Mueller Prost PC
CPAs + Business Advisors

PRACTICE STRATEGIES

EMPLOYMENT AGREEMENTS
Begin with the End in Mind

As the healthcare system continues to realign along new economic lines, physicians are increasingly becoming employees — making the move from private practice to established medical groups, managed care organizations and healthcare institutions.

For many physicians, this means negotiating an employment contract — often for the very first time.

Cover the "What-ifs"

The focus of an employment agreement is usually on the front end: compensation, on-call schedules, etc. Yet, physicians negotiating an employment contract also need to carefully consider what happens at the back end of the agreement — and all the "what-ifs" that can occur.

For example, what if the employment doesn't work out? Here, it may be wise to negotiate some back-end protections:

Tail coverage – Most employment agreements call for the employer to cover the cost of malpractice insurance during employment. In the case of "occurrence-based" coverage, the back end is pretty seamless: The physician leaves, and any professional liability is covered by the insurance carrier.

Coverage may not be seamless, however, if the coverage is "claims-made." Here, so-called "tail coverage" may be required after termination of the employment contract to cover any prior acts. Due to the significant expense, determining who pays for tail coverage can be a key negotiation point.

Negotiating tip: Make sure the employment contract clearly defines what type of malpractice insurance is being offered — and who is responsible for purchasing tail coverage.

Non-compete clauses – Another key back-end issue arises in the area of non-compete clauses. These provisions attempt to prohibit the departing employee from practicing in the same geographic area for a certain period of time. While these clauses are illegal and unenforceable in some states (California, for example), employers often include them in contracts anyway.

Even where legally permitted, the non-compete clause must be "reasonable" in order to be enforceable. For example, you cannot be restricted from practicing in an entire state. Likewise, while a geographic restriction of 30 miles might be reasonable in a far-flung rural setting, it could be considered overly restrictive and unenforceable in a dense metropolitan setting.

Negotiating tip: Always negotiate the smallest geographic area and shortest time period you can for this clause. Also consider adding a liquidated damages clause to the agreement. This gives you the option of setting a price to forego enforcing the non-compete clause.

Non-solicitation clauses – Similar to non-compete clauses, non-solicitation provisions attempt to prohibit the departing physician from recruiting existing patients or employees to a new practice. In general, such clauses are perfectly legal. However, overly restrictive clauses may actually seek to prohibit the physician from even contacting patients regarding his or her departure.

Negotiating tip: Typically, a non-solicitation clause contains some time element (e.g., it may be enforceable for 24 months). Always negotiate the shortest time possible.

No-cause termination provision – Physician employment contracts routinely contain a provision

EMPLOYMENT AGREEMENTS

Begin with the End in Mind, cont'd.

permitting either side to terminate the agreement with 60 or 90 days notice for any reason, or for no reason at all.

Negotiating tip: Consider tweaking the termination provision to require written notice of any breach of the agreement — and an opportunity for the physician to address or correct the situation.

Last Words

Don't fall into the trap of signing an employment agreement without reading it thoroughly — and negotiating terms that protect you. Have a qualified healthcare attorney review any potential employment agreement and provide the guidance you need before you sign.

A comprehensive discussion of standard contract terms and information about pro-physician and pro-employer positions on standard employment agreements can be found in the AMA's *Annotated Model Physician Employment Agreement* (http://ama-assn.org).

Our professionals have real-world experience working with physicians like you and can provide expert guidance in designing or evaluating effective compensation agreements. Call us to discuss your situation in more detail.

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TAX PLANNING STRATEGIES

Strategic Planning for the New Medicare Surtax

The challenges of tax planning for 2013 have increased dramatically with the uncertainty of how Fiscal Clif resolutions will play out.

As part of the Affordable Care Act, a new 3.8 percent Medicare surtax will be imposed on the unearned income of many high-net-worth individuals beginning in 2013. Unearned income includes:

- Dividends
- Rents
- Interest
- Passive activity income
- Capital gains
- Annuities
- Royalties

The surtax is also imposed on estates and trusts, although slightly different rules apply (see sidebar below). For taxpayers, the amount subject to the Medicare surtax will be the lesser of:

1) Net investment income (NII), or

2) The amount of modified adjusted gross income (MAGI) over certain thresholds.

The MAGI threshold for married taxpayers filing jointly is $250,000, while it's $125,000 for married taxpayers filing separately and $200,000 for individuals.

TAX PLANNING STRATEGIES

Strategic Planning for the New Medicare Surtax, cont'd.

For example, Dr. and Mrs. Smith are married taxpayers filing jointly. They have $300,000 in income from salary and $100,000 of net investment income. The amount subject to the surtax would be the lesser of NII ($100,000) or the excess of their MAGI ($400,000) over the threshold amount ($400,000 -$250,000 = $150,000). Because NII is the smaller amount, the tax is calculated on this base, so the surtax would be $3,800 (.038 x $100,000).

Avoiding or Minimizing the Surtax

To avoid or minimize the adverse effects of the Medicare surtax, you may want to consider these investment vehicles to help keep your MAGI and/or NII below the thresholds:

Tax-deferred or tax-free investments – Income from tax-exempt bonds and non-qualified annuities, for example, is not included in NII.

Life insurance – Purchasing a whole life insurance policy allows you to reallocate money from assets that create current NII and/or MAGI to assets that create neither, and then withdraw basis from the policy in lower-income years.

Qualified retirement plans – Maximizing contributions to qualified retirement plans such as IRAs, 401(k)s, and 403(b) and 457 plans may make sense, as distributions from these retirement plans are not subject to the investment surtax.

Roth IRA conversions – Converting traditional IRAs to Roth IRAs in 2012 rather than 2013 can reduce MAGI in 2013.

Rental real estate – If depreciation deductions on rental real estate exceed rental income, the net loss may be able to offset other investment income (limitations apply).

Oil and gas investments – Intangible drilling costs (IDCs) associated with investments in oil and gas wells can produce a large current deduction — as much as 80 percent of the amount invested.

Installment sales – Installment sales in which an asset is sold in exchange for a promissory note paid over a period of time may be used to limit the amount of net investment income in any one year, as well as manage your MAGI.

Above-the-line deductions – Deductible contributions to a Health Savings Account, self-employed retirement account and a traditional IRA could reduce exposure to the surtax.

Contact our office today at 314.862.2070 to begin planning to minimize your tax exposure.

The surtax is also imposed on estates and trusts, but slightly different rules apply.

Surtax Strategies for Trusts and Estates

Under the Supreme Court's decision upholding the Affordable Care Act, trusts and estates will be subject to the 3.8 percent Medicare surtax on the lesser of undistributed net investment income for the taxable year, or the excess (if any) of adjusted gross income over a threshold amount.

Thus, a trust in the highest potential marginal tax bracket in 2013 (39.6 percent) will have a marginal rate of 43.4 percent.

Given the relatively low threshold amount (currently just $11,950), most net investment income of a trust or estate will be subject to the surtax unless it is distributed. If the beneficiaries would not be subject to the surtax on distributions, distributing enough of the net income to reduce undistributed income below $11,950 can help avoid the surtax.

Source: AICPA

Working in an ACO: Questions to Ask

Healthcare reform's focus on quality, efficiency and accountability make alignment with Accountable Care Organizations (ACO) an appealing prospect for many physicians.

Details on how ACOs will be organized and governed are still sketchy. In the end, ACOs may vary widely in their governance, quality improvement strategies and how any shared savings will be distributed.

Physicians seeking employment in an organization that will be structured as an ACO should seriously consider a number of different issues affecting their employment, including these:

Compensation – How will salary and bonuses be tied to the ACO's ability to achieve cost savings (i.e., how will any savings be distributed)? Obviously, you'll want as much information as possible about the other participants in the ACO.

Peer review – How will peer or professional review affect physician employment status? For example, what are the repercussions of failing to meet quality measures? Likewise, will peer review information from one organization be shared with other organizations within the ACO or any payors who contract with the ACO?

Quality standards – How will quality standards and protocols for integrated treatment be developed? And how will they affect physicians' medical decisions?

Liability – Traditionally, physicians have been able to accept or refuse to treat a patient or a group of patients, as well as choose which physicians or other healthcare professionals to collaborate with. Is there any additional risk of physician liability that will be encountered by joint participation with other organizations or physicians? Will the physician be protected by the employer's insurance policy?

Personal expenses – If participation in the ACO requires providers to travel to other participating organizations, will automobile and other personal and travel expenses be reimbursed?

Termination – Does the ACO have the right to expel a physician? How will this impact the employment relationship with the participating employer?

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The firm offers a full range of professional tax, audit, accounting and management advisory services to physicians, physician groups, nursing homes and other providers in the healthcare industry.

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