

Practice Transitions

- Anatomy of a Transaction
 - Nondisclosure Agreement
 - Can be mutual and should not commit the parties
 - Letter of Intent
 - Should be nonbinding except for confidentiality and standstill provisions
 - Due Diligence
 - Purchase and Sale Agreement

Practice Transitions

- Due Diligence
 - Determining assets and liabilities, including intellectual property, if any
 - Key Employees and other Personnel
 - Vendors, Suppliers, Contracts
 - Patient records
 - Financial statements or tax returns
 - Legal compliance and disclosures including litigation or governmental agency investigations

Practice Transitions

- Purchase Agreement
 - Asset v. Stock Transactions-Most Buyers prefer asset deals so they don't assume liabilities, known, contingent or unknown
 - Purchase Price and Asset and Assumed Liabilities Description
 - Accounts Receivable Collections-Buyer can collect for Seller for a limited time for a fee
 - Prepaid Expenses-Buyer should assume approved prepaids
 - Employees-Be clear about messaging to employees and liabilities being assumed.
 - Representations and Warranties and Indemnities

Practice Transitions

- Continuing Relationship between Buyer and Seller
 - Employment Agreement if the Seller stays on during the transition
 - Lease Agreement if the Seller owns the real estate
 - Work in Progress-Seller should remain responsible to finish and cover costs per the Agreement and also remain liable if there is a claim

Practice Transitions

- Addressing Contingencies
 - Credentialing-It can take up to 3 months for the acquiring entity to get credentialed with the payors.
 - Title Clearance-Can delay closing or throw up roadblocks
 - Financing-Buyer's lender needs to approve financing and drives closing time frame
 - Landlord and other third party consents must be obtained prior to closing

Practice Transitions

- Post Closing Considerations
 - Patients and patient records-Buyer will maintain custody
 - Notices to patients-Buyer and Seller mutually agree on letter format
 - Continuity of Care Issues-Scheduling patients during transition period
 - Holdbacks-If there's a lien that remains unsatisfied, for example
 - Right to set off against installment payments-If Seller breaches the Agreement

Managing Risk

- Protecting against Legal Liability
 - Establishing a Corporate Entity
 - Observing Corporate Formalities
 - Operating in accordance with Corporate Documents
 - Filing Annual Reports
 - Maintaining Corporate Records
 - Annual Meetings or Written Consents

Managing Risk

- Insurance
 - General Liability
 - Professional Liability for the Practice and Providers
 - Employee Trainings to minimize risk
 - Document, investigate and report claims
 - Vendors, contractors, lessees and sublessees compliance
 - Annual review of coverage

Managing Risk

- Regulatory Compliance
 - Licenses needed to practice-anesthesia, x-ray equipment, hazardous waste disposal, infection control, OSHA, credentialing
 - Zoning for Practice location
 - Certificate of Occupancy for build out

Managing Risk

- Third Party and Related Party Contracts
 - Deadlines for notice to renew, terminate, retire, pay off or refinance
 - Employment Agreements
 - Leases
 - Loan or line of credit agreements
 - Vendor and Supplier Contracts
 - Buy in and buy out provisions may need to be updated

Managing Risk

- Recordkeeping and Retention
 - Develop a records retention policy
 - Retain organizational documents, corporate votes, stock ledger indefinitely
 - Retain insurance policies at least 20 years and claims related documents at least 30 years
 - Retain patient records including x-rays at least 7 years from last date of patient treatment, and for minors, at least 7 years from the date of last patient treatment or 3 years from the date patient reaches ages of majority, whichever is later
 - “Personal Information” of a MA resident, including employees, must be safeguarded
 - Audit privacy and HIPAA compliance practices each year

Managing Growth

- Employment Agreements with Associates
 - Term sheets, offer letters and agreements must be careful about varying “at will” relationship
 - Agreement terms should include:
 - Employee representations about licenses and registrations including narcotics registrations and eligibility for third party payor insurance plans and professional liability insurance
 - Practice’s behavior standards and policies
 - Duties, both clinical and administrative, and full or part-time
 - Outside activities-commitment to the Practice, moonlighting, consulting
 - Services and supplies furnished by the Practice
 - Revenue generated by Associate is retained by the Practice

Managing Growth

- Compensation and Fringe Benefits for Associates
 - Base Salary plus incentive payments, if any, or a blend based on percentage of collections
 - Responsibility for lab charges and special equipment should be spelled out
 - Fringe benefits can include:
 - Health and dental insurance-may be a uniform plan for all employees if larger Practice
 - Life and disability-may be tax consequences depending on the amount of coverage and who pays the premiums
 - Paid and unpaid time off-vacation, holidays, continuing education. Specify carryover periods for unused vacation
 - Expense reimbursement-dues, subscriptions, education, licenses, auto, cell phone, moving expense
 - Professional liability insurance-usually employer covers except in part-time situation; specify limits
 - Retirement benefits-eligibility, employer contribution

Managing Growth

- Purchase of Ownership Interest in Practice
 - Binding commitment from Practice is unusual in an initial Employment Agreement
 - Factors to consider:
 - What is the time frame for Associate to be considered for ownership?
 - What are the criteria for consideration? Productivity, patient satisfaction, collegiality
 - Role of new owner in decision-making-equal ownership?
 - Buy-in price and over what period to buy-in? Consider tax consequences and liabilities being assumed by new owner
 - What are the buy-out provisions and will new owner need to participate in buy-out of other existing owners?

Managing Growth

- Term and Termination
- One year term is standard. There can be an auto-renew. Consider compensation expectations around renewal.
- Termination without cause on notice-may make Associate insecure but gives the Practice flexibility
- Termination with cause triggers:
 - Failure to comply with Practice's policies and procedures; fraud or material dishonesty; conduct reflecting adversely on the Practice; abusive behavior to staff, patients, colleagues
- Immediate termination triggers:
 - Loss of license or Board Registration or controlled substances registration, death, disability if can't perform essential job functions with reasonable accommodation under the ADA, loss of participation with payors, criminal charges or convictions

Managing Growth

- Noncompetition and Non-solicitation Provisions
- Must be narrowly drafted to protect Practice's legitimate trade secrets, confidential information and goodwill
- Must be reasonable in geographic scope and time frame
- Confidentiality provisions should restrict Associate from use or disclosure of Practice's confidential information including patient information and any other information not generally known by others

Managing Growth

- Offer letters should be clear about at-will employment, if applicable
- Paid Vacation = Earned Wages
 - Cannot be forfeited
 - Must be paid out when employee leaves (even if fired)
 - Best to have clear, written policy
- Earned Sick Time (40 hours per year)
 - Up to 10 employees: unpaid sick time must be granted to all, including temporary and per diem
 - 11+ employees: sick time must be paid, but need not be paid out on termination

Managing Growth

- Prevention of Harassment, Discrimination and Retaliation
 - Written policy required for employers with 6+ employees
 - Policy must be posted in workplace and distributed annually
 - Best practice – and risk mitigation strategy – to train managers and employees annually
- Pregnant Workers
 - Applies to all employers; requires accommodations for pregnancy and related conditions (including breastfeeding)
 - Written policy required: must be distributed to all current employees; to new employees upon hire; to pregnant employee within 10 days of disclosure of pregnancy

Managing Growth

- Equal Pay
 - Becomes law on July 1, 2018
 - Requires men and women in substantially similar jobs to be paid equally (includes base salary, bonuses, and any other aspect of compensation)
- Disability Accommodation
 - Employers must provide reasonable accommodations for disabled employees
 - Employers and employees required to engage in interactive dialogue to identify appropriate reasonable accommodations
 - Accurate written job descriptions are important part of this process

Managing Growth

- Personnel Files
 - Includes more than just “HR files” – any separate file kept by manager is part of personnel file
 - Employees entitled to review 2x/year
 - Employees must be given notice within 10 days of negative material being placed in their personnel files

- I-9
 - Employers must obtain for all employees within 3 days of beginning work
 - Be consistent with respect to obtaining copy of supporting documentation: do or don't, but same for all employees
 - Keep separate from personnel file

Managing Growth

- Wage and Hour
 - Must properly classify employees as **exempt** (not eligible to earn overtime) or **non-exempt** (eligible to earn overtime for hours worked over 40/week)
 - Caution: MA law is very strict on independent contractors
 - Risk of making mistake is enormous: triple damages + attorneys' fees
- Pay Practices
 - Non-exempt employees must record time worked + all meal breaks
 - No unauthorized deductions from any employee's pay (including self-help)
 - Non-exempt employees must be paid at least every other week
 - If employee is fired, must receive all final wages (including accrued but unused vacation) on last day of employment

Managing Growth

- Performance Management
 - Don't let issues linger – address early and consistently
 - Document all counseling sessions about performance or behavior issues
 - If it's not in writing, it didn't happen
 - Be direct and honest about concerns – couching the feedback or hiding the ball to avoid discomfort creates risk
- Involuntary Terminations
 - Be honest; present brief explanation for decision
 - Do not sugar coat
 - Keep discussions short and to the point

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