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Restrictive Covenants in Physicians' Employment Agreements

By Emily Madoff

A restrictive covenant, also known as a covenant not to compete or a non-compete agreement, binds a current or former employee (or independent contractor) from competing with an employer for a specific period of time after their employment ends. In general, restrictive covenants dictate how long the employee must refrain from working with a competitor, in what geographic area and what industry or market. These terms often include prohibitions about using or sharing trade secrets learned during the employment. Restrictive covenants, if they are reasonable in scope, are generally enforceable. However, due to the special nature of healthcare workers, greater limitations may apply to restrictive covenants in physicians' agreements.

The Federal Trade Commission ("FTC") in April 2024, promulgated a rule banning most non-compete agreements between employees and employers; however, in August 2024, the U.S. District Court for the Northern District of Texas set aside the FTC's non-compete ruling holding that the FTC exceeded its authority and that the rule was arbitrary and capricious.

The enforceability of restrictive covenants varies across jurisdictions, influenced by state laws, public policy considerations, and unique circumstances, such as the need for healthcare access during a crisis; however, the various states predominately approach restrictive covenants in physician agreements in a similar fashion. Restrictive covenants are typically enforceable if they are


necessary to protect a legitimate business interest (protection of confidential information, investment in specialized training, and prevention of unfair competition), reasonable in scope, duration, and geographic area, and do not impose undue hardship on the employee or harm the public. In the healthcare field, courts often scrutinize these agreements and may render them unenforceable if there is a potential impact on patient access to care. Also, covenants that restrict access to unique or specialized care are often deemed unenforceable.

> *Restrictive covenants are generally disfavored and '[t]his measure of disfavor is especially acute concerning restrictive covenants among physicians, which affect the public interest to a much greater degree.' Restrictive covenants must therefore be 'strictly construed in favor of professional mobility and access to medical care and facilities.' But while not favored, 'covenants not to compete in the medical profession are not per se unenforceable, and will be upheld if they are reasonable.'" Buckeye Wellness Consultants, LLC v. Hall, 10th Dist. No. 20AP-3280, 2022-Ohio-1602, 30 (internal citations omitted).*

In connection with patient relationships, the goodwill developed between an employee and the employer's customers generally are considered the property of the employer, although in the healthcare field, this justification often conflicts with the personal nature of the patient-physician relationship. Some courts give great weight to the right of patients to obtain treatment from the physicians of their choice. The American Medical Association disfavors non-compete agreements, because they disrupt the continuity of care and potentially deprive the public of access to medical care.

In the healthcare field, there is very little information that may be considered confidential. Patient information belongs to the patient, not the physician's employer. Nevertheless, if the physician worked in an executive or administrative capacity and, as a result, had access to certain information developed solely for business use, that physician may be prevented from working for a competing practice, provided the term and geographic scope is reasonable.

A restriction related to "specialized training" in healthcare must be more than just on-the-job training. The party wishing to enforce the restrictive covenant must be able to show that the training is unique, perhaps something developed by that practice and kept confidential, which would give a subsequent employer of the physician an unfair advantage if the physician were to take that training to a competitor.

> *While an employer, under proper restrictive agreement, can prevent a former employee from using his trade or business secrets, and other confidential knowledge gained in the course of the employment, and from enticing away old customers, he has no right to unnecessarily interfere with the employee's following any trade or calling for which he is fitted and from which he may earn his livelihood and he cannot preclude him from exercising the skill and general knowledge he has acquired or increased through experience or even instructions while in the employment. Kesler v. Ind. Univ. Health Care Assocs., 234 N.E.3d 206, 213 (Ind. Ct. App. 2024) (internal citations omitted).*

As health care systems consolidate into larger organizations, non-compete clauses have become increasingly popular but also more restrictive and disadvantageous for physicians and their patients. Young physicians, in particular, should be mindful of restrictive covenants in their employment agreements as the employer's superior bargaining power may cast doubt on its good faith in imposing the term. Whether signing a new agreement or looking to move on from present employment, all physicians should consider whether a restrictive covenant is enforceable, and if in doubt, consult with legal counsel.

Emily Madoff

About the Author

Emily Madoff is the Managing Partner of Wolf Popper LLP.

Throughout her career, Emily has used the law to drive socio-political change, often protecting the public from consumer fraud. Emily recently focused on the rampant problems with surprise medical bills; she was instrumental in developing the Firm's cases in this area, several of which have settled with full recovery for the class. Emily presently is concentrating on using the law to expedite the benefits of diversity and inclusion.

A commercial attorney, Emily was mentored by Marty Popper, eventually inheriting his practice. As such, Emily has represented several missions to the United Nations and various governments and government officials. She is proud to have represented personally some early social justice luminaries, such as Freda Diamond and Ring Lardner Jr. To this day, Emily represents the Georgian artist, Zurab Tsereteli, an internationally-acclaimed monumentalist and UNESCO Goodwill Ambassador, whose works are installed worldwide, including "Good Defeats Evil," which statue sits on the front grounds of the United Nations headquarters in New York City. The Tsereteli family owns the largest winery in Georgia, producing Tsereteli Wine.

Emily has published many articles about the law, including for the New York Law Journal, an article explaining litigation funding (Analyzing the Fundamentals of Litigation Funding, August 19, 2013) and one about arbitration clauses in consumer contracts (Mandatory Arbitration Clauses in Consumer Contracts, July 5, 2016) and for Latin Lawyer, an article about the securities litigation spawned in the United States as a result of the Petrobras scandal in Brazil (Bringing 'big oil' to the Big Apple, March 2015), for a few examples.

Ms. Madoff is a graduate of Connecticut College (B.A., 1973), and Northeastern University School of Law (J.D., 1979). She is admitted to the Bars of the State of New York, the Commonwealth of Massachusetts and the United States District Court for the Southern District of New York.

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