breach or violation may be difficult to ascertain. Without limiting any other remedy at law or in equity available to Employer, in the event of a breach of any covenant contained in this Section \_\_, Employer shall have the right to an immediate injunction enjoining Physician's breach or violation of such covenant or covenants, without the need to post any security or bond. Employer shall have the right to receive from Physician attorneys' fees, costs and expenses in the event any litigation or judicial proceeding is necessary to enforce any provision of this Section \_\_. Every right and remedy of Employer in respect of this Section \_\_ shall be cumulative and Employer, in its sole discretion, may exercise any and all rights or remedies stated in this Agreement or otherwise available at law or in equity.*

*(i) **Waivers Applicable to Covenants.** In its sole discretion, Employer, by action of its board of directors, shall have the right at any time and from time to time to waive all or any portion of any covenant contained in this Section \_\_ as applicable to Physician, including, without limitation, reducing any of the restrictive time period, geographical area of restriction and/or scope of activity restricted of any such covenant; provided, however, that as so altered by waiver such covenants shall remain fully in effect. In order to be effective, any such waiver must be in writing and executed by Employer.*

*(j) **Tolling Provision.** The duration of any covenant of Physician contained in this Section \_\_ shall be extended by the length of time, if any, during which Physician is in breach of such covenant.*

#### **M. Possible Equity Status for the Physician**

Frequently, the physician will want the employment agreement to state whether, when and how the physician will be considered for admission as a member and owner of the employer entity in the future. In most cases, it will not be possible for the parties to foresee at the inception of the employment relationship all of the various factors and circumstances that may impact whether the physician should or will be offered an opportunity to become a member and owner of the employer entity, or the terms of such an offer. As a result, it is not considered advisable for the employment agreement (particularly a longer-term employment agreement entered into between parties with no or a limited prior working relationship) to attempt to specify

all of the material terms and conditions under which such an offer of membership might occur. Nevertheless, the physician may insist that the process under which he or she will be considered for membership and ownership be addressed in general terms in the employment agreement, even if the agreement makes it clear that the employer does not have any binding obligation to grant membership or admission to the physician in the future. An example of such a general provision is set forth below:

***Consideration of Physician for Membership in Employer.*** No later than \_\_\_\_\_, \_\_\_\_\_, Employer and Physician shall meet and discuss in good faith whether Physician shall be offered the opportunity to purchase a membership interest in Employer and be admitted as an owner and member of Employer, and the proposed terms of any such purchase and admission. Consideration of Physician for such purchase and admission as a member and owner of Employer may be based in part on the satisfaction of the following requirements, all as determined by Employer in its sole and absolute discretion:

(a) Physician shall have practiced as a full-time physician employee of Employer for a minimum period of \_\_\_\_ ( ) years;

(b) Physician shall have taken and passed the applicable courses and examinations to be Board Certified in the field of \_\_\_\_\_;

(c) Physician shall have obtained satisfactory performance reviews from Employer, including a written semiannual review provided to Physician with respect to Physician's progress toward becoming a member and owner of Employer; and

(d) Such other requirements, if any, as Employer may determine and specify in its sole and absolute discretion.

**NOTWITHSTANDING THE FOREGOING OR ANYTHING IN THIS AGREEMENT TO THE CONTRARY, PHYSICIAN ACKNOWLEDGES AND AGREES THAT (A) EMPLOYER DOES NOT AND WILL NOT HAVE ANY OBLIGATION OF ANY KIND TO OFFER OR SELL TO PHYSICIAN ANY MEMBERSHIP INTEREST IN EMPLOYER OR TO ADMIT PHYSICIAN AS A MEMBER OR OWNER OF EMPLOYER, AND (B) EMPLOYER, IN ITS SOLE AND ABSOLUTE DISCRETION, MAY REFUSE TO OFFER OR SELL TO PHYSICIAN ANY MEMBERSHIP INTEREST IN EMPLOYER OR TO ADMIT PHYSICIAN AS A MEMBER OR OWNER OF EMPLOYER.**

#### **N. Miscellaneous Provisions**

The employment agreement should contain various miscellaneous provisions dealing with the types of issues shown in the example provisions stated below. Often, little or no consideration is given to these so-called "boilerplate" provisions by the parties or their counsel. However, these provisions can become some of the most important in the agreement, particularly

if a dispute arises between the parties under the agreement, so they should be carefully considered before the agreement is finalized.

The employment agreement should specify the state whose laws will govern the contract and issues arising thereunder. The parties usually select the state in which the physician resides and the employer's office where the physician will be based is located. A sample provision is shown below:

***Governing Law.*** *This Agreement shall be governed by and construed and interpreted in accordance with the laws of the State of Texas, without regard to conflicts of laws principles that might require the application of the laws of any other state.*

The employment agreement should state that it contains the entire agreement between the parties and supersedes all prior and contemporaneous agreements between them relating to the employment of the physician by the employer. A sample provision is shown below:

***Entire Agreement.*** *This Agreement (including the Exhibits hereto) sets forth and constitutes the entire agreement, and supersedes any prior or contemporaneous agreements (whether written or oral), between Employer and Physician relating to the subject matter of this Agreement. There are no representations, warranties, covenants, promises, agreements, arrangements or understandings, written or oral, express or implied, between the parties with respect to the subject matter of this Agreement that are not set forth in this Agreement. The Exhibits attached hereto are made a part hereof by reference as fully as if copied and set forth in the main body hereof.*

The employment agreement should state that all notices required or permitted to be given under or in connection with the agreement must be in writing, the address to which any notices must be given, the method by which any notices are to be given, and when notices will be deemed to have been given or delivered. A sample provision is shown below:

***Notices.*** *In order to be effective, any notice, demand or request that a party to this Agreement is required or permitted to give to the other party under or in connection with this Agreement must be in writing and delivered to the other party (a) by certified mail, postage prepaid, return receipt requested, addressed to the other party's address shown on the signature page to this Agreement, or (b) by personal delivery to the other party. Any such notice shall be deemed effectively given, delivered and received when personally delivered to the other party or when deposited in the United States mail in accordance with the immediately preceding sentence. Either party may change its notice address hereunder by delivering notice to the other party specifying the new notice address.*

The employment agreement should provide that amendments must be in writing and signed by the parties in order to be effective. A sample provision is shown below:

***Amendments.*** *No amendment to any provision of this Agreement shall be valid or effective unless such amendment is in writing and signed by both parties.*

The parties may wish to state that neither party has the right to assign the employment agreement or any right thereunder, or to delegate any duties or obligations under the agreement, without the prior written consent of the other party. The physician may particularly want this provision to ensure that he or she will not be required to work for any assignee employer entity that the physician does not approve. On the other hand, the employer may want to reserve the right to assign the agreement to an affiliate of the employer or to the purchaser of all or substantially all of the employer's assets. A sample provision is shown below:

***Assignment.*** *Neither party shall have the right to assign this Agreement or any right hereunder, or to delegate all or any of its duties or obligations hereunder, without the prior written consent of the other party; provided, however, that Employer may assign this Agreement: (a) to any entity that is wholly-owned by Employer or by any or all of the owners of Employer; or (b) in connection with the sale of all or substantially all of the assets of Employer, to the purchaser of such assets in such sale transaction.*

The employment agreement should clearly state the parties intended to be benefited by the agreement and confirm that no other person or entity has any rights under the agreement. A sample provision is shown below:

***Binding Effect; No Third Party Rights.*** *This Agreement shall be binding upon and inure to the benefit of the parties hereto and their respective heirs, legal representatives, successors and permitted assigns, and nothing in this Agreement, whether express or implied, is intended to confer any right or remedy on any other person or entity.*

The employment agreement should state that any waiver of any provision or obligation under the agreement must be in writing to be effective, and that any waiver is limited to the specific matters stated therein. A sample provision is shown below:

***Waiver.*** *No waiver of any failure by a party to comply with or perform any provision, covenant or condition of this Agreement shall be valid unless such waiver is in writing and signed by the other party, nor shall any such waiver be deemed to be a waiver of any preceding or succeeding breach of the same or any other provision, covenant, or condition. Failure on the part of any party to complain of any act or failure to act of the other party hereunder, irrespective of how long such failure continues, shall not constitute a waiver of any of such first party's rights hereunder.*

The employment agreement typically will state certain basic principles of construction relating to the headings in the agreement, the gender and number of words used therein, and similar matters. A sample provision is shown below:

***Construction.*** *The headings set forth in this Agreement are for convenience only and shall have no bearing whatsoever on the interpretation of this Agreement. Whenever the terms or context of this Agreement require or provide, the gender of all words herein will include the masculine, feminine and neuter, and the number of all words herein will include the singular and the plural.*

The employment agreement should permit execution of the agreement in counterparts, and delivery of signatures by fax or other electronic transmission. A sample provision is shown below:

***Counterparts.*** *This Agreement may be executed in any number of counterparts, each of which shall be deemed an original and together shall constitute one and the same instrument. In making proof of this Agreement, it shall not be necessary to produce or account for more than one such counterpart. The signature of any party to this Agreement may be delivered by fax or other electronic transmission, and such a delivery of the signature of any party shall have the same force and effect as the delivery of the original signature of such party .*

The parties may wish to include a “further assurances” provision under which the parties agree to execute other documents and take other actions that are reasonably necessary to carry out the purposes of the employment agreement. A sample provision is shown below:

***Further Assurances.*** *Each party agrees to execute such additional documents and take such other actions as the other party may reasonably request to carry out the purposes of this Agreement.*

An important issue to consider when drafting the employment agreement is how disputes will be resolved. Many contracts simply recite that each party shall have all remedies available to it at law or in equity, that all such remedies are cumulative and that resort to any one remedy shall not preclude any other remedy. Alternatively, the agreement may require that disputes first be submitted to non-binding mediation before a lawsuit or arbitration proceeding is pursued by either party, or require that disputes be submitted to binding arbitration. Any of these provisions may specify the required venue for the lawsuit, mediation or arbitration, and that the prevailing party is entitled to recover from the other party attorney’s fees and costs incurred in connection with the dispute. The parties and their respective counsel should carefully consider all of these issues when negotiating and preparing the agreement. A sample provision requiring mandatory arbitration is shown below:

***Resolution of Disputes.*** *Except as otherwise expressly provided in this Agreement, any controversy or claim arising out of or relating to this Agreement, or any breach thereof, shall be settled by arbitration, in the city \_\_\_\_\_, Texas, in accordance with the then applicable rules obtained from the American Health Lawyer’s Association Alternative*

*Dispute Resolution Service, and judgment upon the award may be entered in any court having jurisdiction thereof. The prevailing party with respect to any controversy or claim arising out of or in connection with this Agreement shall be entitled to recover reasonable attorney's fees and costs incurred in connection with such claim or controversy.*

The employment agreement usually will provide that the invalidation of one provision of the agreement will not invalidate the entire agreement. A sample provision is shown below:

***Severability.*** *In case any one or more of the terms or provisions contained in this Agreement shall for any reason be held to be invalid, illegal or unenforceable in any respect, such invalidity, illegality or unenforceability shall not affect any other term or provision of this Agreement, and this Agreement shall be construed so as to be enforceable to the maximum extent permissible by law.*

The parties will frequently want to reaffirm their commitment that the employment agreement is intended to comply with all applicable laws and regulations, and their agreement to revise the agreement from time to time as necessary for it to do so. A sample provision is shown below:

***Compliance with Law.*** *The parties enter into this Agreement with the intent of conducting their relationship in full compliance with all applicable federal, state and local laws, including, without limitation, the federal Stark Act and regulations, the federal Medicare/Medicaid anti-fraud and abuse statutes and regulations, the Health Insurance Portability and Accountability Act of 1996, the Texas Medical Practice Act and the Texas Health and Safety Code, each as amended from time to time. Notwithstanding any unanticipated effect of any of the provisions in this Agreement, neither party shall intentionally conduct itself under the terms and conditions of this Agreement in a manner that constitutes a violation of any law or regulation or in a manner that would jeopardize either party's participation in any federal or state health care program, including, without limitation, Medicare or Medicaid. In the event any state or federal law or regulation, now existing or enacted or promulgated after the Effective Date, is interpreted by judicial decision, a regulatory agency, or legal counsel of Employer or Physician, in such a manner as to indicate that the structure of this Agreement is in violation of any such law or regulation, Employer and Physician shall amend this Agreement as necessary to comply with such law or regulation. To the maximum extent possible, any such amendment shall preserve the underlying economic and financial arrangements between Employer and Physician set forth in this Agreement.*

The employment agreement will often include a provision whereby the physician acknowledges that he or she has read and understands the agreement and has been advised to discuss it with independent legal counsel. A sample provision is shown below:

**LEGAL REVIEW.** ***PHYSICIAN EXPRESSLY ACKNOWLEDGES THAT SHE HAS BEEN ADVISED, AND HAS BEEN GIVEN THE OPPORTUNITY,***

***TO REVIEW THIS AGREEMENT WITH HER OWN LEGAL COUNSEL BEFORE ENTERING INTO THIS AGREEMENT, AND THAT SHE HAS READ, UNDERSTANDS AND AGREES TO BE BOUND BY THE TERMS OF THIS AGREEMENT.***

### **III. CONCLUSION**

No single form of employment agreement or list of contract terms will necessarily fit any particular proposed physician employment arrangement. Accordingly, it is critical that both the employer and the physician carefully consider the needs and desires of the parties and the pros and cons of each provision of a proposed physician employment agreement, and discuss them with their own respective legal counsel, before finalizing and signing the agreement. Attorneys preparing or reviewing such agreements for either the employer or the physician should be aware of the health care law, tax, benefits and other issues impacting such agreements since they are “not your ordinary employment contracts.”

**SELECTED STATUTES AND REGULATIONS AFFECTING PHYSICIAN  
EMPLOYMENT ARRANGEMENTS**

**I. WHO CAN EMPLOY TEXAS PHYSICIANS AND BILL AND COLLECT FOR  
THEIR SERVICES?**

**Texas Corporate Practice of Medicine.** Texas Medical Practice Act, Texas Occupations Code, Chapters 151-165. The Texas corporate practice of medicine prohibition generally applies to prohibit non-physicians from practicing medicine in Texas or controlling the practice of medicine by licensed Texas physicians. Generally, a licensed Texas physician is prohibited from entering into a partnership, employee relationship or fee splitting or other arrangement under which the physician's professional medical judgment is controlled or directed by a non-physician.

Section 155.001 provides that a person may not practice medicine in the State of Texas unless that person holds a license issued under the Texas Medical Practice Act.

Section 151.002(a)(12) defines "physician" as a person licensed to practice medicine in the State of Texas.

Section 151.002(a)(13) generally defines "practicing medicine" as the diagnosis, treatment or offer to treat a mental or physical disease or disorder or a physical deformity or injury, or the attempt to effect cures of those conditions, by a person who (a) publicly professes to be a physician, or (b) directly or indirectly charges money or other compensation for those services.

Section 155.003 sets forth the general eligibility requirements for a license to practice medicine, which can only be met by a natural person.

Section 157.001 generally authorizes physicians to delegate certain medical acts to a qualified and properly trained person acting under the physician's supervision, but includes a requirement that the person to whom the delegation is made not represent to the public that the person is authorized to practice medicine when he or she is not so authorized.

Section 164.052(a)(13) generally prohibits a physician from permitting another to use the person's license or certificate to practice medicine in the State of Texas.

Section 164.052(a)(17) generally prohibits a physician from directly or indirectly aiding or abetting the practice of medicine by a person, partnership, association, or corporation that is not licensed to practice medicine by the Texas Medical Board.

Section 165.052(a) generally provides that if the Texas Medical Board determines after notice and opportunity for a hearing that a person who is not licensed as a physician is violating the Texas Medical Practice Act or related statutes or rules, the Board may issue a cease and desist order prohibiting the person from engaging in the activity.

Section 165.152 provides that a person commits a third degree felony if the person practices medicine in Texas in violation of the Texas Medical Practice Act.

Section 165.156 generally provides that a person or entity commits an offense if it in any manner indicates that it is entitled to practice medicine if it is not licensed to do so.

*See also* limited exceptions to the corporate practice of medicine prohibition, located at Sections 151.055, 162.001, 162.051 and 162.201 of the Texas Occupations Code.

Generally, physicians may enter into independent contractor arrangements with non-physicians. *See, e.g.*, Section 151.055 of the Texas Occupations Code. However, whether an independent contractor arrangement exists depends on the facts of the relationship and the right of control over the means and methods for providing services. *See* Texas Medical Board, *Corporate Practice of Medicine*, available at <http://www.tmb.state.tx.us/professionals/physicians/licensed/cpq.php> (last visited March 26, 2009). This website also lists certain Texas cases relevant to the Texas corporate practice of medicine doctrine.

The Texas corporate practice of medicine prohibition and its application, particularly to rural healthcare settings, has been the focus of recent legislation in Texas. The December 2008 Texas Senate Committee on State Affairs Interim Report to the 81<sup>st</sup> Legislature acknowledges that the Texas Legislature has allowed approximately 10 hospital districts to employ physicians, and similar bills have been introduced for consideration this session. *See* Senate Comm. on State Affairs, Interim Report to the 81st Leg., at 5-9 (Tex. 2008); Tex. S.B. 1502 & 1503, 81st Leg., R.S. (2009).

**Other Specified Texas Entities.** Texas Business Organizations Code, Chapters 152, 301, 302 and 304. Licensed Texas physicians may form a Texas general partnership (typically a registered limited liability partnership, as provided for in Section 152.801 *et seq.* of the Texas Business Organizations Code), a Texas professional association or a Texas professional limited liability company for the purpose of providing physician professional services through such entity. Generally, all members, owners, physician service providers, governing persons and officers of the respective entity must be licensed to practice medicine by the Texas Medical Board (however, it is possible for owners of these entities to in turn be similar entities owned and controlled by Texas-licensed physicians). Other specific requirements also apply, depending on the type of entity in question. *See also* 2005, 17<sup>th</sup> Annual UT Health Law Conference: “*Don’t Fence Me In! A Survey of Health Entity Choices.*”

**Texas Certified Nonprofit Health Organizations.** Texas Occupations Code, § 162.001 *et seq.*; 22 Texas Administrative Code §§ 177.1-177.13. The Texas Medical Board may approve and certify certain types of health organizations which are permitted to employ physicians. These include a Texas nonprofit corporation that is organized and incorporated solely by Texas licensed physicians to engage in specified health care related activities (which may include, but do not have to be limited to, delivery of health care to the public), and whose directors and trustees are licensed by the Texas Medical Board and are actively engaged in the practice of medicine. The statute also provides for the Texas Medical Board to approve and certify certain other entities or hospital districts to employ Texas-licensed physicians.

**Reassignment of Medicare Claims by Employed Physicians.** 42 C.F.R. § 424.80; Form CMS-855R. Medicare may pay an enrolled physician supplier’s employer if the physician is required, as a condition of employment, to turn over to the employer the fees for his or her services. This right to reassign claims and rights to receive payments also extends to independent contractors, subject to satisfaction of certain additional requirements stated in the regulations.

## **II. SELF REFERRAL, ANTI-KICKBACK AND RELATED PROVISIONS**

**Stark Self Referral Law & Regulations.** 42 U.S.C. § 1395nn; 42 C.F.R. §§ 411.350 - 411.389. The federal Stark Law and the regulations promulgated thereunder generally provide that a physician may not make a referral for the furnishing of designated health services (“DHS”) to an entity with which the physician (or an immediate family member) has a financial relationship, unless the arrangement satisfies an applicable exception. In order to satisfy a Stark Law exception, an arrangement must meet every element of the exception. Particularly relevant to physician employment arrangements are the Stark Law exceptions pertaining to bona fide employment relationships, personal services arrangements, physician group practices, in-office ancillary services, academic medical centers, fair market value compensation, and physician recruitment. Also, meeting the definition of a “member of the group or member of a group practice” (*e.g.*, a practice owner or employee) under the Stark Law regulations can have significant implications for being able to bill for certain ancillary services that are DHS and avoid the limitations of the “anti-markup” rule.

Bona Fide Employment Relationships Exception. 42 U.S.C. § 1395nn(e)(2); 42 C.F.R. § 411.357(c)

Personal Services Arrangements Exception. 42 U.S.C. § 1395nn(e)(3); 42 C.F.R. § 411.357(d)

Physician Services Group Practice Exception. 42 U.S.C. § 1395nn(b)(1); 42 C.F.R. § 411.355(a)

In-office Ancillary Services Exception. 42 U.S.C. § 1395nn(b)(2); 42 C.F.R. § 411.355(b)

Academic Medical Centers Exception. 42 C.F.R. § 411.355(e)

Fair Market Value Compensation Exception. 42 C.F.R. § 411.357(l)

Physician Recruitment Exception. 42 U.S.C. § 1395nn(e)(5); 42 C.F.R. § 411.357(e)

**Federal Anti-kickback Statute & Regulations.** 42 U.S.C. § 1320a-7b(b); 42 C.F.R. § 1001.952. The federal Anti-kickback Statute and the regulations promulgated thereunder generally prohibit the offer, payment, solicitation, or receipt of any remuneration, directly or indirectly, covertly or overtly, in cash or in kind, for: (a) the referral of patients, or arranging for the referral of patients, for the provision of items or services for which payment may be made under a federal health care program; or (b) the purchase, lease, or order, or arranging for or recommending the purchase, lease, or order, of any good, facility, service, or item for which

payment may be made under a federal health care program. The Anti-kickback Statute contains an express exception for amounts paid by an employer to an employee (who has a bona fide employment relationship with the employer) for employment in the provision of covered items or services. In addition, a number of regulatory “safe harbors” have been promulgated under the Anti-kickback Statute, including safe harbors applicable to certain employment arrangements, personal services arrangements and recruitment arrangements. Unlike the Stark Law exceptions, an arrangement that does not meet every element of a safe harbor is not illegal *per se* under the Anti-kickback Statute, but the arrangement may be subject to increased scrutiny based on the facts and risk of fraud or abuse.

Bona Fide Employment Relationship Safe Harbor. 42 U.S.C. § 1320a-7b(b)(3)(B);  
42 C.F.R. § 1001.952(i)

Personal Services Arrangement Safe Harbor. 42 C.F.R. § 1001.952(d)

Physician Recruitment Safe Harbor. 42 C.F.R. § 1001.952(n)

**Federal Civil False Claims Act.** 31 U.S.C. § 3729-3733. The federal Civil False Claims Act generally provides for the imposition of civil penalties against any person who knowingly makes, uses, or causes to be made or used, a false record or statement to get a false or fraudulent claim paid or approved by the Government.

**Federal Civil Monetary Penalty Act.** 42 U.S.C. § 1320a-7a. The federal Civil Monetary Penalty Act generally authorizes the imposition of civil monetary penalties, assessments and program exclusions on certain individuals or entities whose continued participation in certain health care programs will be deemed, or who may be determined, to be likely to cause injury to such programs or their beneficiaries. The statute provides for the imposition of those penalties, exclusions or other actions in a wide range of circumstances, including, without limitation, the “improper filing” of claims relating to upcoding, false or fraudulent claims, medical or other items or services furnished during a period of time when the person seeking the reimbursements (directly or through an employer) was excluded from the Medicare program, or in connection with payments made by a hospital to a physician “as an inducement to reduce or limit services;” and a person arranging or contracting (by employment or otherwise) with an individual or entity that the person knows or should know is excluded from participation in a federal health care program, for the provision of items or services for which payment may be made under such a program.

**Texas Anti-kickback and Other Related Texas Statutes.** Like the federal Anti-kickback Statute, certain Texas statutes generally prohibit a person from knowingly offering to pay or agreeing to accept, directly or indirectly, overtly or covertly, any remuneration in cash or in kind to or from another for securing or soliciting a patient or patronage for or from a person licensed, certified, or registered by a state health care regulatory agency. The statute applies regardless of the payor for the health care services in question; however, the statute permits arrangements that otherwise comply with the federal Anti-kickback Statute. See below for references to this and certain other Texas statutes:

Texas Occupations Code § 102.001 *et seq.* (applicable to any person)

Texas Occupations Code § 102.051 (applicable to any person except Texas licensed physicians)

Texas Health and Safety Code § 164.001 *et seq.* (mental health)

Texas Penal Code § 32.43 (commercial bribery)

### III. SELECTED TAX ISSUES

**Independent Contractor v. Employee Classification.** Whether a physician is considered an independent contractor or an employee of an entity is an important distinction for both legal and financial reasons. The physician's classification will impact the hiring party's obligation to withhold taxes from amounts paid to the physician, and possibly its obligation to provide facilities, vacation, sick leave, health insurance or other employee benefits to the physician. Additionally, the physician's classification may impact compliance with federal and state anti-kickback laws, or whether the hiring entity is liable for acts or omissions of the physician. The primary factor in determining the physician's status as an independent contractor or employee of an entity is whether the entity has the ability to control and direct the physician's duties under the arrangement. The Internal Revenue Service will generally consider twenty (20) "common law" factors when evaluating whether a person is an independent contractor or an employee; most of these factors generally relate to the ability of the entity to control the time, place and manner of service of the physician. *See, e.g.,* Treasury Regulations, 26 C.F.R. §§ 31.3121(d)-1 and 31.3401(c)-1; Rev. Rul. 87-41, 1987-1 C.B. 296.

**Federal Tax Exemption.** Tax exempt organizations that employ or compensate physicians must consider private inurement and public benefit issues in relation to those compensation arrangements. Generally, an organization described in Section 501(c)(3) of the Internal Revenue Code that is exempt from federal income taxation must not be organized or operated for the benefit of private interests, and no part of the net earnings of such an organization may inure to the benefit of any private shareholder or individual. Accordingly, these organizations must ensure that any compensation they pay to an employed physician is reasonable (fair market value) in relation to the services provided by the physician. The Internal Revenue Service will consider a variety of factors in evaluating whether a particular compensation arrangement between a tax exempt organization and a physician provides for "reasonable compensation." *See, e.g.,* 26 U.S.C. § 501(c)(3); 2000 EO CPE (Exempt Organizations Continuing Professional Education) Text.

### IV. RESTRICTIONS ON COMPETITION

**Covenants Not to Compete.** Texas Business and Commerce Code, § 15.50 *et seq.* This statute generally provides that a covenant not to compete is enforceable if it is ancillary to or part of an otherwise enforceable agreement at the time the agreement is made to the extent that it contains limitations as to time, geographical area, and scope of activity to be restrained that are reasonable and do not impose a greater restraint than is necessary to protect the goodwill or other business interest of the promisee. However, the statute further provides that in order to be enforceable against a person licensed as a physician by the Texas Medical Board, a covenant not to compete (a) must not deny the physician access to a list of his patients whom he had seen or

treated within one year of termination of the contract or employment; (b) must provide access to medical records of the physician's patients upon authorization of the patient and any copies of medical records for a reasonable fee as established by the Texas Medical Board under Section 159.008 of the Texas Occupations Code; (c) must provide that any access to a list of patients or to patients' medical records after termination of the contract or employment shall not require such list or records to be provided in a format different than that by which such records are maintained except by mutual consent of the parties to the contract; (d) must provide that the physician will not be prohibited from providing continuing care and treatment to a specific patient or patients during the course of an acute illness even after the contract or employment has been terminated; and (e) must provide for a buy out of the covenant by the physician at a reasonable price or, at the option of either party, as determined by a mutually agreed upon arbitrator or, in the case of an inability to agree, an arbitrator of the court whose decision shall be binding on the parties. For recent Texas cases dealing with covenants not to compete, see *Alex Sheshunoff Management Services, LP v. Kenneth Johnson & Strunk Assoc.*, 209 S.W.3d 644 (Tex. 2006) (simultaneous consideration not a necessary requirement for noncompete enforcement in Texas); and *Valley Diagnostic Clinic v. Dougherty*, No. 13-08-00201-CV, 2009 WL 332252 (Tex. App.—Corpus Christi Feb. 12, 2009, no pet. h.) (deferred compensation forfeiture clause declared to be unenforceable non-compete agreement).

## **V. PRIVACY AND OTHER REGULATORY ISSUES**

**Health Insurance Portability and Accountability Act of 1996 – Security and Privacy Rules.** Pub. L. 104-191; and 45 C.F.R. §§ 160, 162 and 164. The HIPAA security and privacy rules provide federal protections for personal health information held by certain covered entities. The rules permit the disclosure of personal health information needed for treatment, payment and health care operations purposes and give patients rights regarding the use and disclosure of their personal health information.

**Red Flag Rules from the Fair and Accurate Credit Transactions (FACT) Act of 2003.** Pub. L. 108-159, 111 Stat. 1952. FACT was passed in 2003 as an amendment to the Fair Credit Reporting Act (“FCRA”). The Red Flag Rules were created by the Federal Trade Commission (“FTC”) in accordance with FACT and, as of the date of this publication, apply to health care providers, including physicians. Under the Red Flag Rules, creditors that are subject to FTC enforcement under FCRA with “covered accounts” must implement programs that identify, detect and respond to practices that could indicate identity theft. The Red Flag Rules mandate that a covered entity’s program should detect, prevent and mitigate identity theft in connection with covered accounts. A compliance program may be part of a provider’s HIPAA compliance efforts, as there may be overlap between the requirements of HIPAA and the Red Flag Rules. The deadline for compliance is May 1, 2009.

**Health Care Quality Improvement Act (HCQIA) of 1986.** 42 U.S.C. § 11101 *et seq.* HCQIA was passed as a patient safety act; however, the National Practitioner Data Bank (“NPDB”) and peer review element of the Act is most influential on physician employment arrangements, since the reporting requirements of the Act give hospitals, medical groups and managed care organizations the ability to access reports associated with malpractice, medical licensure and peer review actions. Physicians may “self-query” the data base for copies of their reports.

**Texas Statutes Relating to Professional Review Actions or Medical Peer Review.** Texas Medical Practice Act, Texas Occupations Code, Chapter 160. These Texas statutes provide that HCQIA applies to a professional review action or medical peer review conducted by a professional review body or medical peer review committee in Texas, and set forth confidentiality, reporting, immunity and other requirements and standards relating to those types of actions.

## **VI. MISCELLANEOUS EMPLOYMENT RELATED STATUTES**

**Title VII of the Federal Civil Rights Act of 1964.** 42 U.S.C. § 2000e *et seq.* Title VII generally prohibits discrimination, harassment and retaliation by private and public employers and by labor organizations and employment agencies on the basis of race, sex, pregnancy, color, religion or national origin. It applies to hiring, discharge, classification, promotion, demotion, training, compensation and other terms and conditions of employment. Exceptions permitting certain forms of discrimination in some cases are provided, the most significant being for bona fide occupational qualifications.

**The Americans With Disabilities Act of 1990 (ADA).** 42 U.S.C. § 12101 *et seq.* Title 1 of ADA generally protects qualified individuals with a physical, mental or emotional disability against discrimination in private employment, as well as in state and local government employment. ADA also generally requires an employer to make a reasonable accommodation to a known disability unless the employer can demonstrate that the accommodation would impose an undue hardship on the employer.

**Age Discrimination in Employment Act of 1967 (ADEA).** 29 U.S.C. §§ 621-634. ADEA generally forbids discrimination on the basis of age in the employment of any person forty (40) years of age or older. The affected employment practices dealt with under ADEA are comprehensive and include, without limitation, hiring, firing and treatment during employment, as well as retaliation.

**The Equal Pay Act of 1963.** 29 U.S.C. § 206(d). The Equal Pay Act is applicable to private and governmental employers and labor organizations. It generally requires that employees of both sexes receive equal pay for substantially equivalent work under similar conditions. Exceptions in this Act are included for seniority systems, merit systems, and piece work or production bonus systems.

**Employee Retirement Income Security Act of 1974 (ERISA).** 29 U.S.C. § 1001 *et seq.* ERISA generally regulates employers who offer pension or welfare benefit plans for their employees. ERISA protects employees who participate in qualified benefit plans from being discharged or discriminated against by their employer in order to interfere with their attainment of vested pension rights or employee benefits to which they are entitled under the plans.

**The Fair Labor Standards Act (FLSA).** 29 U.S.C. § 201 *et seq.* FLSA reflects the national policy on minimum wage and overtime payments. It governs how employees are classified for minimum wage and overtime wages. Among other things, it generally prohibits retaliatory discharge based on an employee's exercise of rights under FLSA.

**The Family and Medical Leave Act of 1993 (FMLA).** 29 U.S.C. § 2601 *et seq.* FMLA generally entitles eligible employees to up to a total of twelve (12) work weeks of unpaid leave during a twelve-month period for the birth or adoption of a child, for the care of a seriously ill family member, or due to the employee's own serious health condition. With limited exceptions, the employees are entitled to return to the same or an equivalent position following the leave period. In certain circumstances, FMLA leave can be on a continuous or intermittent basis. The National Defense Authorization Act for FY 2008 amended FMLA to provide for additional categories of protected persons and extended unpaid leave for military family members.

**The Civil Rights Act of 1866.** 42 U.S.C. § 1981. This Act generally affords a federal remedy against discrimination in private employment, including hiring, discharge, and other terms and conditions of employment, on the basis of race.

**The Occupational Safety and Health Act (OSHA).** 29 U.S.C. § 651 *et seq.* Safety and health conditions in most private industries are regulated by OSHA-approved state programs. Covered employers generally must comply with the regulations and the safety and health standards promulgated by OSHA. Employers also have a general duty under OSHA to provide their employees with work and a workplace free from recognized, serious hazards.

**Worker Adjustment and Retraining Notification Act (WARN).** 29 U.S.C. § 2101 *et seq.* WARN generally requires that employees receive early warning of impending layoffs or plant closings in certain circumstances. Covered employees are required to notify affected employees with sixty (60) days' prior notice of certain plant closings or mass layoffs.

**The Consolidated Omnibus Budget Reconciliation Act (COBRA).** 29 U.S.C. § 1161 *et seq.* Under COBRA, employees covered under an existing health plan who lose their health benefits generally have the right to choose to continue group health benefits provided by the health plan for limited periods of time if coverage is lost due to a qualifying event. Those qualifying events include voluntary or involuntary job loss, reduction in the hours worked, transition between jobs, death, divorce and other events.

**Texas Commission on Human Rights Act (TCHRA).** Texas Labor Code § 21.001 *et seq.* TCHRA generally prohibits discrimination against persons on the basis of race, color, disability, religion, sex, pregnancy, national origin and age. To a large extent, this law is modeled after federal anti-discrimination statutes.

**Texas Workers' Compensation Act.** Texas Labor Code § 401.001 *et seq.* This Act generally covers employees who suffer a work-related injury. Chapter 451 of the Act prohibits employers from discharging or otherwise discriminating against employees who have in good faith filed workers' compensation claims.

**Texas Civil Practice & Remedies Code §122.** This statute generally prohibits discharge based on an employee's compliance with a jury summons.

**Texas Health and Safety Code §161.134.** This statute generally prohibits a hospital, mental health facility, or treatment facility from disciplining or retaliating against an employee for reporting to the employee's supervisor, an administrator of the facility, a state regulatory agency, or a law enforcement agency a violation of law, including a violation of rules adopted by

the Texas Board of Mental Health and Mental Retardation, the Texas Board of Health, or the Texas Commission on Alcohol and Drug Abuse.