

Enforcing Restrictive Covenants for Health Care Professionals

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Over the past decade, whether by case law or adopted regulations, many states have limited the circumstances under which restrictive covenants (i.e., non-competition and non-solicitation provisions) can be imposed and/or enforced. Particularly in the health care field, where providers have a near-permanent relationship with their patients and a constant expectation of continuing to provide professional services to such patients, the ability to prevent departing employees from soliciting patients or opening a competitive practice in close geographic proximity is critical. An employer's ability to impose and enforce these restrictive covenants has been increasingly limited over the past several years. Accordingly, knowing a particular state's laws and tolerances with respect to restrictive covenants has become an increasingly important part of the employment process.

Trends in Restrictive Covenant Enforcement

Recent trends in imposing and enforcing restrictive covenants have focused on four main areas: (1) advanced notice of restrictions; (2) independent consideration to enforce a restriction; (3) limitations on the category of employees who can be subject to restrictions; and (4) penalties for violating restrictive covenants:

1. *Notice requirements.* Several states now require that a proposed employee be presented with a written notice allowing the employee a period of time to consider the restrictive covenants prior to executing an employment agreement or accepting employment. What is required for such notice to be effective varies, but generally the notice must inform potential employees that they should have the restrictions reviewed by legal counsel and details their rights under the law. While a notice requirement adds an additional burden to employers and can slow the process by which an employment offer is accepted, it can be a benefit. Employee candidates who receive notice are much less likely to be able to argue successfully they did not understand the restrictive covenants or how they may impact their future employment.

2. *Independent consideration requirements.* A common requirement among states is that a potential employee must be provided with “independent consideration” in order to enforce the restrictive covenant provisions. What exactly constitutes such consideration often can be additional financial payment above and beyond a salary, continued employment for a period of time, or the employer performing the promise of employment. Whether the amount or type of independent consideration offered to a proposed employee will be sufficient to allow an employer to enforce a restrictive covenant is not always clear in a state’s regulations or relevant case law. Under these circumstances, it can be difficult for employers to determine what consideration is adequate. Additionally, employers must determine if financial consideration must be paid in a lump sum upon the effective date of employment or if payments over time will be adequate or superior.

3. *Limitations on enforcement.* Multiple states limit enforcement of restrictive covenants based on the proposed employee’s wage. The minimum wage an employee must earn to impose restrictive covenants differs greatly among states and often increases year-to-year. Restrictions also may limit enforceability to the length of time an employee has worked for the employer or may limit the length of time a restrictive covenant can be enforced after employment terminates. Other states have restrictions that limit the type and class of employees who can be required to comply with restrictive covenants. For example, New Mexico limits enforcement of non-competition agreements against certain health care providers. In addition, California prohibits restrictive covenants against employed health care providers, but such restrictions may be allowed as a condition to becoming an owner of a medical practice.

4. *Penalties.* Imposing restrictive covenant provisions that do not comply with a state's legal requirements can have negative consequences for the employer. Some states have imposed laws requiring employers to pay all legal fees and costs associated with an employee's successful legal challenge of a restrictive covenant provision. Other states impose financial penalties for each employer violation. The state of Colorado, effective March 1, 2022, will make violating state restrictive covenant laws a Class 2 Misdemeanor, potentially subjecting an employer to fines and/or up to 120 days imprisonment.

Best Practices to ensure restrictive covenants will be enforceable

To minimize risk that restrictive covenant provisions will not be enforceable, health care employers should consider the following:

1. *Know the laws of the applicable state.* States vary significantly related to restrictive covenant enforcement, and many state laws have changed in recent years and do not apply the same way as when an employer entered into previous employment agreements. Employers should understand clearly any restrictions and limitations related to restrictive covenant provisions in the applicable state.
2. *Research case law.* Not all states have specific laws regulating restrictive covenant terms and enforcement. Alternatively, restrictive covenants in these states may be regulated by a body of case law. Employers should be aware of relevant case law in their jurisdiction that may impact these provisions.
3. *Review and update template documents.* Many employers use the same template employment agreements over several years. While often basic employment terms do not vary much from employee to employee, knowing a state's laws related to restrictive covenants will be of no use if the employer's template employment agreement is not updated to reflect these requirements.
4. *Evaluate restrictive covenants from prior employers.* Often, employers desire to employ an individual who is subject to a restrictive covenant from a prior employer. Absent state regulations or a body of case law addressing these restrictions, employers generally refer to the plain language of the former employer's restrictive covenants to determine whether the same will impact whether an employee can be hired without violating the restrictions. In states where restrictive covenants are regulated, employers should make an effort to determine whether restrictions in a prior employment agreement actually meet legal requirements or will be enforceable. For example, if a geographic restriction prohibits an individual from providing services at an employer's office location on its face, but the proposed employee was not afforded the appropriate consideration as required by law, such a restriction may not be enforceable. In this scenario, there is less risk of violating the

covenant restrictions if the employer hires the proposed employee. However, employers should be cognizant of the fact that it may be an expensive and lengthy battle to prove the former employer's non-compete was unenforceable. The new employer also can be named in a lawsuit based on the theory of tortious interference with contract and, even if such suit ultimately is resolved in the new employer's favor, there likely will be significant time and expense achieving that result.

5. *Conduct a risk-benefit analysis.* Having to comply with restrictive covenant limitations can make imposing such restrictions less attractive for employers. Is it worth the cost of paying independent consideration if it is unlikely an employee who leaves and competes with the employer will actually have a detrimental financial impact on the practice? Does an employer want to offer a higher starting salary just to be able to enforce a restrictive covenant? The long-term impact and financial ramifications of offering employment with no restrictive covenant provisions, versus having to meet a myriad of requirements to enforce such provision, should be considered.

Just as there have been changes to imposing and enforcing restrictive covenants over the last decade, there are certain to be more changes in the future. An employer's review and understanding of restrictive covenant limitations should be an ongoing concern and part of its business operations and legal review. Making these efforts a routine part of the employment process will help to identify when imposing restrictive covenants are a valuable part of a health care practice and most likely to be upheld if challenged.

About the Author

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