Physician Non-Compete Agreements Present Challenges, Potential Controversy

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When it comes to physician employment agreements, non-compete provisions can be controversial and tricky. The use of these agreements is nonetheless increasing and evolving as hospitals and other groups try to protect their investments in successful medical practices, especially those that they helped launch and nurture. After assuming the risks and costs of building a medical practice, they obviously do not want to see employed doctors move their practices (and patients) to a competitor.

A recent study found that 36 million workers in this country are now subject to some sort of non-compete agreement. But what is unique about non-compete agreements involving doctors? To begin with, the American Medical Association (AMA) sees fundamental problems in applying non-compete agreements to physicians. AMA ethical standards allow competition that is based on factors such as services, skill, experience, conveniences to patients, or fees. On the other hand, the AMA discourages covenants-not-to-compete that unreasonably restrict the rights of doctor to practice medicine for a specified time or in a specified geographic area following termination of a contractual relationship or do not provide for the reasonable accommodation of a patient's choice of physician.

Of course, non-compete agreements can arguably do what the AMA discourages. Particularly, they can restrict a doctor from practicing in a specified geographic area for a stipulated period of time after termination of their employment. The key question is when do such provisions become unreasonable? The analysis becomes even more complicated when factoring in the unique bond between patients and their doctors. After all, most patients' sense of loyalty lies with their physician, not with a particular hospital, clinic or medical group.

The law regarding all covenants-not-to-compete varies by state. California, for example, broadly prohibits non-compete agreements with any employees. Despite finding such agreements generally contrary to public policy, other states permit parties to contract for them subject to certain limitations. Some states tighten the applicable restrictions further in certain industries, such as medicine or law, where unique relationships and the sharing of sensitive, confidential information is fundamental. In Massachusetts, for example, non-compete agreements are unenforceable against physicians, nurses, psychologists, social workers, and certain other non-medical professionals. Rhode Island and Colorado completely prohibit non-compete agreements between doctors and employers.

In states that permit non-compete agreements with physicians, a restricted geographic area will often be deemed reasonable if it matches the area in which the restricted employee worked and had contact with patient. A two-year non-competition period is typically considered to be reasonable, but Connecticut narrows these restrictions further for physicians. That state will not enforce physician non-compete agreements under other circumstances, such as when the employer terminates the doctor's employment for any reason other than "for cause." And the employer seeking to enforce the agreement has the burden proving all the applicable components.

Concerned about protecting the continuity of patient care, Texas will enforce non-compete covenants with doctors *only* if they meet three requirements. They must allow a physician access to a list of patients seen within one year of the separation and permit access to patients' medical records, include a "reasonable" buyout option, and not prohibit the doctor from caring for a patient during an acute illness, even after the doctor's employment has ended.

Again, each state not only has its own set of rules – and each state's court will apply those rules according to its jurisprudence. Utah, Idaho, Wisconsin, and South Dakota, to name a few, have seen recent legislative or court actions that made it harder to enforce non-compete agreements. One court invalidated an agreement because it concluded that the non-compete provisions it contained were not narrowly tailored enough to restrict *only* the activity necessary to protect the employer's legitimate business interests. Rather than "blue penciling" (reforming) those provisions to be less burdensome upon the doctor's ability to engage in his livelihood, the court simply invalidated the agreement. One common thread running through all states that will enforce non-compete agreements is this: disputes over these agreements can be costly and time-consuming to resolve.

Still, hospitals and other employers continue to include covenants-not-to-compete in their employment agreements, though some have become more receptive to negotiating more flexible terms or shorter periods of post-employment non-competition. These agreements are also increasingly common because they may be used to protect confidential information and avoid employee poaching by a departing doctor. All of these are legitimate business interests, worthy of safeguarding. So tensions within the realm of physician non-compete agreements continues.

In sum, the issue of confecting effective non-compete agreements with employed doctors remains an active, important, and evolving area that demands careful attention, tailored to each employer's business needs and the law in the applicable state. The current state climate does not seem likely to relax any time soon. If anything, such activity may become even more commonplace and intense.

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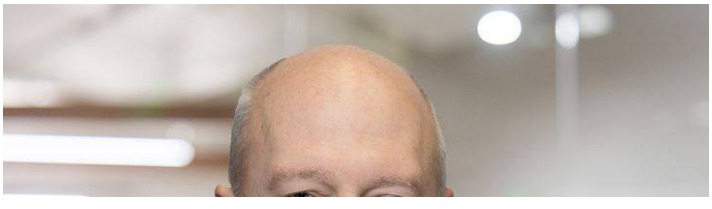

A. Kevin Troutman
Senior Counsel
713.292.5602
Email

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