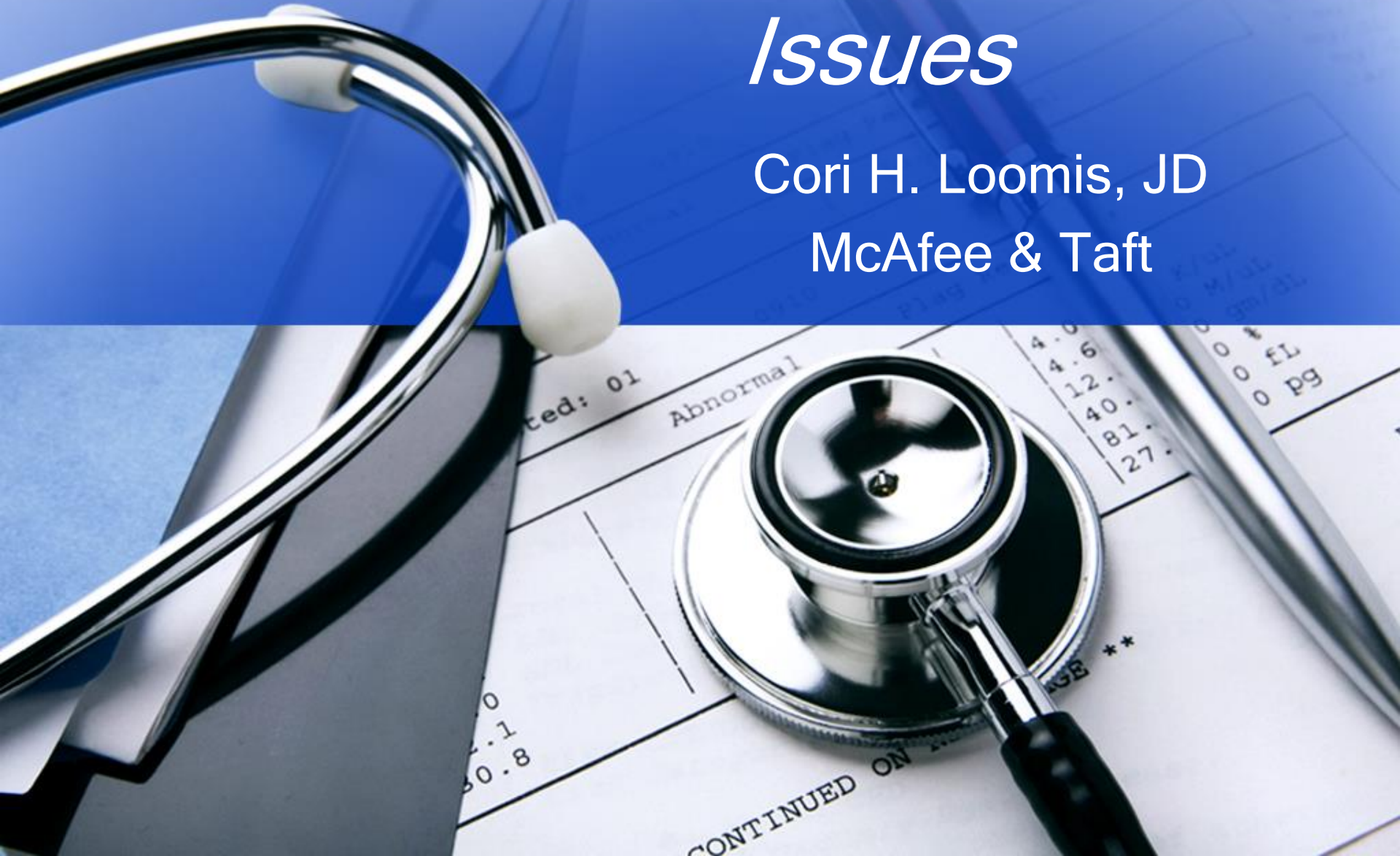


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# *Physician Contracting Issues*

Cori H. Loomis, JD  
McAfee & Taft





# Objectives

- **Employment Agreements:** Recognize the biggest mistakes physicians make in negotiating employment agreements;
- **Medical Practice Ownership/Buy-Ins:** Identify key issues and terms that need to be considered and negotiated;
- **Visa Waiver Issues**
- **Investment Issues:** Recognizing the fallacies in a sales pitch.

# Employment Agreements





# Employment Agreements - Common Mistakes

- Not thoroughly reviewing the contract.
  - Assuming you can't negotiate.
  - Failing to get verbal commitments in writing.





# Physician's Options

Get a  
legal  
review

Request  
changes  
w/o legal  
counsel

Utilize  
books  
and  
online  
resources

# Key Metrics to Negotiate





# Employment Agreements - Common Mistakes

- Failure to conduct adequate due diligence or research on employer and employer culture.





# Employment Agreements - Common Mistakes

- Failure to ensure understanding of terms.
  - Defined terms
  - Vague provisions
  - Obligations incorporated by reference
  - What's there and what's not





# Employment Agreements - Common Mistakes

- Failing to understand compensation formulas and benefits.
  - What circumstances may negatively impact comp.
  - Supplementing benefits if needed.





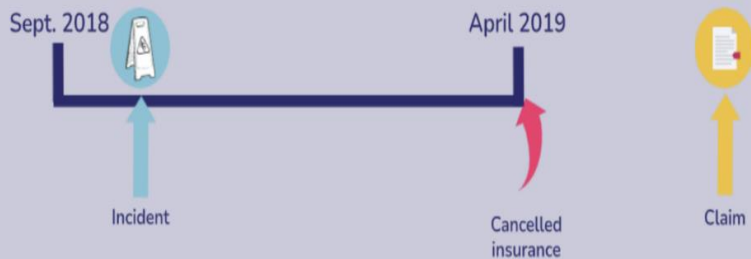
# Employment Agreements - Common Mistakes

- Failing to recognize one-sided nature of most agreements and considering impact of termination.
  - Tail insurance
  - Repayment of any loans/advances.
  - Restrictive covenants.



# Types of Insurance

## Occurrence



Because the **event** occurred during the policy period, the **claim** is covered. It doesn't matter when the **claim** was made.

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insurance  
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## Claims made



The **event** occurred after the retroactive date and the **claim** occurred during the following policy period, so the claim was covered under the following year's policy.

Had the Insured not renewed their policy or purchased an **ERP**, it wouldn't be covered.

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# Restrictive Covenants

- Covenant Not to Compete
  - Prevents departing physician from competing with employer in specific geographic area for defined period of time.
  - Not enforceable under current Oklahoma law.
- Confidentiality Provisions
  - Trade secrets
  - Proprietary information
  - HIPAA - patient identifiable information
  - Enforceable
- Non-solicitation Clause
  - Cannot solicit patients
  - Cannot solicit other employees or contractors of the practice
  - Enforceable



# Restrictive Covenants

- Under current Oklahoma law, a non-compete in an employment agreement is not enforceable, but in the ownership context, it is enforceable.
  - Geographic restrictions
  - Time
  - Services/Scope of restriction

# Practice Buy-In



[BY-SA](#)

A stethoscope and a pen are resting on a medical chart. The stethoscope is silver and black, with its chest piece on the chart. The pen is silver and lies diagonally across the chart. The chart has various lines and text, including the word "CONTINUOUS" visible.

# Negotiating Practice Buy-In

- What does your initial employment agreement say?
  - Hopefully, it said something. . . .
  - Prospective nonbinding buy-in terms

A stethoscope and a pen are resting on a medical chart. The stethoscope is silver and black, with its chest piece on the chart. The pen is silver and lies diagonally across the chart. The chart has various lines and text, including the word 'CONTINUOUS' visible.

# Know what you are buying

- **Liabilities**

- Has the practice been subject to payer audits or recoupments?
- Compliance issues?
- Debt? Personal guarantees?
- Lawsuits?
- Is it as profitable as you think it is?



# Major Issues

- Buy-In terms
- Control/decision making
- Transferability of ownership
- Compensation/allocation of expenses
- Restrictive covenants
- Tax Issues (Consult CPA, LLM)

A stethoscope and a medical chart are visible in the top-left corner of the slide. The stethoscope is silver and black, resting on a white medical chart with some text and a small diagram. The chart is placed on a blue surface.

# Buy-In Terms

- Formula
- Flat Amount
- Valuation (What is it based on?)
- Sweat equity
- Lump-sum
- Pay-out

A stethoscope and a pen resting on a medical chart with various tables and text, including the word 'CONTINUOUS' visible.

# Control

- **How are decisions made?**
  - A senior physician manager (founding owner)
  - Management or executive committee
  - All owners
- **Minority owner protections**



# Transferability of Ownership

- Sale/assignment/transfer of an ownership interest: permitted or prohibited?
- Right of first refusal on sale
- Triggering events for repurchase
  - Death
  - Disability
  - Voluntary?



# Transferability of Ownership

- Valuation of ownership interests
  - Certificate of agreed value
  - Valuation formula
    - Book value
    - Multiple of earnings
    - Multiple of compensation
    - Other
  - Appraisal method



# Transferability of Ownership

- **Payment method and terms**
  - Insurance funding of death/disability
  - Payment terms and security
    - Lump sum
    - Installments
      - Promissory note
      - Interest rate
      - Events of default
    - Security

A stethoscope and a pen are resting on a medical chart. The stethoscope is silver and black, with its chest piece on the chart. The pen is silver and black, with its tip on the chart. The chart has some text and lines on it.

# Compensation a/k/a Income Distribution

- Equally
- Production
- Combination

A stethoscope and a medical chart are visible in the top left corner of the slide, partially overlapping the blue header.

# Expense Allocation

- Equal assessment
- Direct cost allocation
  - Each owner calculated separately.
- Indirect cost allocation
  - Fixed costs such as rent and utilities are charged to each physician.
- Allocation based on time worked/productivity.

# Visa Waivers





# Options

- Two of the most commonly used waiver programs for physicians who hold J-1 nonimmigrant visa status are:
  - Conrad 30 waiver program and
  - HHS's waiver program.
    - Only primary care physicians are eligible to apply for an HHS waiver, but they are unlimited.

A blue gradient background with a medical-themed image in the top left corner. The image shows a stethoscope, a pen, and some medical papers or charts.

# HHS Waiver

- Primary care
  - Family medicine
  - General internal medicine
  - General pediatrics
  - Obstetrics & gynecology
  - General psychiatry
- Must agree to practice in HPSA



# Conrad 30 waiver

## The J-1 foreign medical graduate must:

- Have been admitted to the United States under section 101(a)(15)(J) of the INA to receive graduate medical training;
- Enter into a bona fide, full-time employment contract to practice medicine in H-1B nonimmigrant status for at least 3 years at a health care facility located in an underserved area;
- Obtain a “no objection” statement in writing from their home country if they are contractually obligated to return to their home country upon completion of the exchange program.
- Agree to begin employment at the health care facility, specified in the waiver application, within 90 days of receipt of the waiver, not the date their J-1 visa expires.
- See each state’s public health department (or its equivalent) website for specific details.

# Other Issues - Investments





# Suspicious Sales Pitch

- **“The most you can lose is your investment.”**
  - Not true.
  - If the investment/venture is not structured properly and violates the Stark Law or the Anti-Kickback Statute, you can incur significant fines and penalties and face false claims act liability.
  - Be very cautious about “loaning” your medical license to others who want to use it to make a profit.



# Suspicious Sales Pitch

- **“Don’t worry. Our attorney has approved this.”**
  - You need to have YOUR attorney look at the agreement or arrangement - someone who is looking out for you.
  - Sometimes deal promoters do not tell their attorneys all the important details.
  - Sometimes they had their attorney look at a prior version of the documents.



# Suspicious Sales Pitch

- **“We’ve been doing this for years.”**
  - This is why the fines and penalties are so high. To deter people from trying to get away with something.
  - You may get away with pushing the envelope, but if you get caught, the consequences can be devastating.



# Suspicious Sales Pitch

- **“We’ve ‘carved out’ Medicare /Medicaid.”**
  - If the entity or investment is being formed to accept only private payers, but you are referring patients to another entity owned by the same people or business, you are still making a prohibited referral.

A stethoscope and a pen are resting on a medical chart in the top left corner of the slide. The stethoscope is silver and black, and the pen is silver. The medical chart has some text and a small diagram on it.

# Suspicious Sales Pitch

- **Sales rep says, “We use this CPT code all the time and it gets paid.”**
  - The code you use has to be for the service or product actually provided.
  - You cannot document what you didn’t do or provide and think that solves the billing issues.

# *Thank you.*

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