

Restrictive covenants: What every physician should know

By M. MARK BAJALIA

The health-care environment is always changing, and the demand for today's health-care dollars is more competitive than ever. As such, physicians and other health-care practitioners must understand the legal ramifications of their employment agreements, and especially any restrictive covenants (also known as covenants-not-to-compete or non-competition agreements) contained in such agreements. That is because the ability of a physician to earn a living can be dramatically affected by an enforceable restrictive covenant.

protect the employer's investment in a physician employee (recruiting costs, moving expenses and opportunity costs) by encouraging the physician to remain with the employer.

A common misunderstanding among physicians is that restrictive covenants are not enforceable — but nothing could be further from the truth. Even though restrictive covenants essentially act as restraints on trade, many states, including Florida, will uphold them if they are properly drafted. In Florida, the enforceability of restrictive covenants is controlled in large part by section 542.335 of the Florida Statutes, and most courts view

them as valid and enforceable so long as they are supported by adequate consideration, they are reasonably tailored in geographic scope and duration, and they are designed to protect a legitimate business interest. Nevertheless, physicians should always scrutinize the language of restrictive covenants with an eye toward ensuring that they are drafted in the least restrictive manner possible, as ultimately the language of the covenant could make the difference

between whether it is enforceable or not.

Validity of restrictive covenants

A valid restrictive covenant must be ancillary to another agreement and cannot be used solely for the purpose of restricting competition. Whether a restrictive covenant is contractually valid or not also depends, in part, on whether adequate consideration was given to the physician in exchange for entering into the restrictive covenant. Generally speaking, this is not usually

an issue because the hiring of a physician is typically contingent upon the physician agreeing to be bound by the covenant. However, where the physician enters into a restrictive covenant during an ongoing employment relationship, adequate consideration may not exist if no additional consideration (such as increased salary or better benefits) was given to the physician in exchange for agreeing to be bound by the restrictive covenant.

Reasonable restrictions

Restrictive covenants must be reasonable in their geographic scope and in their duration in order to be enforceable. In determining what is reasonable, courts will evaluate each covenant on a case-by-case basis. In the context of a physician's restrictive covenant, some of the factors that may be considered in determining reasonableness are the type of medical practice that is seeking to enforce the covenant, the demand for services in the area, the ability of patients to obtain treatment by a similarly qualified physician within the geographic area, the geographic area from which the practice obtains the majority of its patients, and the ability of the physician to find work outside of the restricted area.

Because restrictive covenants can prohibit a physician from practicing in one or more counties, in specific ZIP codes, within certain town borders, or within a specified area marked on a map, it is important to understand the nature of the employer's practice and where it draws its patients and referrals from. Generally, if the restriction is limited to an area surrounding the practice, it will be upheld, but there are many exceptions to this rule. The facts and circumstances of each case must be evaluated in order to determine what is reasonable.

As to the duration of restrictive covenants, restrictions on competition for one to two years are common. In Florida, any restriction of six months or less is presumed to be reasonable and any restriction of more than two years

is presumed to be unreasonable. If a restrictive covenant is predicated on the protection of trade secrets, it is presumed to be reasonable if it is for a period of five years or less, and unreasonable if it exceeds 10 years. However, it is important to keep in mind that these presumptions can be overcome by evidence demonstrating that they are unreasonable under the circumstances.

Legitimate business interests

Even if a restrictive covenant is supported by adequate consideration and is deemed reasonable in its geographic scope and duration, it still may not be enforceable if it is not designed to prevent the loss of the employer's protectible business interests. Under the current law in Florida, a restrictive covenant will only be enforced to the extent it is necessary to protect the "legitimate business interest" of the party seeking to enforce it. Thus, an employer must plead and prove the existence of at least one legitimate business interest in order to justify the enforcement of a restrictive covenant. The Florida Statutes enumerate a number of business interests that will support the enforcement of a restrictive covenant. They include:

- Trade secrets
- Valuable confidential business or professional information.
- Substantial relationships with specific prospective or existing customers, clients or patients
- Good will associated with an ongoing business or professional practice by way of trademark, geographic location or specific marketing/ trade area

Extraordinary specialized training

Interestingly, because the Florida Statutes expressly define "legitimate business interest" to include only those "specific prospective or existing" patients with whom a party has a substantial relationship, one Florida court recently held that "a stream of unidentified prospective patients" from a

Under Florida law, a restrictive covenant will only be enforced to the extent it is necessary to protect the "legitimate business interest" of the party seeking to enforce it.

Restrictive covenants are most often found in physician employment agreements but, depending on the circumstances, may also appear in shareholders' agreements and asset purchase agreements. The goal of these covenants is to protect an employer's asset base (patients and referral sources) by prohibiting the physician from practicing in a specified geographic area for a given period of time if the physician's employment terminates. These covenants also serve to

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referring physician did not qualify as a legitimate business interest.

Public policy concerns

Because restrictive covenants in a physician's employment contract are frequently litigated, courts have routinely struggled to balance the enforcement of such covenants against the public policy concerns that have been raised in the context of the health-care setting. More often than not, courts will consider these public policy concerns in deciding whether to enforce an otherwise valid and reasonable restrictive covenant. For example, a court may refuse to enforce a restrictive covenant in a geographic area that has a shortage of physicians with similar skills or because the court wants to honor patients' freedom to be treated by the physician of their choice. In other words, the public policy of access to health care may outweigh the need to enforce the restrictive covenant so as to protect the individual employers' legitimate business interests.

In fact, the Tennessee Supreme Court recently held that restrictive covenants could not be enforced against physicians for public policy reasons. Other states have banned restrictive

covenants in physician contracts altogether. In Florida, although restrictive covenants are permitted in physician contracts, the same public policy concerns might be applicable depending on the circumstances of the case.

Given the competitive nature of the health-care industry, physicians and other health-care providers must understand the potential impact of a restrictive covenant on his or her ability to practice medicine. Because the law with respect to restrictive covenants is continually changing and developing, physicians must always scrutinize their contractual relationships to ensure that their interests are protected. When in doubt, consult a qualified legal professional.

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