Part II:

Physician /Employment Agreements/

Restrictive Covenants not to Compete

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In Part I of this series, I discussed when an employment agreement is appropriate and when and how to negotiate an employment agreement. One of the most important provisions in any employment agreement is whether a restrictive covenant will be negotiated between the parties.

What is a restrictive covenant not to compete?

A physician, medical group or any other health care organization that has an existing patient base, may wish to protect that base of patients if a new physician joins the organization and later decides to terminate. Therefore, an employer may wish to restrict the employee from competing against the organization when the employee terminates employment. It is not a question of if the employee will terminate. It is a question of when the employee terminates employment from the organization. Remember, in every employee/employer relationship, the employee will ultimately terminate employment whether due to death, disability voluntary termination, being involuntarily dismissed or retirement.

Terms of restrictive covenant not to compete

In many states restrictive covenants are illegal and unenforceable. In the state of Illinois, restrictive covenants may be enforced; however, the courts frown upon the enforcement of such provisions and will look for a reason to prevent the enforcement of such restrictions. The courts will strictly interpret the activities that are limited, review the amount of time the employee is unable to work and the geographical area to which the restriction applies.

The restriction must be limited as to time and geographical area to protect the actual business interests of the medical group. For example, a general surgeon in central Illinois who services a 50 mile radius of his office, may be able to enforce a restrictive covenant that covers a 50 mile radius for a two- or three-year period. On the other hand, a general surgeon working in the Chicago city limits may only be able to enforce such a covenant within a three- to five-mile radius and requiring the person to resign from hospital staff privileges at only one or two hospitals. The reason is that in the rural area, the general surgeon has a much broader geographical area in which he receives referrals and treats patients. In the urban area, the patient catch-basin is generally very restricted since there are so many other competing specialists in close proximity.

Unenforceability of restrictive covenants not to compete

In addition to the courts strictly enforcing the reasonableness of the restrictive covenant, Illinois law provides that since the employer or its legal counsel prepared the restriction in the agreement, any ambiguity will be ruled against the employer. Also, the restrictive covenant may not be enforced if the employer has materially breached the employment agreement, (i.e., not paid compensation or other promises). The employee can then argue that the restriction would be unfair to enforce since the employer did not honor its commitment to the agreement. It is critical, therefore, that the employer strictly honor and fulfill its promises if it wants the restrictive covenants to be enforced. Also, the employee should seek legal counsel and review whether all promises have been met by the employer if the employee wants to break the restriction.

Damages for breach of restrictive covenant not to compete

Depending upon how the restrictive covenant is drafted, the consequences of such a breach may be monetary and/or an injunction which prohibits establishing a medical practice. Courts will not enforce a monetary penalty if it appears to be punitive. Courts will enforce a monetary penalty if it is for liquidated damages. When I represent employers, I encourage an agreed-to liquidated damages provision since courts will generally enforce such a provision so long as it is not perceived as a punitive amount. Also, use of such a provision reduces or eliminates the possible argument in future court proceedings as to the actual business loss to the employer.

Summary

When I represent employers, I encourage them to have a restrictive covenant to protect their patient base. It is unfair for a junior physician to move into a community, be financially supported by the established medical practice and then separate at a later date and significantly damage the medical practice by taking a large number of patients. When I represent an employee joining a medical practice, I advise them to not enter into an employment agreement with a restrictive covenant unless they clearly intend to honor it or unless the restrictive covenant has a prearranged liquidated damages provision, which will allow them to "buy out" of the restriction. The costs to both parties in any litigation to enforce or breach the restrictive covenant are time-consuming, costly and uncertain since courts are reluctant to enforce such restrictions. n

This article is the second in a series. Part III will appear in the spring issue of Chicago Medicine.

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