

WHAT PATHOLOGISTS SHOULD KNOW ABOUT NEGOTIATING EMPLOYMENT CONTRACTS

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When considering new employment, many prospective employees, including physicians such as pathologists, focus primarily upon the compensation terms in the contract. However, there are many other provisions in employment contracts that merit careful attention from pathologists, as discussed in more detail below.

Historically, most pathologists were employed in private practice, that is, professional corporations or professional associations that were owned by pathologists, and not by hospitals or large corporate entities. Young physicians would join the private practice as non-owner employees and, after a number of years, typically be offered the opportunity to buy into the practice as an owner. Although private practice used to be the predominant mode of practice for most physicians, more than three-quarters of physicians now are employed by hospitals, health systems, or larger corporate entities. There are many reasons for this transition, including perceived improvement in work-life balance, coverage under stronger third party payer agreements, access to lower malpractice rates, and no buy-in expenses such as are associated with the private practice model.

There are also two other types of practice options that pathologists may consider. One is employment by an academic medical center and the other is employment by a larger commercial laboratory. With respect to the terms of an employment contract, employment by an academic medical center or a commercial laboratory are more similar to employment by a hospital or health system than employment with a private practice.

When considering the type of practice desired, it is important to rank the pros and cons of each of these types of employment with personal priorities such as maximizing compensation (paying off a heavy student loan debt), lifestyle (work-life balance, particularly to accommodate raising a family or elder care), geography, the importance in being employed in a specific city or town, as well as professional challenge (particularly for those who are interested in academics and research).

To the extent that dollars are a top priority, typically a pathologist will earn more money over a professional lifetime in private practice, particularly once the pathologist buys into the practice as an owner. However, given the scarcity of pathologists in recent years, hospitals, health systems, academic medical centers and commercial laboratories are increasingly paying higher salaries to pathologist employees. The greater the scarcity of pathologists, particularly those with necessary subspecialty expertise, the greater the flexibility the prospective employee will have in negotiating a higher salary.

It is important to note that in the private practice setting, the top earning years typically arrive after the pathologist has purchased an ownership stake in the practice. Those practices with affiliated histology laboratories tend to have higher income pathologists than those that are solely hospital based without an affiliated histology laboratory to bring in additional income.

To the extent that work-life balance is critical, a pathologist may find employment by a hospital, health system, academic medical center, or commercial laboratory to be preferential over private practice. Typically, these positions have more fixed hours and, in the case of commercial laboratories, may have minimal or no call coverage requirements. Academic medical centers may have a heavier burden to the extent that there are teaching and research obligations, but usually these are offset with a reduced workload of professional pathology services.

Compensation

The compensation terms of an employment are typically the primary focus of attention for a prospective employee. Compensation methodologies can range from a fixed, flat annual salary to a model that is based 100% upon the pathologist's productivity (the dollars that the pathologist brings in the door). Most compensation provisions, however, reflect a hybrid model. This hybrid model includes a base salary that is a fixed amount as well as a bonus provision (as described in the paragraph below). It is important to ensure that the bonus is a guaranteed bonus, and not a bonus that is completely discretionary (only paid in the discretion of the employer). If the bonus is discretionary, then there is a chance that the bonus will never be paid if the employer decides that it does not have the additional dollars at the end of the year or simply decides to put the additional dollars towards the compensation of the owners. A guaranteed bonus formula provides a strong incentive for the employee to work hard, and provides the potential for increasing compensation if maximizing dollars is important to the employee.

A typical bonus provision in an employment contract states that the employee will be paid a percentage of the employee's personal collections (the dollars the employee brings in the door from the employee's professional services) minus all overhead associated with the employee (base salary, benefits and other overhead expenses). For example, assume an employee generates \$700,000 of collection in the first year of employment. Assume that the employee is paid a base salary of \$200,000 per year, and has benefit costs and malpractice insurance costs of \$50,000 per year and other associated overhead costs of \$100,000. In this example, \$350,000 will be deducted from the \$700,000 of collections generated by the employee for the year. If the bonus provision provides that the employee is paid 30% of this net profit amount, the employee then would receive a bonus of \$105,000. It is rare that an employee would be paid more than 50 or 60% of the difference between the collections generated by the employee minus the aggregate costs associated with the employee. Consider negotiating an increase in the percentage paid to the employee each year, for example, 25% the first year, 35% the second year, 45% the third year, etc.

This type of base salary plus productivity model is fairly common in private practice settings as well as employment by hospitals, health systems, academic medical centers, and commercial laboratories. In academic medical centers, given the focus on research and teaching, it is possible that the pathologist may not generate as many dollars that would be attributable to a bonus calculation. Therefore, it may be of benefit to utilize relatively value units or some other measure to account for time spent in research and teaching. Similarly, if the pathologist will have any CLIA laboratory director duties, the value of these services must be taken into account given that they may not generate dollars that are directly attributable to the employee. There could be an additional

fixed amount paid per directorship assumed by the employee, or an RVU conversion factor that is worked into a productivity bonus.

Benefits

In addition to compensation, there are also significant dollars tied to benefits, and these should be outlined in the employment contract. For example, how much will the employer pay annually towards medical license fees, hospital medical staff dues, journal subscriptions, and continuing medical education? If the pathologist will be required to cover multiple hospitals, and therefore require medical staff privileges at multiple hospitals, it is important to ensure that each hospital's medical staff dues are covered by the employer.

In addition, the employment contract should specify vacation time, sick leave, continuing medical education leave, and parental leave. It is not uncommon for the number of weeks of leave to increase each year, for example, increasing from four weeks in the first year of employment, to five weeks in the second year of employment, and six weeks thereafter.

Term and Termination

A multi-year term of an employment contract can be deceiving if the employer has the right to terminate the contract with or without cause upon relatively short notice. For example, if an employment contract recites a term of five years, but the employer can terminate the contract without cause on 30 days' notice, this means that the employee really has only a 30-day contract.

If having a guarantee of employment is important to the employee (the employee has relocated, purchased a new home, has a spouse or partner who has secured new employment, etc.), then the employee may wish to negotiate a compromise provision in the employment contract whereby the employer can only terminate the contract during the first year of employment with good cause. Good cause means a situation where the employee has breached the terms of the contract, such as unexcused absences, losing a medical license, losing hospital staff privileges, etc.

Another important ramification of termination provisions is their possible impact upon a signing bonus or recruitment guarantee. Oftentimes, employment contracts state that the employee must repay all or a prorated portion of a signing bonus or recruitment guarantee if the employee's employment terminates for any reason within the first year or two (or even three) of employment. If the employee decides to relocate without good cause and terminate employment, such a provision may not be unreasonable. However, if the employer terminates the contract without good cause, then the employee not only faces an unexpected loss of employment, but also the financial repercussions of repayment. If such language exists in the employment contract, the ideal negotiation would be to remove this language. As a compromise, the employee should not be required to repay any amounts if the employer terminates the contract without good cause or the employee terminates with good cause.

Professional Goals

If a new pathologist has subspecialty training and expertise, and it is important that the pathologist has a substantial portion of work in this subspecialty area, then the employment contract should recite a minimum guaranteed threshold of subspecialty work that would be available to the pathologist. For example, for a dermatopathologist joining a new practice, it would be advisable to specify that 85% or more the new employee's work will be in dermatopathology. Without such a guarantee written into the contract, a pathologist with subspecialty expertise may spend most of the employee's time doing general pathology work.

Other issues to consider clarifying in the employment contract include the call schedule, how many hospitals or offices the pathologist must cover, and, if multiple hospitals and offices must be covered, the geographic extent of coverage. If the pathologist will be required to travel extensively for the position, are these travel expenses covered by the employer? If the new employee has significant child care or elder care obligations, will this travel interfere with these obligations? These may be important issues to clarify for the pathologist.

Licensure

If the new employment position is in a border state area, or will require the new employee to interpret specimens that are collected in other states, it is important to clarify that the employer will provide assistance and funding to obtain medical licensure in those states. Some states have consultation exceptions, which can permit a pathologist to interpret specimens generated in another state as long as the results are provided to the ordering physician. In a number of states, however, no such consultation exception exists, or it is only available for occasional or sporadic interpretations.

There is still a perception, particularly in some academic and commercial laboratory settings, that there are across-the-board consultation exceptions that protect pathologists and do not require pathologists to obtain medical licenses in multiple states. Unfortunately, when malpractice cases have arisen or there have been other complaints to state medical boards, and it has been discovered that the interpreting pathologist does not have a medical license in the state where the specimen was collected, some states have taken disciplinary action against the pathologist for the unlicensed practice of medicine. Further complicating matters is that the pathologist's "home state" can also then take action against the pathologist's license in the home state based solely upon an adverse action taken by an out-of-state medical board. Therefore, it is important to determine the extent to which out-of-state professional interpretations may be required and, if so, the assistance that the employer will provide with obtaining and paying for the additional medical licenses.

Insurance

Professional liability insurance is carried on an occurrence or claims-made basis, or maybe through self-insurance. Most private practices have traditional professional liability insurance, most often claims-made, but occasional occurrence based. Many larger hospitals, health systems and commercial laboratories have all or part of the liability exposure covered through self-insurance, perhaps with umbrella coverage or re-insurance for catastrophic events. It is important to clarify the type of insurance covered and, if any of the insurance is covered on a claims-made basis, who is responsible for the tail coverage.

Claims-made insurance coverage only provides coverage to defend against malpractice claims that are brought in a year in which the premium is paid. This means if employment terminates, and no tail policy is purchased, the pathologist would not have insurance coverage available to cover the lawsuit and/or any resulting damage award to the patient if the lawsuit is filed after the termination of employment. In contrast, occurrence based insurance will cover any claim that arose from an act or omission that occurred in a year in which the premium was paid, regardless of when the actual claim is filed.

Some employment contracts specify that the employee is responsible for the cost of the tail insurance. Instead, compromise provisions could include a 50/50 sharing between the employer and the employee of the tail coverage in the event of termination of employment. Another compromise position is payment of the tail coverage by the employer if the employer terminates without good cause or the employee terminates with good cause. If the employee walks away without good cause or if the employer terminates with good cause, then it would be reasonable for the employee to pay the cost of the tail insurance.

Shareholder/Partnership/Member Track in Private Practice Settings

In employment by hospitals, health systems, academic medical centers, or commercial laboratories, the pathologist will remain an employee, and would never have an ownership stake in the employer. However, in private practice settings, it is fairly common for the pathologist to be offered the opportunity to buy into the practice after some period of time, such as three to seven years, if continued employment is mutually acceptable to both parties.

While an initial employment contract would rarely guarantee such a buy-in opportunity, there is a benefit to including a provision in the contract regarding the general expectations and buy-in formula that are typically used by the practice. For example, the contract could contain language explaining that if the parties mutually agree that continued employment is desired after four years, the employer will offer the employee the opportunity to buy into the practice on the same terms as offered to other pathologists in the practice. The contract would then recite the formula for the buy-in that the parties would anticipate applying. Again, such language is not a guarantee, but can be useful to set expectations.

Restrictive Covenants

There are several types of restrictive covenants that may appear in a contract. A non-competition provision prohibits the pathologist from working for a competitor during and for one or two years after employment, typically within a given geographic area. A non-solicitation provision restricts the pathologist from directly or indirectly soliciting (a) clients of the current employer, (b) patients of the current employer, and (c) employees of the current employer, to leave their employment and join the pathologist in his or her new place of employment. A confidentiality provision requires that the pathologist maintain the confidentiality of confidential and proprietary information of the employer. Non-solicitation and non-competition provisions generally are enforceable, and pathologists should heed these restrictions. Typically a non-solicitation provision applies during

employment and for one or two years after termination of employment. Confidentiality provisions may extend indefinitely.

Non-competition provisions are more complicated. The Federal Trade Commission (“FTC”) recently enacted a new rule that would have banned most restrictive covenants, including virtually all restrictive covenants that would have applied to new pathologist employees. This new FTC rule was challenged and a court has barred the FTC from enforcing the new rule. It is unclear what direction the FTC may take in the future. Notwithstanding, there are several states that already prohibit the enforcement of non-competition provisions against physicians, including Massachusetts and California. In other states, non-competition provisions are enforceable and can significantly impede a pathologist’s ability to secure new employment following termination of an employment contract.

If a non-competition restriction is included in the employment contract, it is best to try to negotiate to remove this provision, particularly if the employer is in a state that does not permit enforcement of the restriction. For other situations, as a compromise, it would be reasonable for the non-competition restriction to only be triggered if the employee terminates the employment contract without good cause or the employer terminates with good cause. With this compromise, if the employer terminates the employment contract without good cause, the employee will not be further burdened by having to relocate in order to find new employment.

The foregoing is not an exhaustive list of important provisions in employment contracts, but represents common provisions that often are overlooked or misunderstood.