



BY BRUCE D. ARMON *and* CHRISTOPHER P. STIEF

A Clause for Concern

The details of any non-competition covenant within an employment contract may mean the difference between a contract you can live with and one that needs to change.

Very few things last forever. For most physicians, one of the most difficult transitions is the end of an employment relationship. In addition to the inevitable personal reflection that will take place, the severing of the physician's employment with the employer will likely have a profound professional impact on the physician. One aspect of the transition that physician-employees often do not anticipate is the long and short-term impact of contractual non-competition provisions on the physician's professional success in a community.

For a moment, let's look at the situation from the

employer's perspective. Imagine that you are an employer and you hire a bright and eager physician-employee. You provide your employee with uninhibited access to your referral sources, patient lists, business model, and payer contract agreements. When this employee leaves your employ, he sends a letter to each of your practice's patients notifying them of the decision to no longer work with you and that he would welcome the opportunity to continue to care for the patient and her family and friends at the new office location—right down the street from your current office!

To protect an employer's interests from such behavior, most physician employment contracts include so-called "non-competition" provisions, which govern the physician-employee's activities both during employment and after termination. Like most physician employment contract provisions, the devil is in the details regarding the scope—and enforceability—of a non-competition provision.

A non-competition provision usually includes language that the employee covenants not to directly or indirectly own, manage, work for, invest in, or otherwise participate in "certain activities" within a defined "radius" for a certain "period of time."

Activities. It is imperative that the prohibited activities accurately describe the employer's medical practice and are not overly broad from the employee's perspective. Every medical specialty includes various practice components. For instance, a physiatrist's practice could include (1) inpatient and/or (2) outpatient pain services in the area of (3) management and/or (4) rehabilitation. The practice likely does not include all four practice types and settings. If the non-competition provision broadly prohibits the employee from practicing any physiatry upon termination, a court may find the covenant overly broad if the

Continued

Agreeing not to perform certain activities within a five-mile radius of an employer's office(s) likely has much different implications if your practice is in Lower Manhattan versus a suburban or rural community.

employer's practice was, for instance, exclusively focused upon outpatient pain management.

Radius. The "radius" of a non-compete provision can have important consequences, and should be examined carefully by both employers and employees. Agreeing not to perform certain activities within a five-mile radius of an employer's office(s) likely has much different implications if your practice is in Lower Manhattan versus a suburban or rural community. As an employee, it is important to determine your long and short-term goals and the potential opportunities in a community before you agree to a particular non-compete radius. If your spouse or significant other also is a physician, be cognizant of the radii of your respective non-compete provisions. Ideally, both of you will not have to switch jobs—and home and schools if you have children—because the radius in one of your contracts effectively means you will have to move to continue practicing medicine. The radius should be specifically identified in the employment contract, whether it is city blocks, particular zip code(s), a county, or natural boundaries (e.g., a river).

An employer will want to make sure that the geographic radius matches the actual radius of the practice's business. Radius will be closely scrutinized by the courts if the non-competition provision is challenged. In some states, if the radius is too broad the court will modify it to something the court feels is appropriate. But there are other possibilities. In a recent Kansas case, *Graham v. Cirocco*, involving a colorectal surgeon, the Kansas Court of Appeals found a shortage of colorectal surgeons on the

Kansas side of Kansas City, and consequently refused to enforce an agreement not to place an office within a 25 mile radius (the court did, however, enforce a separate covenant not to solicit patients). In other states, such as Georgia and Wisconsin, there is no leeway: If any part of the covenant is over broad, the entire covenant will be thrown out.

Time Period. Finally, the physician's employment contract should identify the period of time in which the employee will not compete with the employer. In many circumstances, this begins when the employee starts work for the employer and will continue in effect for a year or more beyond the end of the contractual relationship. The employment agreement may provide that the period of time may extend beyond the designated period if the employer seeks an action for equitable relief because the employee violated a provision of the non-compete clause. This is to ensure that the employer has the benefit of the restrictions in place for the full, agreed-on period of time.

Non-Solicitation of Patients. A non-compete agreement may also include a non-solicitation clause. As its name suggests, these provisions may prohibit an employee from directly or indirectly soliciting for treatment any former or existing patient (or patient's family member) of the employer, influencing anyone with a referral relationship with the employer from altering that relationship, and/or influencing any employee of the employer to alter her employment relationship with the employer. An employer may not generally interfere with a patient who requests that he continue to be treated by the departing physician and

requests, in writing, the medical records be forwarded accordingly. Depending on the language in the non-solicitation clause, it may be difficult or impossible for a departing employee to build a patient base from the former employer's practice.

Protection of Confidential Information and Trade Secrets. An employer is entitled to protect its confidential business information and trade secrets even without a signed contract restricting use of such information. In a case decided in 2002, *Total Care Physicians v. O'Hara*, a Delaware court ruled that a physician practice's billing records containing patient identity, address, treatment history, and insurance data were trade secrets under the Delaware version of the Uniform Trade Secrets Act (a standardized trade secrets statute that has been enacted by more than 40 states). The court held a departing physician liable and required him to pay money damages when he removed copies of billing records and used them to send a solicitation mailing that resulted in the transfer of hundreds of patients to his new practice.

Professional Announcements. An interesting issue that came up in the *Total Care Physicians v. O'Hara* case was whether a physician has a right or duty to inform existing patients of a new practice affiliation, regardless of contract or trade secrets issues. The court examined the AMA Code of Medical Ethics, as well as state public policy on the medical profession, and concluded that patients are entitled to be notified. The court even went so far as to conclude that trade secret materials may be used to effectuate that notification, but stressed that using trade secret data to solicit,

rather than merely notify, crosses the line into a violation of trade secrets law. This may mean that even a contractual clause purporting to prohibit announcement of a new affiliation would be unenforceable. Many states also have abandonment statutes or regulations that prohibit a physician from abandoning her patients.

Liquidated Damages or “Buy-Out” Provisions. Many employers include a buy-out or liquidated damages provision that permits an employee to not comply with one or more of the provisions in the non-compete clause in exchange for a cash payment. In many situations the requested payment is quite significant, e.g., some multiplying factor of the employee’s wages during a designated period of time or a pre-determined amount. To be enforceable, a liquidated damages clause must meet some basic criteria: (a) the actual damages must be difficult to measure; and (b) the contractually specified damages payment must be a reasonable amount in proportion to the value of the services involved in the contract itself. In covenant cases, the first of these is usually easy to satisfy, but the second factor typically receives fairly close scrutiny. For instance, even though the Pennsylvania Superior Court had upheld a liquidated damages clause in the 1992 case of *Geisinger Clinic v. DiCuccio*, a 2001 decision from a lower court (*Medical Wellness Associates v. Heithaus*) refused to enforce a liquidated damages clause because the former employer did not introduce evidence of how the \$25,000 figure was derived as a damages forecast. The lesson is that if your contract includes a liquidated damages clause, the employer needs to have a rational and defensible basis

for the number to explain to a busy trial court judge if the employer wants to get the clause enforced.


The Public Interest. One factor that comes up often in litigation involving physician non-compete agreements is the public interest. Frequently, courts will examine the impact on the public before issuing an order preventing a physician from practicing in a certain area, such as availability of physicians practicing a particular specialty in the geographic area. Employers will argue that the public interest is served by protecting investment in building successful businesses in the community.

It is very important to review and understand the potential short and long-term impact of your contract’s non-competition clauses before you sign the employment agreement. A few potential items to consider:

- Are your long-term plans to stay in the community? If you are close to 100 percent positive that you will be moving far away if, for any reason, you stop working for your employer, the non-compete clauses may be much less important than other issues in the contract (e.g., salary, bonus, benefits).
- Does the contract provide any exceptions in which the non-compete clauses do not apply (e.g., expiration of the contract or termination by employer without cause)?
- Are the non-compete clauses overbroad and/or unenforceable?

Many physician employees erroneously assume that non-competition clauses are illegal or will not be upheld by a judge or an arbitrator. This is a gamble that may prove expensive for the physician—both financially and professionally. Should there be a dispute regarding enforcement of a non-competition clause, the employer

is likely to have more financial resources at its disposal and can make the departing employee’s professional and personal life miserable. Careful consideration should be given to reviewing and seeking modification to your non-competition clause to protect yourself in the short term financially, and in the long term professionally.

In the next issue of *UO*, we will detail what you can expect during litigation or arbitration of a disputed non-competition clause in an employment agreement. 

Bruce Armon is a partner and practices health-care law for Saul Ewing LLP. He can be reached at barmon@saulewing.com. Chris Stief is a partner and litigator who chairs Saul Ewing’s Employee Defection & Recruitment Practice Group and can be reached at cstief@saulewing.com.