

## **The State of Non-Compete Agreements for Doctors and Mid-Level Practitioners in Texas**

Doctors in Texas are increasingly opting to forgo the administrative hassles and economic insecurity of running independent practices to seek employment with hospitals or multi-practitioner medical groups. Large physician groups and hospitals doing business in Texas often require their doctor, nurse practitioner and physician assistant employees to sign employment contracts that contain non-compete agreements or “covenants not to compete.”

Non-compete agreements are important tools that employers can use to insure against employees sharing proprietary information with a competitor. A software development company, for example, risks exposing its design secrets to competitors through the employees it hires. Covenants not to compete make perfect sense in those situations. To be enforceable, an employer can only restrict its employee from engaging in similar commercial activities that compete with the employer for a limited amount of time (usually six months to two years) and within a limited geographical range (five to twenty miles from the employer’s place of business, for example). The employee must also receive something of value from the employer to support the restriction on competing.

The rationale for non-compete agreements in the high tech world does not make as much sense in employment contracts for doctors and mid-level healthcare providers. This is because physicians are rarely exposed to confidential information or trade secrets of their employers. Despite this, healthcare providers routinely execute non-compete agreements in employment contracts without understanding the long-term affect on their career paths, and without much choice in the matter.

### **What should a doctor or mid-level practitioner be aware of when signing an employment contract with a non-compete?**

- I. Is the non-compete enforceable?

A) Is there consideration for the non-compete? Healthcare providers must receive something of value or “consideration” from their employers *independent of salary, bonuses, benefits and access to patients* that justifies restricting the provider from practicing in competition with the employer for a period of time within a geographical limitation after the provider leaves his employer. Without adequate consideration, a non-compete agreement is not enforceable. Courts determining whether there is sufficient consideration to support a non-compete will consider several things:

1. Does the physician have *real* access to “confidential information” of an employer such as EMR or billing software to justify restricting him from competing if he leaves his employment? Unless doctors are involved in the technology or IT department of an employer, however, they rarely gain the kind of exposure to such “confidential information.” In the employed physician context, it’s difficult to imagine a surgeon, for example, exposing the secrets of a former employer’s billing software to a new employer in a way that would allow the new employer to gain an unfair advantage in the marketplace.

2. Has the employer made a significant investment in recruiting the physician?

3. Has the employer provided substantial resources to the physician that he will use?

4. Does the employer have an existing client base or is the employer building a reputation and patient base around the employee physician?

5. Has the employer spent a significant amount of money advertising the physician employer’s practice?

B) Is there a buy-out clause?: In Texas, non-compete agreements that seek to restrict physicians *must* have a buy-out clause. *See TEX. BUS. & COM. CODE §§15.50-.52.* If the non-compete covenant does not offer the physician the option to buy out of the restriction against competition, Texas

courts have held the covenant is not enforceable against the physician. See *In re: LasikPlus of Texas, P.A. v. Federico Mattioli, M.D.*, 2013 Tex. App. LEXIS 14275 (November 21, 2013). But...

C) Is the buy-out clause reasonable? Many buy-out agreements in physician employment contracts are valued at the physician's salary for one year. Physicians often argue that this is an unreasonable price. If the physician and the employer cannot agree about whether the buy out is reasonable, by statute, an arbitrator shall decide whether the price is reasonable.

D) Is there a public policy interest against enforcing the non-compete? If the interest of the employer in restricting the physician from competing is outweighed by the public interest in having access to medical care, Texas courts have held such restriction to be void as against public policy. In *Nacogdoches Heart Clinic, P.A. v. Prabhakar R. Guniganti, M.D. et al*, 2013 Tex. App. LEXIS 1066 (February 6, 2013), the court declined to enforce a non-compete on public policy grounds and explained, "the public interest [in having access to cardiac care] would be adversely affected" if the cardiologist was restricted from practicing in the same community as his former employer. In small communities like Nacogdoches, the court reasoned, "for one doctor to be taken out of the equation hurts the medical care of the people."

The enforceability of covenants not to compete in employment contracts for healthcare providers is a rapidly evolving legal topic, and there is no clear direction from the courts or the legislature at the moment. With the implementation of the Affordable Care Act and the many uncertainties that doctors, nurse practitioners and physician assistants are facing these days, along with concerns about an impending shortage of physicians, the Texas Supreme Court may soon follow the lead of other states in invalidating any agreement that restricts or prohibits a physician from earning a living in any market.