

# Physician Recruitment Agreements Obligate the Hospital, Medical Practice and the Physician – Make Sure You Know What Your Obligations Are

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Hospitals and medical practices need quality physicians to do necessary research and to treat their patients. Getting new talent includes hiring existing physicians – who often work for other hospitals and other practices. It also includes hiring newly trained doctors. Most hospitals and practices need a combination of experienced specialists and newly trained physicians.

There are usually three sides to a physician recruitment agreement:

- The existing medical practice
- The hospital
- The physician

Each party to the agreement needs to understand more than just the financial and medical benefits. The parties need to understand what laws regulate physician recruitment agreements. Violations of Stark Law and Anti-Kickback laws can result in heavy fines, civil and criminal actions, and even the loss of a medical license and operating privileges. Other laws can affect the enforcement ability of the agreement which is a legal contract. There are also business and tax considerations that must be evaluated.

## **PHYSICIANS SHOULD REVIEW THEIR EMPLOYMENT AGREEMENT OR RISK VIOLATING FEDERAL AND STATE LAW**

Physicians who fail to consult with legal counsel before signing an employment contract often lose more than just money, benefits, and the freedom to leave on their terms. They may be putting [...]

### **What the Agreements Typically Provide**

Recruiting new doctors takes a lot of time and costs a lot of money. There's no guarantee that the doctor will have the necessary medical, business, and personal skills. In large measure, the hospital (which usually funds the practice's recruitment efforts) agrees to also pay the new doctor's base salary for a limited time period. The limited time frame that the medical practice and hospital guarantee is usually one year. The hospital often agrees to pay the difference between the negotiated salary and the money the doctor brings into the practice.

The hospital benefits by having a doctor nearby who will ideally “refer” patients to the hospital if surgeries or more advanced care is required. Typically, the doctor will do the medical work at the hospital or refer the patient to other doctors at the hospital – if other types of care (than the one the new doctor does) are needed. Referrals must be done correctly though so they don’t violate the Anti-Kickback Statute, Stark Law, or any state laws.

The medical practice benefits by having a doctor on staff who can treat patients while the practice gets the fees for services – and ideally referrals of new patients from satisfied patients. The medical practice also gets to test how good or bad a fit the doctor is.

The doctor benefits by having a base fee until he/she can build up their medical practice. He/she also gets to see if they’re a good fit with the medical practice that hires them and the hospital.

### **Some of the concerns each side may have to a physician recruitment agreement**

Experienced healthcare lawyers review the following rights and duties of each of the three signers to the agreement.

- **The geographical pledge.** The physician agrees that if he/she moves out of the geographical area for a predefined period (such as 2-4 years), that the doctor will be in breach of the contract and must pay a penalty or some sum set forth in the contract. A promissory note is often used to guarantee payment if the doctor breaches the contract. Because the doctor will absorb financial damages if he/she leaves the geographical area, it is important that the doctor review with legal counsel and with his/her own medical and family needs – their commitment to the geographical region. The geographical portion of the physician recruitment should be drafted to address external contingencies such as the need to move due to a death in the family or the needs of a child.
- **The compensation.** Agreements should detail whether the pay is based on hours of service, a yearly salary, productivity factors such as the number of patients treated, or other factors.
- **The physician’s duties.** The agreement should detail what services the physician will perform for the medical practice and, when needed, for the hospital. For example, it should be clear when a doctor is – on call.
- **The length of the agreement.** The guaranteed base salary usually covers a year or two. The agreement will also normally detail how long the doctor agrees to work for the medical practice and how many years he/she will commit to working for the hospital – after the guaranteed period has expired. The agreement will detail what happens if there is a breach. What happens includes more than just the financial damage. It can include many issues such as whether the case is arbitrated or can be heard in court and other matters.
- **The loan.** The agreement by the hospital to pay the salary or part of the salary is considered a loan. The loan is essentially repaid by the physician and or the practice through performance of medical duties or by cash – depending on the contract terms. The loan is normally accompanied by a note which can be used to obtain a legal judgment if the doctor breaches the agreement.
- **Covenants not to compete.** Physicians should review with experienced healthcare contract lawyers their rights if the contract ends – due to either their desire or needs or the desire or needs of the hospital (or medical employer). Hospitals and employers may try to restrict the right of the doctor to practice in the same geographical region – for the term of the guarantee or the full term of the contract. Generally, covenants not to compete are not enforceable in California. A doctor will still likely to have pay any amount due on the loan.
- **Additional contract terms.** Other items that an experienced healthcare lawyer will review in physician recruitment agreements are:
  - The tax consequences. The timing and length of payments may be subject to adjustments to limit the federal and state taxes due
  - The requirements for terminating the contract
  - The consequences for terminating a contract

- Additional contract terms

All parties to the agreement should review the agreement before signing it. Once the agreement is signed, it becomes very hard to overturn the contract unless fraud was involved.

### **The Anti-Kickback Statute (AKS) and Stark Law**

The AKS and Stark Law are two separate federal laws that seek to protect patients and consumers.

Stark Law prohibits certain types of referrals. The idea behind the law is that patients have the right to trust that when a physician makes a recommendation – that the recommendation is based on merit and not because the physician has a financial stake in the referral. Stark prohibits self-referrals by doctors who bill Medicare or Medicaid if the referral is to an entity that provides “designated health services.” – if the doctor has a financial relationship with that entity. Stark Law defines the types of designated health services (DHS). DHS services includes such things as physical therapy, occupational therapy, radiology services, ultrasound services, different types of medical supplies, clinical laboratory services and other services. A financial relationship includes investment interests, ownership, and compensation agreements. Stark also forbids referrals to entities that provide the designated health service – if an immediate family member has a financial interest in that entity.

On the surface, physician recruitment agreements raise the possibility of violating Stark Law if the hospital is seeking referrals from the physician or some financial benefit due to the doctor's working relationship with the hospital.

However, Stark Law does have exceptions. One specific exception is for recruitment services if all the conditions of the law are met. Some of the key details of the Stark Law exception for physician recruitment include the following:

The physician recruitment exception: Stark law permits a hospital to induce a doctor to “relocate his or her medical practice to the geographic area served by the hospital in order to become a member of the hospital's medical staff, if all of the following conditions are met:

- The arrangement is set out in writing and signed by both parties.
- The arrangement is not conditioned on the physician's referral of patients to the hospital.
- The amount of remuneration under the arrangement is not determined in a manner that takes into account (directly or indirectly) the volume or value of any actual or anticipated referrals by the physician or other business generated between the parties and
- The physician is allowed to establish staff privileges at any other hospital(s) and to refer business to any other entities (except as referrals may be restricted under an employment or services arrangement that comply with other parts of Stark Law.

### **EXCEPTIONS TO THE STARK LAW PROHIBITION OF MEDICAL REFERRALS**

The Stark Law governs what types of referrals doctors can make if they bill for Medicare and Medicaid. The presumption is that that referrals made by a doctor to a designated health service are [...]

Additional exception requirements for the physician recruitment exception:

- A physician will be considered to have relocated his or her medical practice if the medical practice was located outside the geographic area served by the hospital and –
  - The physician moves his or her medical practice at least 25 miles and into the geographic area served by the hospital;
  - or

- Other factors based on the geographical area such as the source of revenues for three years prior to the signing of the physical recruitment agreement
- The relocation requirement may not apply if the doctor had limited experience, worked in a federal or state bureau of prison, or for other listed agencies or services. The conditions generally indicate that the doctor wouldn't be able to refer many patients because of his/her background.
- Where payments are made by the hospital directly or indirectly through another physician practice:
  - The physician practice also signs the physician recruitment agreement
  - Except for actual costs incurred by the physician practice in recruiting the new physician, the remuneration is passed directly through to or remains with the recruited physician.
  - Many other specific and precise conditions an experienced Stark law attorney can explain
- Additional rules for rural hospitals apply
- Other conditions for non-rural hospital may also apply

The core idea behind the exception is that the new doctor should fill a need (specialty) and add to the hospital's service. Generally, the terms of the recruitment contract can't be varied after it is signed. Other Stark problems and exceptions may be needed for recruiting and hiring non-physician staff.

An experienced Stark law attorney can explain how the conditions may vary if a medical practice (without using a hospital) hires a doctor as an employee or as an independent contractor. The payment should be based on fair market value and not the amount or worth or any referrals.

The Anti-Kickback Statute forbids the payment, solicitation, offering, or receiving of anything of value for the purpose of inducing referrals or the generation of health care business through federal agencies. The AKS uses voluntary safe harbors instead of mandatory exceptions.

Generally, most of the requirements for meeting the Stark Law exception will also qualify for the AKS safe harbor. 42 CFR § 1001.952 Section n. The AKS uses the term "practitioner recruitment" instead of "physician recruitment." A skilled physician recruitment lawyer can explain and negotiate any differences between the AKS and Stark that may apply.

Physician recruitment agreements should also comply with any IRS 501(c) (3) requirements.

Skilled healthcare lawyers represent one of the three signers to the physician recruitment. They focus on:

- Any laws or regulations that might result in the violation of Stark, the AKS, or other federal or state laws
- The terms of the loan, promissory note, salary benefits, and the benefits and obligations of each signer
- Related medical issues such as when a physician must be on-call
- Any other relevant legal, business, medical, and business issues

If you have any questions about physician recruiting contracts, Contact the physician recruitment agreement lawyers at Cohen Healthcare Law Group, PC.

Contact our healthcare law and FDA attorneys for legal advice relevant to your healthcare venture.