How Doctors Can Make Their Non-Compete Agreements Rock-Solid

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Restrictive covenants in employment agreements are a hot topic these days. However, despite their recent proliferation, restrictive covenants are still viewed by courts as restraints on trade. As a result, enforcing them in full is anything but automatic, and they continue to be enforced cautiously by judges. In fact, courts frequently narrow their scope, shorten their duration, reduce their geographic reach or, on occasion, refuse to enforce them altogether. This article addresses ways to fine-tune your restrictive covenants to make them more likely to be enforced.

II. What is a restrictive covenant?

"Restrictive covenant" is the legal term for an agreement not to engage in certain specified competitive activities. Traditionally used in employment agreements for senior executives, outside sales personnel, researchers, scientists and other employees with access to their employer's trade secrets, restrictive covenants have also become very popular in the medical professions. In fact, many of the recent reported decisions concerning the enforcement of restrictive covenants have resulted from attempts by medical practices to enforce covenants against departing doctors.

The three common types of restrictive covenants, from most restrictive to least, are: (1) agreements not to compete with the former employer; (2) agreements not to solicit patients, employees or both; and (3) agreements not to use or disclose confidential information.

III. Enforcement of restrictive covenants.

Although suits to enforce restrictive covenants are breach of contract actions, because restrictive covenants are generally aimed at preventing theft of the company's trade secrets, their enforcement is closely related to suits for so-called "business torts." Business tort actions are suits for money damages caused by such things as unfair competitive practices or theft of trade secrets.

All but two states (New York and Massachusetts), including Delaware, Pennsylvania, and, more recently, New Jersey and Texas, have enacted laws modeled after the Uniform Trade Secrets Act to establish standards to protect trade secrets from theft and misappropriation. Those statutes all define "trade secret" to include such things as patient lists and contact information, pricing methods and other similar valuable, non-technical business information, and they all create causes of action for businesses damaged by the misappropriation of their trade secrets. Even in the absence of a restrictive covenant, therefore, the law

provides protection for businesses whose employees seek to use their employer's trade secrets to its competitive disadvantage.

Nonetheless, restrictive covenants continue to be attractive to employers because they allow a business to define both its confidential information and the activities it considers off limits with precision. Like trade secret law, restrictive covenants are regulated by state law, so their interpretation and enforceability will vary from state to state. Courts in most states, including New Jersey, Pennsylvania, Delaware and Texas, will refuse to enforce a restrictive covenant that (1) does not protect the employer's legitimate interest; (2) imposes an undue hardship upon the employee; (3) contains terms (duration, geographic scope and/or breadth of restricted activities) that are broader than necessary to protect the employer's legitimate interests; or (4) causes harm to the public.

A restrictive covenant will be more likely to be enforced if its description of the employer's protected business interest is similar to the definition of trade secrets in the home state's trade secrets act. Anything broader than that definition will be subject to possible rejection by a court asked to enforce it.

Even a covenant that is designed to protect a legitimate interest of the employer will have difficulty finding favor in a court if its enforcement would prevent a departing employee from finding employment in his field. Laws in most states, including New Jersey, Pennsylvania, Delaware and Texas, allow judges to "blue pencil" such a contract to allow some protection for the employer's legitimate interests, while narrowing the restriction to reduce its deleterious impact on the departing employee.

Likewise, an overly broad restrictive covenant that is viewed by the court as lasting too long or covering too wide a geographic scope, will either be denied enforcement or blue-penciled to shorten its duration or narrow its geographic scope.

Finally, where enforcing a restriction would result in harm to an area of public interest, it will not be enforced, although the court might craft some other equitable remedy to mitigate the damage to the public, while giving the employer's interest some protection. Restrictive covenants sought to be enforced against medical specialists are particularly prone to attacks on public interest grounds, due to the public's general desire to have unfettered access to medical services.

IV. The future of restrictive covenants.

An emerging trend might make much of this discussion moot in the near future. As in many other areas of social policy, California took the lead several years ago by enacting a statute that bars enforcement of restrictive covenants in most employment agreements. Although no other state followed California's lead at the time, several states, including New Jersey, fueled by public policy concerns about unemployment, are now considering legislation that would restrict enforcement of restrictive covenants in employment agreements.

In addition, the "Mobility and Opportunity for Vulnerable Employees Act" ("MOVE Act") was recently introduced in the US Senate. If enacted, it will limit the use of non-competition agreements for certain low-wage employees of companies involved in interstate commerce. This trend to further curtail enforcement of restrictive covenants makes it even more important that contracts containing them be drafted as precisely as possible.

V. The take-away.

For now, at least, restrictive covenants continue to be generally enforceable, except in California, subject to the principles discussed above. At the same time, courts remain cautious about restraining trade and will not enforce them unless they are narrowly tailored to protect a legitimate business interest. For these reasons, to assure that your employment agreements with restrictive covenants are enforceable, you should:

- Limit their use to key employees who have access to patient relationships and other trade secrets.
- Draft employment contracts to track the definition of "trade secret" in your state's trade secret act.
- Choose the least restrictive type of covenant that will get the job done. Do not use a non-competition agreement where a less restrictive non-disclosure agreement will suffice.
- Define as precisely as possible the restricted activities.
- Limit the geographic scope and duration of the restriction to what you really need to protect your business.
- Consider any public policy concerns that might be triggered by enforcement of your contract.
- Before imposing a new restrictive covenant on an existing employee, check with an employment lawyer in your state; many states, including Pennsylvania and Delaware, require that new consideration be given to the employee to make the newly imposed restriction enforceable.

To make your restrictive covenants rock-solid and give them the best chance of being enforced, seek to protect only legitimate business interests, resist the urge to prevent lawful competition, and choose the least restrictive option to protect those interests.

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