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Non-Compete Clauses: Are They Really Enforceable?
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This is one of The Health Care Group's all-time client frequently asked questions.

It is asked both by employing medical practices and by employee doctors.

Employing practices ask the question when they are preparing a contract to offer to a potential new physician associate. The employer is afraid that including such a clause in a physician employment agreement will deter the candidate from signing.

Associate physicians sometimes ask the question when they are asked to sign such clauses as part of an employment agreement. They also ask the question after they have signed the contract, when things are not going well and they are thinking about leaving to compete.

The question keeps popping up because there is an urban myth that as a general rule, non-competes are not enforceable.

I am not really sure who propagates this myth. I suspect that it is recruiters or other consultants or attorneys who are trying to comfort an employer who feels uncomfortable asking an associate physician to sign such an agreement.

However, as an attorney who specializes in physician contracts, and has reviewed innumerable non-compete clauses, I can assure you that in most states, non-compete clauses are very much enforceable.

To be sure, there are many potential reasons why a given non-compete clause, as applied to a specific set of facts, is likely unenforceable. However, it is wrong to assume, as general matter, that any non-compete will be unenforceable.

The question whether a non-compete clause is enforceable is a function of state law as applied to the specific circumstances in which the non-compete is sought to be enforced.

In most states, a "reasonable" non-compete clause is very much enforceable. By "reasonable" I mean that the clause has a reasonable geographic radius and a reasonable time duration. More on "reasonableness" below.

A few states, such as California, Massachusetts, and Alabama absolutely prohibit non-compete clauses for associate (non-shareholder) physicians. So yes, it is safe to say that in these three states, a non-compete clause that bars an associate doctor from competitive practice is not enforceable, regardless of its terms.

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A few other states have enacted "bright line" statutes that impose very specific restrictions on physician non-competes. For example, a non-compete clause for an associate physician in Texas must allow the employee to buy out the non-compete for a "reasonable price". In addition, in Texas, the non-compete may not deny the employee physician access to a list of his patients who he had seen or treated within one year of termination of employment.

In Delaware, an associate physician non-compete may not specify that it is to be enforced by court order (injunction). Instead, the sole remedy is "reasonable" money damages (liquidated damages, a kind of buy-out clause.)

So in Delaware and Texas, the drafting attorney must be careful to comply with the specific requirements of the statutes in these states. If not, again the non-compete will be unenforceable.

However, the vast majority of states do allow non-competes, and they impose few clear guidelines or requirements other than that the non-compete be "reasonable" and not contrary to public policy. Ultimately, the question whether the non-compete is enforceable depends on the facts and circumstances in the particular case, including:

- How broad the geographic radius of the non-compete is;
- How long it lasts;
- Whether the former employee was terminated involuntarily, or if he resigned voluntarily;
- Whether the non-compete clause was signed before or after the employee took the job;
- Whether there are "public policy" considerations. For example, a judge is not likely to enforce a non-compete clause against a highly specialized physician who is the only one of his kind in a rural area. To do so would be against public policy, in that it would deprive patients of access to subspecialty medical care.

As noted, generally speaking, a "reasonable" non-compete is one that is limited in geographic scope and time duration. The idea is that the employer is entitled to <u>some</u> protection for what is termed its "protectable interest."

For example, assume a family practice hires an associate physician, in a state that permits "reasonable" non-compete clauses. The employer is located in the suburbs of a major metro area. It has many competitors. Starting a competitive practice from "scratch" in the immediate neighborhood is possible, but not necessarily easy.

In any event, our hypothetical employer plans to introduce the new associate employee to its patients and referring sources. In so doing, the employer turns the new employee from an "outsider" into an "insider"

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and makes that associate employee into a potential formidable competitor. The employee learns confidential information that greatly enhances the employee's ability to compete. Without such insider information, and contact with employer's patients, the employee might have great difficulty starting up a competitive practice.

In many states, courts would find that the employer has a "protectable interest" in not having a former insider use inside information to the employer's disadvantage. The courts would say that the employer can demand reasonable restrictions on the employee to protect that interest.

So, for example, in a suburban area of a major city, the employer might reasonably demand that the employee, if he resigns, refrain from competition in the immediate neighborhood of three miles, for a period of 24 months following termination of employment.

By contrast, that same employer cannot "reasonably" demand that the former employee refrain from competition throughout the entire metro area (even though the employer does not service the entire metro area) for a period of five years after termination of employment. That would be "unreasonable."

In most states, the maximum permissible geographic and time restrictions cannot be stated with precision. That's because the delineation of what is "reasonable" is laid out only in specific court decisions addressing a specific "fact pattern," as lawyers say. In one case, a court concludes that an ophthalmologist in a densely populated, well serviced suburban area can be held to a 7 mile 2 year non-compete clause that the doctor signed. But another case holds that a pediatric surgeon in an underserved rural area cannot reasonably be held to a 6 mile 1 year non-compete, for public policy reasons. You can see how the "rules" for geographic or other terms become hard to ascertain, in these fact-intensive decisions.

The bottom line on non-competes is that there are few situations where it can be said with relative certainty that a given non-compete is enforceable or unenforceable. One exception is if the state bars non-compete clauses altogether, as in California, Massachusetts or Alabama, for associate physicians. Otherwise, for most states, and most situations, lawyers are left to saying that a given non-compete is "likely" enforceable, or not enforceable, but of course no "guarantees" can be made.

So generally speaking an employer cannot be assured that the non-compete is sure to be enforced, and the employee cannot be assured that it is not enforceable. The parties only have "probabilities" to work with, as explained by their attorneys.

This ambiguity serves to help employers and hurt employees.

Employers are helped by the ambiguity because (generally speaking) they have greater financial resources to litigate the issue with a competing former associate. It will cost the employer some money to retain an attorney to prosecute the case, and the publicity may not be welcome, but aside from that the employer can go on doing business as usual.

By contrast, associate physicians are rarely equipped, financially, to engage in litigation over a non-

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compete clause. And if they commence competitive practice, without securing a release of the non-compete, they risk very large damages or even a court order to cease and desist from operating their new competitive practice (or employment)!

The moral of the story is to check with a knowledgeable attorney regarding your particular situation. Employers should not assume that an appropriate, enforceable non-compete cannot be crafted for them. Employees should not assume that their non-compete is unenforceable and therefore that there is no risk to starting a competitive practice. There are many factors that go into the enforceability analysis, and, except in a few states as noted above, it is not a cut-and-dried issue.

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