



**DISCLAIMER:** *None of the information in this article constitutes legal advice, as all of the information is general and individual circumstances may vary. The*

*only purpose of this article is for continuing medical education in the area of professional practice development.*

Clinical emergency physicians have many significant professional problems and most of these problems emanate from our contracts. The days are long gone when a physician can simply sign a brief straightforward contract or letter of retention without carefully reviewing its contents. Before signing any contract, physicians should hire a contract attorney to review the contract and serve as the physician's advocate.

This article will provide brief general information about contract law as it pertains to physicians, then focus on common problems that arise in emergency physician contracts. Some of these problems could profoundly affect the balance of your career.

A contract is a legally binding agreement where parties exchange things of value. Typically, an employer or contract holder will provide a salary and benefits, while the physician provides professional services. Verbal contracts are enforceable in most states but harder to prove. Therefore, physicians almost always sign written contracts. Most written contracts have a clause near the end that states that the entire agreement is contained within the contract. Therefore, if the physician receives oral promises not contained within the contract, such promises are unenforceable. In such cases, the physician should request an amendment to the contract containing the oral promises.

A section near the beginning of most physician contracts will include a list of duties that each party must perform. Typically, the contract will specify your clinical duties. Beware, if the contract specifies that you must perform duties outside of the emergency department (ED). Make sure your malpractice insurance

# Read Your Contract, It's Dangerous!

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covers such duties. Virtually every medical malpractice insurance policy only covers you for acts performed within your specialty. Such policies may not provide coverage for practicing in the intensive care unit, inserting central lines in admitted patients, running cardiac arrests outside the ED, or writing admission orders.

## Employee or Independent Contractor?

A central issue in physician contracts is the question of whether the physician will function as an employee or an independent contractor (IC). This has great importance for three major reasons. An IC may take more business related tax deductions, including far more generous tax deferrals for retirement accounts. On the other hand, an IC pays double social security taxes. On the balance, IC status confers significant tax advantages.

The second important reason to determine the status of the physician concerns benefits. Generally, employees may receive benefits and the employer will make all necessary tax deductions from the employee's paycheck. ICs do not receive benefits and must pay their own taxes. Finally, employers will always have vicarious (indirect) liability for the acts of their employees performed within the scope of their employment, but contract holders generally do not have

liability for the acts of ICs.

If the contract holder provides medical malpractice insurance for the physician but does not provide any other benefits, the Internal Revenue Service (IRS) will most likely classify the physician as an IC. However, the single most important factor is control. If a supervisor controls the work of a physician, then the physician is most likely an employee, even if the contract refers to the

physician as an "independent contractor." For simplicity, this article will refer to all parties to a contract as "employers" and "employees" regardless of the legal status of the physician.

More technically, the IRS has a list of 20 factors to determine whether an individual functions as an employee or an IC. Discussion of these factors lies beyond the scope of this article, but you may easily find a list of these factors on the IRS website or by performing a general internet search.

For many reasons, you should review the malpractice policy before you sign a contract. Not only should you review the scope of coverage, but determine the amount of coverage and whether you must pay for tail coverage after termination of the contract. Most policies in emergency medicine are "claims made"



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policies that provide coverage only during the period of employment. Extending coverage beyond the term of employment requires purchase of tail coverage.

After about five years of employment, the cost of tail coverage plateaus at about 250% the cost of an annual premium. For example, if your malpractice policy costs \$40,000 per year, then the cost of the tail will be around \$100,000. Therefore, you must receive written guarantees that the employer will pay for tail coverage.

**Indemnification**

An important issue relating to malpractice litigation is the “indemnification clause.” These pernicious clauses began routinely appearing in physician contracts 15-20 years ago. On first glance, these clauses seem harmless. In fact, they are sometimes labeled “hold harmless” clauses. The most common form of indemnification clauses in physician contracts state that each party will indemnify the other, or hold the other party harmless, for all liability. This sounds “harmless” and reciprocal, but in practice it places the physician at huge risk for uninsurable losses.

As a general rule, an indemnification clause means that the primary actor in any alleged case of negligence must pay the attorney fees, court costs, and verdicts levied against all other defendants. For example, in a typical medical malpractice lawsuit, the plaintiff will allege that the physician committed malpractice. Therefore, the physician is the primary actor. If the plaintiff then names the hospital and the practice group as additional defendants, then the physician will have to pay all costs of the other defendants.

Malpractice insurance policies do not cover these indemnification expenses. Physicians will have to pay these expenses out of pocket. Just one case can cost several million dollars, resulting in financial ruin for the physician. No benign reason exists why a contract would saddle physicians with such a burden.

**Your Practice Rights**

Perhaps the most important advocacy issues in emergency medicine relate to the systematic abuse of emergency physician practice rights. These abusive practices emanate from our employment contracts. Most important are

waivers in physician contracts that deprive us of basic due process at hospitals. Due process within this setting means that adverse actions against our medical staff privileges must not occur until after a fair hearing before a panel of the physician’s peers.

We have many sources of our due process rights. At government owned or operated hospitals, our due process rights come from the U.S. Constitution, specifically the Fifth and Fourteenth Amendments. At non-government hospitals, our due process rights come from a variety of sources. The Health Care Quality Improvement Act of 1986 specifies in detail the type of hearing we must receive so that hospitals retain their protection from retaliatory lawsuits from dismissed physicians. Also, the Joint Commission requires all physicians at hospitals to have due process rights. Finally, because of the Joint Commission requirements, virtually every set of medical staff bylaws requires due process rights for every member of the organized medical staff.

Regardless, physicians may voluntarily waive these rights. A scientifically valid survey of emergency physicians published in 2013 showed that more than 60% of emergency physicians did not have due process rights at their hospitals.<sup>1</sup> Many reasons exist for emergency physicians to waive these rights. An individual emergency physician has little or no leverage when negotiating a contract with a large hospital or a large contract management group. Routinely, emergency physicians do not have due process rights at most community hospitals.

Since virtually all emergency physicians can have their contracts terminated under the terms of their contracts, what is the real importance of due process rights? Perhaps the most important reason to retain these rights is to end the “second class” status of most emergency physicians at community hospitals. The right to a fair hearing is perhaps the most important basic right of physicians at hospitals. Emergency physicians cannot expect to be treated as full members of the medical staff without basic practice rights.

Another important reason for emergency physicians to retain their due process rights relates to the National Practitioner Databank (NPDB). If a physician loses his medical staff

privileges due to any aspect of his performance or behavior, the hospital has a legal duty to report this action to the NPDB within 30 days. Failure to report such disciplinary actions may result in a loss of the hospital’s peer review antitrust immunity for up to three years.

If the terms of a contract force a physician to waive her due process rights, then the physician should seek legal counsel to try to protect her rights. If the other contracting party insists on depriving the physician of her due process rights, then she must make a decision whether to look elsewhere for employment. The demand for board eligible or board certified emergency physicians is currently very strong. Most emergency physicians do not realize how much bargaining power they have, so in most cases they can look elsewhere and take a job at a hospital that does not deny their practice rights.

Another contractual provision routinely used to restrict the practice rights of emergency physicians is the restrictive covenant, or “non-compete clause.” In its most common form, a post contractual restrictive covenant will prohibit the physician from working in a defined geographical location for a specific period of time. For example, a restrictive covenant may state that the physician cannot work in a 50 mile radius from the hospital for a two year period after termination of the contract.

Laws in eight states prohibit the use of restrictive covenants in physician contracts. Courts in the other 42 states use a “rule of reason” when deciding whether to uphold restrictive covenants. This rule balances an owner’s legitimate business interests against an individual’s right to practice one’s profession. Courts in these states will uphold the restrictive covenant if the geographic and time restrictions are reasonable. However, the prevention of competition is not a legitimate business interest.

What constitutes a legitimate business interest that a restrictive covenant may protect? Restrictive covenants primarily protect trade secrets. For this reason, many contracts containing restrictive covenants will also contain unintelligible language stating that the physician acknowledges that he will learn trade secrets from the employer, and these trade secrets have enormous value. I’m not aware



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of any trade secrets in emergency medicine. We don't have referral lists. We keep our doors open 24/7 and patients constantly fill our waiting rooms.

For a number of other reasons, restrictive covenants are most inappropriate in emergency medicine. We don't learn our profession from employers. Almost every emergency physician learns everything they need to know during residency. Unlike physicians in many other specialties, we don't learn office management from employers. We don't have personal patients who will follow us to other hospitals. Unfortunately, restrictive covenants exist only to control and exploit emergency physicians. If a prospective employer will not remove a restrictive covenant from a contract, this creates another need for legal representation. Also, since many restrictive covenants do not protect legitimate business interests, they may not survive a challenge in court.

## Conclusion

For many emergency physicians, signing a contract may constitute the most hazardous step in one's career. Most emergency physician contracts contain some exploitative provisions. In addition to understanding employment status and duties under the contract, physicians should pay close attention to conditions under which they may be terminated, whether they have access to a fair hearing prior to termination, and whether they may be subject to a restrictive covenant after termination of their contract. Finally, indemnification clauses represent a relatively new danger with potentially devastating consequences.

Physicians should secure legal counsel while navigating the process of signing a contract. An experienced contract lawyer can review almost any physician contract within three hours. Therefore, the cost of such representation will be quite modest, especially when

considering the important consequences of signing a dangerous contract.

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