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Are Physician Post-Employment Noncompete Agreements Enforceable?

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In this increasingly mobile society, employers are turning more frequently to noncompete agreements, which prohibit their professional employees from competing with the employer in a certain geographic area and for a certain period of time following termination of employment. The medical profession is no exception. As physicians become more specialized, physician-employers, clinics, and even hospitals seek to curtail the physician-employee's ability to compete with the former employer for patients.

This article addresses physician post-employment noncompete agreements as opposed to those noncompete agreements that are part of the sale of a medical practice or part of partnership agreements, which are analyzed differently. Therefore, our reference to noncompete agreements throughout this article refers to post-employment noncompete agreements.

Historically, states have taken two divergent views when addressing the enforceability of physician-noncompete agreements. Some states have held physician-noncompete agreements unenforceable as a matter of law on the grounds that such agreements hinder the public's right

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to choose a physician. Other states, while disfavoring noncompete provisions in general, have upheld physician-noncompete agreements under the standard noncompete-enforceability reasonableness test, or some slight variation. These latter states uphold physician-noncompete agreements when an employer has demonstrated that it needs to protect a legitimate interest, the agreement is reasonable in geographic and temporal scope, and the public is not adversely affected. Still other jurisdictions, such as the District of Columbia, Rhode Island, and South Carolina have no definitive case law regarding physician-noncompete agreements. This last group of jurisdictions will not be addressed in this article.

Despite the disfavored status of noncompete agreements, with the increased specialization of physicians' practices, a trend appears to be developing that makes physician-noncompete agreements easier to enforce. The developing case law makes clear that an employer can no longer draft a one-size-fits-all noncompetition agreement for all physicians in its employ. Rather, first, the employer must be aware of and consider the applicable state's law on enforceability of physician-noncompete agreements. Second, assuming such agreements are not void per se, the employer must consider the specialty practiced by the physician and the need for the specialty within a specific locale.

This article addresses generally the

enforceability of physician noncompete agreements in certain jurisdictions. Because the enforceability of noncompete agreements against physicians (and generally) depends on a fact-specific analysis, employers and physicians should consult counsel before drafting, signing, or attempting to enforce a noncompete.

Physician-Noncompete Agreements Are Void Per Se In Some States

At one extreme are states that hold physician-noncompete agreements void per se. Generally, these states prohibit such agreements based on public policy and, more specifically, a patient's right to choose his physician. For instance, Delaware statutory law prohibits agreements that restrict the right of physicians to practice medicine in a particular locale and/or for a definite period of time. The Delaware Legislature determined it was important to adopt this policy to maintain continuity of care and protect the physician-patient relationship. Specifically, the Delaware Legislature has recognized that patients should not be deprived of medical services by their physician of choice because of an economic contract between two physicians. Likewise, Alabama statutory law renders void any agreement restraining the practice of a profession, including the practice of medicine, for similar reasons.

In Massachusetts, the Legislature has adopted statutes prohibiting noncompete agreements with physicians and nurses on the grounds that such agreements have an inhibitory effect on a medical professional's right to practice and limit the patients' right to choose her medical pro-

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professionals. California law goes even further. With very limited exceptions, California prohibits virtually all post-employment noncompete agreements.

Some States Analyze Physician-Noncompete Agreements Under A Reasonableness Test

Despite the strong public policy that has led some states to prohibit physician-noncompete agreements, and despite the general disfavored status of noncompete agreements, other states have opted for balancing the rights of (a) employers to protect legitimate business interests, including patient relationships, (b) employees to earn a living in their chosen profession, and (c) the public to access healthcare and to choose their physician. Those states have held physician-noncompete agreements enforceable if they meet the reasonableness test utilized to determine the enforceability of standard noncompete agreements. Typically, those state courts uphold noncompete agreements if they: (1) protect the legitimate interests of the employer; (2) do not impose undue hardship on the employee; and (3) are not injurious to the public. Courts measure the reasonableness of noncompetes in terms of time, geographic area, and scope of activity. Ironically, as physicians become more specialized, the use of the reasonableness test has resulted in what may be a trend toward increased likelihood of enforceability of physician-noncompete agreements.

For example, in 2003, the New Jersey courts reaffirmed and expanded on prior law on the enforceability of physician-noncompete agreements, based in large part on the increased specialization in the practice of medicine. The noncompete at issue prohibited the former employee/physician from practicing neurosurgery within a 30-mile radius for two years after his resignation. Expanding on earlier jurisprudence, and after a thorough analysis of referral patterns and the economics of establishing and maintaining a neurosurgery practice in that locale, the New Jersey appellate court held that a physician has a protectible interest in his patient relationships, and held that a medical group also has a legitimate interest in protecting its patient and referral base.

In early January, 2004, the New Jersey Supreme Court granted a stay pending review of the lower court's decision in light of the former employee/physician's argument that barring him from practicing at a hospital within the 30-mile radius will leave that hospital understaffed with

respect to neurosurgeons and, ultimately, patients may suffer. It is unclear when the New Jersey Supreme Court will issue a final decision.

In other states, such as Missouri, courts have upheld noncompete agreements that prohibit former employees/physicians from competing within a 75-mile radius and from treating any individual who was a patient of his former employer for two years after termination. Both the New Jersey and Missouri courts held the expansive geographic scope of the noncompetes at issue reasonable under the circumstances finding that patients are willing to travel farther for specialized care, and a specialty practice must draw its patient base from a larger geographic area than a general practitioner.

States such as Georgia, Indiana, Maryland, Florida, Connecticut, Mississippi, Virginia, and New York also utilize the standard reasonableness test discussed above in determining the enforceability of physician noncompetes. In New York, for instance, the courts have upheld as reasonable restrictive covenants precluding a neurosurgeon from practicing for one year at a specified medical center and precluding a hematologist/oncologist from practicing within a 3-mile radius of his former employer. Connecticut courts have upheld as reasonable restrictive covenants precluding a physician who provided primary medical care exclusively for women from competing with her former employer for one year within a 15-mile radius.

Illinois courts, with limited exceptions, also apply a reasonableness test to physician-noncompete agreements. Ohio, Pennsylvania, and North Carolina courts utilize the reasonableness test, but these courts strictly construe physician-noncompete agreements in favor of physician mobility and the public's access to medical care and facilities. Specifically, North Carolina courts have held that, if ordering the former employee/physician to honor his contractual obligation would create a substantial question of potential harm to the public health, the noncompete agreement will be struck down as unenforceable. Thus, if the community affected by the noncompete has a shortage of physicians within a certain specialty, a noncompete against a physician practicing in such a specialty will be held unenforceable as against public policy. For instance, the North Carolina Court of Appeals held invalid and unenforceable a physician noncompete where a pediatric endocrinologist submitted affidavits of 20 other physicians

practicing in the county tending to show that pediatric endocrinologists performed highly specialized tests and protocols, which pediatricians and other doctors did not perform, and there was a need for this type of specialist in the affected county.

The Louisiana Legislature has set forth the exact limits of the reasonableness test for all noncompete agreements, including physician-noncompete agreements. Louisiana statutory law permits any agent, servant, or employee to enter into an agreement with his employer not to compete within a specified locale and for a period not to exceed two years from termination. Louisiana courts require a high degree of specificity; for example, Louisiana courts have held unenforceable physician-noncompete agreements prohibiting competition in the "greater New Orleans area," finding the phrase was too vague.

Kentucky courts have upheld physician noncompetes for as long as five years and as far as 50 miles. In fact, the Kentucky Court of Appeals has suggested that restrictive covenants are especially enforceable when they involve professional services, unless very serious inequities would result. Likewise, West Virginia courts have upheld as enforceable physician-noncompete agreements where such agreements bound the physician not to practice medicine within a 30-air-mile radius for a period of three years after his termination from a non-profit clinical institution. West Virginia courts also have upheld noncompete provisions against physicians for five years and across a span of 50-miles from any of the former employer's offices.

Conclusion

As the practice of medicine becomes more specialized and our society becomes more mobile, noncompete agreements in the medical profession, typically disfavored, may actually become easier to enforce. As the above survey demonstrates, however, courts across the country diverge as to the enforceability of such noncompetes. Even in those states where physician noncompetes may be enforced, the changes in medicine and the needs in a given locale for certain medical specialties impact greatly the enforceability of a noncompete in specific circumstances. Because of the fact-specific nature of the analysis courts apply to determine whether such agreements are enforceable, physicians and their employers must become familiar with their state's laws on this topic and take a case-by-case approach among medical specialties and even individual doctors.