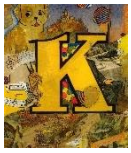

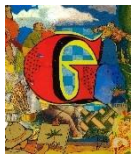
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Anatomy of Locum Tenens Contracts: Physicians' Guide to Understanding Contractual Provisions to Maximize Opportunities and Minimize Risks

By Jack A. Gordon, Esq. and Andrew E. Sarti, Esq.[1]

Locum tenens means "to hold the place of, to substitute for" and locum tenens contracts are a common form of agreement for physicians who provide temporary medical services in place of full-time physicians. Frequently, locum tenens physicians substitute for staff physicians on leave in hospitals and other healthcare settings or where those facilities lack enough full-time attendings. Many physicians are drawn to locum tenens work for a variety of reasons, including flexible work schedules, increased compensation, less administrative work, the ability to deduct from income expenses that might not otherwise be deductible, and steering clear of office politics. Now, during the COVID-19 pandemic, many physicians find locum tenens work a necessity as certain specialists experience pay cuts, are furloughed or even laid off. Others have come out of retirement to help fight the pandemic through locum tenens engagements.

While demand for locum tenens physicians continues to increase, even before COVID-19, many hospitals and other facilities utilized the practice to address physician shortages and maintain continuity of patient care. While increased demand puts physicians in a better position to negotiate their locum tenens contracts, too many practitioners simply sign them without fully understanding all of their implications. This is a grave mistake. A well-drafted locum tenens contract (a) promotes and protects the physician's interests beyond compensation, (b) anticipates and prevents disputes between the parties (or at least has dispute resolution mechanisms), and (c) limits the risks inherent in such arrangements.

This article dissects some of the key provisions found in locum tenens contracts, as well as their common legal implications and pitfalls, so physicians can better recognize provisions that are for and against their interests. However, this is by no means an exhaustive list of the provisions commonly found in these contracts nor does it reflect all of their associated implications to the contracting physician.

How Locum Tenens Works

Physicians generally provide locum tenens services through third-party placement agencies, directly to healthcare facilities, or both.

Most locum tenens work is offered through placement agencies. These agencies recruit and directly contract with physicians to meet the temporary staffing needs of the hospitals and other healthcare facilities they represent. In addition to matching physicians with locum tenens opportunities, agencies generally coordinate the entire placement and onboarding process, including support with licensing, credentialing, and the privileging

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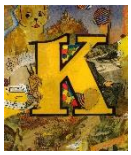


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process, and often organize travel and housing for the assignments. Although these agencies market themselves as advocates for physicians, their primary loyalty is to the clients that pay their fees – the facilities they represent. Unfortunately, the facilities' interests often conflict with those of the contracting physician.

Once one understands that placement agencies are not advocates for locum tenens physicians, it becomes clear that it is up to physicians to protect their own interests. The locum tenens physician agreement is the place to do this. While there are some agency contracts that are fair and equitable to all parties, most are pro-employer agreements that are heavily stacked against the interests of the physician. This is precisely why physicians should hire an attorney well-versed in drafting and negotiating locum tenens agreements to ensure their interests are protected.

Locum tenens opportunities sometimes come directly from the facilities themselves. This is often the case where physicians have established a network of facilities that need locum tenens coverage on a regular basis. There are many advantages to contracting directly with a facility, the most significant being the possibility of negotiating increased pay by eliminating the "middle man." And, it is not uncommon for the facility to ask that the physician draft the locum tenens agreement, making it imperative to retain knowledgeable counsel. Conversely, if the healthcare facility has its own form of agreement, the physician should have it vetted by counsel before putting pen to paper.

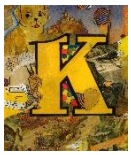
What Physicians Need to Know

The structure of locum tenens contracts and their specific provisions vary between agencies and facilities. Some use a blanket master services agreement that governs the relationship between the facility and the agency and, as a result, establishes many critical elements, including the representations and warranties, obligations, conditions, and procedures for how locum tenens opportunities are offered, accepted and declined. For most agencies, a master services agreement is generally signed before placing or even offering physician services to any of its client facilities. After the master services agreement is signed, it is supplemented by tailored written locum tenens assignments (often referred to as work orders, statements of work, or confirmations), which specify the facility's location, dates of engagement, compensation and possible modifications to the master services agreement with regard to that specific assignment.

Although the form of the contract and any subsequent work orders can differ, many provisions are standard. Below is a list of some of the key provisions and what to focus on.

Term

A basic but still important provision in any locum tenens agreement is its term – *i.e.*, how long it remains in effect. An "evergreen clause," one that automatically renews the term for successive periods of time, is common in locum tenens agreements. An evergreen provision means the contract does not expire and, as a result, remains in effect

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until one party terminates it. Evergreen provisions have several advantages as well as disadvantages for physicians.

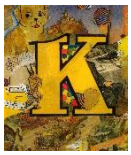
Advantages include not having to renew the agreement in writing every time the term is otherwise nearing its end. Although this might seem relatively simple, career locum tenens physicians are often parties to numerous contracts with different agencies and healthcare facilities, and keeping track of them all can be a burden. An evergreen provision not only eliminates this administrative burden but also avoids the unintended risk of providing medical services without an active agreement in place. These are the principal reasons why many of our career locum tenens clients prefer an evergreen provision in their contracts.

These clauses also come with pitfalls, however. One common issue with an evergreen clause is that physicians often neglect to terminate their locum tenens agreements with agencies that are not providing enough work. This can be a mistake because the duration of the physician's restrictive covenants (discussed below) as well as many other obligations under the agreement are tied to its term. In short, a physician will be contractually bound to comply with its requirements and restrictions for an extended period, which could forestall job opportunities and add unnecessary administrative work. It is also worth noting that notifying the counter-party of one's intent to terminate sometimes helps restart negotiations and often leads to negotiating an unfavorable locum tenens arrangement into a more rewarding one.

Termination

Termination provisions generally allow either party to end the contract for specified reasons or for no reason at all. Many components of termination clauses significantly impact the physician's interests, so review and analyze them carefully. These provisions, which generally govern the cancelation of specific assignments as well, can differ considerably according to whether termination is (a) "without cause" or "for cause" or "for good reason" and (b) who terminates.

"Without cause" means one party can terminate the agreement and/or assignment, for any reason or no reason, usually following a specified period of advance written notice. It is common for both parties to be afforded the same right to terminate "without cause" as well as to be provided the same notice period. The standard period calls for 30 days' advance written notice, which is commonly utilized by agencies and sometimes by healthcare facilities as well. The main issue or point of contention here comes down to what amount of notice is best for you, which, in the end, is the proverbial double-edged sword. On one hand, a shorter notice period affords the physician a quick exit from the contractual relationship or assignment, which can be crucial for physicians that find themselves in unsatisfactory engagements. On the other hand, a longer notice period provides physicians more security or protection from the contracting agency or facility as that entity will be prevented from canceling the agreement or any agreed to assignment during the notice period – or will be required to remunerate the physician for some period

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post-notice. Thus, a longer notice period, from this perspective, not only protects the physician's income but affords more time to find new opportunities or replacement work.

"For cause" means the healthcare facility can terminate the contract, either immediately without an opportunity to cure or after a cure period of time if the issue triggering a default under the contract is not adequately addressed during a "cure period." Generally when an agency or facility drafts the agreement, the circumstances triggering such a termination almost always weigh heavily in favor of the agency or facility. The traditional laundry list of "for cause" events includes valid reasons for immediate termination because such circumstances would prevent physicians from providing locum tenens services (*e.g.*, loss or suspension of one's medical license, clinical privileges, or the ability to participate in Medicaid and Medicare programs). However, they also often include reasons like "failure to perform Physician's duties to the reasonable satisfaction of Hospital" or things of that ilk, and for these "curable breaches" it is important that the physician insist on notice and an opportunity to cure.[2] Furthermore, the operative language of "for cause" events commonly and purposely includes broad and ambiguous wording (*e.g.*, "conviction of a crime involving moral turpitude," with "moral turpitude" not defined) and, as a result, can provide the non-physician party far too much leeway to terminate "for cause" (or, more accurately, for any reason).

There are many opportunities, drawbacks and associated implications concerning "for cause" termination. One of the main opportunities to consider is making sure the "for cause" events are fair and equitable to both parties. For instance, are there any "for cause" events that are outside the physician's control? If yes, such an event can expose the physician to a risk that she cannot manage or prevent.

"Termination for good reason" usually applies when the physician's hours or compensation are materially reduced or if there is some form of workplace harassment. A physician should endeavor to include as many reasons as possible in this type of termination.

Why is the type of termination important? Because the consequences of each type can differ greatly. These consequences, which can benefit or harm the physician's interests, are not always easy to spot because they are often found in other sections of the agreement and obscured by vague language and legalese. The most important consequences include the effect on restrictive covenants and the physicians' malpractice insurance coverage.

Restrictive Covenants

Restrictive covenants, usually in the form of a non-compete clause paired with a non-solicitation clause, can be one of the most commonly misunderstood, and sometimes contentious, provisions in locum tenens contracts. These provisions prohibit the physician

[2] Conversely, physicians are often provided the bare minimum of "for cause" events, including if the other party fails timely to pay undisputed monies due. Consider adding events like a change in control or the agency's loss of its right to provide services to a particular facility.


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from competing with the other contracting party within a fixed geographic area, certain facilities, or both, for a specified period of time.

It is imperative for physicians who are contemplating or engaged in locum tenens work to understand restrictive covenants as well as their enforceability. Restrictive covenants are governed by state law, and state laws vary greatly. Many newly graduated residents and fellows are under the misconception that non-competes are unenforceable. While this is largely true in California and a few other states, this is far from true in a majority of states. Many states, including New York and New Jersey, enforce non-competes against physicians when the restrictions are deemed reasonable. In determining whether a restrictive covenant is reasonable, courts look to three elements: scope (the types of services the physician cannot provide); duration (the length of time the physician cannot perform the covered services); and geographic limitations (the physical boundaries of the area under restriction). Even where restrictive covenants are deemed unreasonable, or greater than necessary to protect the legitimate business interests of the agency or facility, this does not automatically mean that they are entirely unenforceable. Many states permit their courts to modify, or "blue pencil," restrictive covenants so as to preserve the original intent of the parties' contract as closely as possible while making them reasonable, and therefore, enforceable.

Other misconceptions include the belief that restrictive covenants are virtually non-negotiable and, as a result, there is nothing a physician can do to proactively protect himself from unfair restrictions. To the contrary, we have found this to be fertile ground for negotiation. Here's one example: A physician regularly performs locum tenens services under an agency agreement at a healthcare facility that is near her home. Through no fault of the physician, the agency loses the healthcare facility as a client. Should she be prohibited from working there for, say, two years? The way the contracts are commonly drafted by agencies, the answer would be 'yes' because there usually are no conditions afforded under these agreements that would release the physician from the covenant. By including an exception to the restrictive covenant that addresses situations like this, the physician is protected and is free to continue providing services – now on a direct basis – to the facility. And, where the agency or facility insists on overly burdensome restrictions in a jurisdiction that might uphold them, the physician should seriously consider walking away from the negotiating table.

There are many ways to protect against unreasonable restrictive covenants. One way is to negotiate provisions that would disable the restrictive covenant under specified circumstances. For instance, a provision could release the physician from the covenant if the agency terminates "without cause" or the physician terminates "for good reason."

Malpractice Insurance

Medical malpractice insurance is a standard provision in locum tenens agreements, but which party provides the coverage, the policy type, its term, the policy limits, tail coverage and other important aspects vary wildly. Even for the most prudent and skilled physicians, the threat of a malpractice suit is very real. This is why physicians must both

understand and be certain of the details of the malpractice coverage that is set forth in the agreement.

Most locum tenens malpractice insurance policies provide coverage limits in the amounts of one million dollars ($1,000,000) per claim with an aggregate total of three million dollars ($3,000,000) for a one year term. Although the monetary limits are standard in the majority of agreements, they do vary depending on state law requirements, including applicable liability caps thereunder, and some facilities require higher coverage limits.

The two main types of malpractice insurance policies offered are "occurrence" and "claims-made" policies. It is critical to understand the differences between the two because they offer different degrees of protection. Occurrence policies cover the physician for incidents that occur when the policy is in effect, regardless of when the claim is made. This policy provides a longer degree of protection with a decreased risk in coverage gaps compared to a claims-made policy, but it is often more expensive. This type of policy is more frequently offered when the physician contracts directly with a large facility like a hospital or a super group.

Claims-made policies, which are often offered by agencies and provided under their agreements, cover the physician if the policy is in effect when the claim of malpractice is made. For example, say a physician was insured under a claims-made policy effective from January 1, 2019 to December 31, 2019. There would be no coverage if the incident occurred on February 1, 2019, but no claim was made until after the policy expired, say on January 15, 2020. Simply put, when the claims-made policy expires so does the coverage for everything that occurred during the effective period. Accordingly, if the claims-made policy is cancelled or not renewed, the physician is exposed to a gap in coverage. To avoid this, physicians should ensure that their agreement includes an extended reporting endorsement, commonly referred to as "tail" coverage, when the agreement calls for a claims-made policy.

Tail coverage extends reporting for a specified additional term for any malpractice claims made after the policy period has ended, but which arose from medical services provided while the claims-made policy was in effect. Depending on the tail's term, it basically turns a claims-made policy into an occurrence policy. While many locum tenens agencies provide adequate tail coverage, some do not, which is why physicians must analyze the malpractice insurance provisions as well as the policy specifics. Hence, it is vital that the agreement address what happens to the coverage if the agreement is terminated. Pursuant to some of the standard agency agreements, the malpractice insurance provisions provide tail coverage no matter the reason for termination (with a few exceptions). More specifically, the obligation to provide adequate tail coverage "survives" termination. However, pursuant to other agreements, the agency is not responsible to maintain tail coverage upon termination of the agreement. For these reasons, the provisions concerning malpractice insurance need to be scrutinized and addressed accordingly.

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Compensation and Paid Expenses

Arguably one of most desirable benefits of locum tenens work is the opportunity to earn compensation based on hours of work. Locum tenens physicians almost always earn more than their full-time counterparts. Pay for these positions is usually on a per diem (daily or shift) or hourly basis, and the amounts are driven primarily by market forces. Examples of some of these forces and variables include contracting through an agency or directly with the facility, location and type of facility, demand and supply of the particular specialty, physician's experience and skillset, urgency of assignment, case or patient loads, type of shifts required and assignment length, among many others.

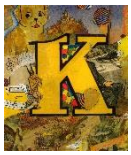
Physicians must understand that pay rates for locum tenens work are negotiable. Generally speaking, the first offer is rarely the best offer. Even when knowing this as well as understanding one's value while accounting for the lack of perquisites (*e.g.*, non-salary benefits), some physicians are more timid than others when it comes to negotiating. This can be a huge disadvantage because it is certain that if you do not ask for it, you will not get it. Remember, when it comes to negotiating compensation or any provision in a locum tenens contract, the best and most successful negotiator is the most prepared one.

To promote and protect a physician's compensation under locum tenens contracts, there are several provisions physicians should consider incorporating. Most common are provisions providing for customary rate premiums such as shift differential, holiday, on call or "call back pay." Also consider "escalators." An escalator clause provides for the automatic increase in pay rates under agreed to conditions. One condition is to tie the escalation to the evergreen term, so the rate will automatically increase by a certain minimum percentage (say 3%) each time the term renews, which typically is on a yearly basis.

There are other compensation considerations, including paid or reimbursed expenses. These expenses not only typically include the cost of physician's malpractice insurance, but often include licensing, credentialing and privileging fees, as well as reimbursement for associated travel and housing. The contract should clearly state what expenses are covered and the particulars concerning the reimbursement process. When common expenses like housing are not needed for an assignment, which is generally the case when physicians provide locum tenens services near their homes, physicians should consider negotiating an increased rate as the agency or facility will not have to pay this customary expense. This is true for other costs the physician deems appropriate, like an umbrella policy.

"Boilerplate" Provisions

Locum tenens contracts, like all contracts, contain "boilerplate" clauses. These seemingly innocuous clauses are usually found at the end of the agreement, sometimes under a heading titled Miscellaneous, General or Additional Provisions. While the majority of physicians stop reading the contract when they see the word Miscellaneous, you should not be one of them. Physicians must understand that these provisions have significant

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practical and legal implications, meaning they can be among the most important provisions in protecting and promoting your interests. Here is an explanation of just a few of these provisions and their implications.

An "entire agreement" clause, also known as a "merger" or "integration clause," is a standard contract provision in locum tenens agreements. Generally, this clause states that the written contract is the final and complete expression of the parties' agreement and, as a result, the signed contract supersedes any prior or contemporaneous discussions, statements, understandings, or agreements, whether verbal or in writing, concerning the subject matter of the locum tenens contract. Physicians must be aware that when the contract contains an integration clause (which is likely) a well-established substantive rule of contract law known as the "parol evidence rule" may come into play. The parol evidence rule prohibits the admission of extrinsic evidence in court (*e.g.*, any evidence of prior or contemporaneous understandings concerning the contract) to add to, modify or contradict the written provisions of the contract. For instance, it can bar a physician's hard proof that the other contracting party promised not to enforce a certain provision in the contract. Here, the physician's takeaway is, do not expect any statement or representation that is not included in the written contract to be honored by the other party or enforced by a court of law. Instead, protect yourself, and make sure every aspect of the agreement is properly spelled out in the contract prior to signing it.

The "choice of law" and "forum selection" clauses are two provisions commonly found in locum tenens agreements. Both are critical in their own right because the outcome of a contract dispute, as well as the amount and type of relief available, can vary significantly depending on the law governing the contract as well as the forum (*i.e.*, the specific court or arbitration tribunal) adjudicating the dispute. More specifically, substantive and procedural law varies between jurisdictions and court systems. Usually in locum tenens agreements both the governing law and the forum are in the same jurisdiction (*e.g.*, New York law and court venue located in New York), although they can be different (*e.g.*, the governing law could be the home office of the agency in Wisconsin while the venue is the courts of New Jersey). Many physicians ignore these provisions and find that they agreed to litigate their dispute far from both their home and place of work.

A "force majeure" clause aims to shield physicians against liability from their delay or failure to perform a contractual obligation if the inability to perform is caused by a specified event beyond the reasonable control of the physician. In every locum tenens engagement, there are risks that such an extreme event beyond the reasonable control and fault of the impacted physician prevents performance. When this happens, and a force majeure clause is not properly included in the agreement, physicians may be held liable for breach of contract which in turn can lead to thousands of dollars in monetary damages. As this is not a standard provision in locum tenens contracts, discuss including one with your attorney.


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Conclusion

Do not take the locum tenens contract lightly. Even the most basic and seemingly standard provisions have real consequences which can significantly affect physicians' locum tenens assignments as well as their careers. Accordingly, physicians should review and analyze the entire agreement thoroughly. Make sure everything agreed upon is accurately included in the contract prior to signing. Understand that agencies and healthcare facilities engage sophisticated legal counsel to draft, revise and negotiate their locum tenens contracts to protect their interests. It is well worth the time and expense for physicians to retain their own attorneys to safeguard and uphold theirs.

DISCLAIMER:

Our objective with this article is to provide an overview of the key provisions commonly found in locum tenens contracts as well as the associated considerations and implications physicians often face. However, the scope of this article is extremely limited. There are, of course, other provisions, implications, nuances, exclusions, and details concerning locum tenens contracts which are not covered in this publication. Depending on the specific circumstances, the structure of the locum tenens contract, and the phraseology of its provisions, its implications can vary significantly from the material provided herein.

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