

## Non-compete Clauses in Physician Contracts

We are frequently asked to get involved with restrictive covenant clauses in physician contracts either by the Employee or Independent Contractor perspective or at the request of the Employer. There are many rumors that seem to circulate around this topic. Unfortunately, each case must be evaluated on its own merits as a superficial review might lead to a wrong conclusion. A restrictive covenant can have a dramatic effect on your ability to practice after you leave your current position; therefore, it is essential that you realize how serious restrictive covenants are before you sign a contract of employment.



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clause is not against public policy. Many states have sided with the departing physician because of ethical considerations which allow patients to freely choose their doctor.

In accordance with public policy concerns, two states, Delaware and Colorado, have enacted statutes specifically invalidating post employment practice restrictions in physician employment contracts. The AMA policy on the topic states that it "discourages any agreement between physicians which restricts the right of a physician to practice medicine."

**Non Solicitation of clients/patients** – Most courts will

uphold non-solicitation of patients as being valid. A doctor should not take patient lists and mail flyers to patients of the current practice. It would be OK for the departing doctor to put an ad in the paper notifying patients of his new practice location, but it would not be OK to use the practice's mailing list to send out postcards announcing the new practice.

**Non-solicitation of employees (poaching)** - Most courts would enforce a restriction on soliciting and hiring employees of the former practice. Of course, soliciting is difficult to prove so many contracts will actually state that for a certain period of time, the departing physician will not hire, employ (directly or indirectly) the employees of the former group.

**Restrictions on use of confidential information and trade secrets** - As discussed above regarding solicitation of patients, most courts would find that a restriction on the use of confidential information would be a reasonable and therefore an enforceable restrictive covenant. On the other hand, patient lists are confidential information that each practice should protect and no one should have access to the entire list and/or use for other purposes.

**Non-disparagement** – Many contracts have a non-disparagement clause whereby the parties agree not to say anything negative about the other party. These are difficult to enforce because of First Amendment rights and because it is very difficult to calculate damages.

### Enforcement

Of all of the restrictive clauses, the post contract practice restriction is responsible for the majority of issues. In order for an enforceable covenant to exist, two requirements must be met. First, there must be a "legitimate business interest" of the employer which justifies such a covenant and second, the restraint sought must be "reasonably necessary to protect the legitimate business interest or interests justifying the restriction". Most states recognize the following as legitimate business interests:

- (2) Confidential business information (not otherwise a trade secret);
- (3) Substantial relationships with specific existing and prospective clients;
- (4) Specialized training.

If the non-compete clause does not protect a legitimate business interest of an employer, the court will not enforce the covenant as written. In *The University of Florida v. Sanal*, 2003 Fla. App. LEXIS 735 (Fla. App. 1st Dist. 2003), the court held that the employer did not have a legitimate business interest in protecting against solicitation of its prospective patients. The statute provides substantial relationships with "specific prospective or existing customers" are a legitimate business interest. Here, however, the plaintiff was unable to identify any specific prospective patients with whom the doctor had interfered, or had threatened to interfere. Therefore, the plaintiff failed to carry its burden of establishing a legitimate business interest.

### Reasonable Restraints

Contractual restraints must be "reasonable" both in time as well as geography necessary to protect the employer's legitimate business interests. While there are no hard and fast rules, most courts consider a reasonable period to be between 6 months and two years but each case will be evaluated on its own merit and circumstances. If a restriction is overbroad, or lacking altogether, most courts have the discretion to determine under the facts of the case what a reasonable restriction would be, and enforce that as the covenant.

### Burden of Proof

Remember, it is the person seeking enforcement of a restrictive covenant who bears the burden of proving that the covenant is reasonable. If this party meets this burden, the burden shifts to the party opposing enforcement to establish that the contract is overbroad, or otherwise not necessary to protect the employer's interest.

### Injunction

For a court to issue a preliminary injunction, the employer must meet a heavy burden. In most states the employer must show that it is necessary to prevent immediate and irreparable harm which could not be compensated monetarily; that Damage is not monetarily calculable; that greater injury would result by refusing it than by granting it and that the party seeking the injunction has a likelihood of prevailing at trial. A court may also award monetary damages for a violation of a restrictive covenant.

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