Physician Employment and Non-Competes: What Does Taking the Plunge Really Mean?

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PHYSICIAN’S GUIDE TO EMPLOYMENT CONTRACTS: TOP 10 TIPS FOR PHYSICIAN EMPLOYMENT RELATIONSHIPS (i.e., what I tell my physician clients)

Lively debate and thoughtful observations are WELCOME!
Tip No. 1—
READ YOUR AGREEMENT BEFORE YOU SIGN

READ
1. READ AND UNDERSTAND AGREEMENT BEFORE YOU SIGN

► Terms become enforceable once signed;
► and possibly before, when acting in compliance.
► Understand the substance thoroughly.
► Hire an experienced health care attorney—
  ● to review and fully discuss;
  ● answer questions and determine expectations;
  ● to make the best decision;
  ● what about negotiation? Well, it depends. . .
2. HOW MUCH LEVERAGE DO YOU HAVE?

Typically depends on how much—
- the employer needs the physician;
- the employer needs call coverage;
- the employer profits from the physician’s services.

Greater ability to negotiate v. lesser ability –
- Remote geographic location v. urban area;
- Uncommon subspecialty v. common or general;
- Profitable subspecialty v. marginally profitable.

Some terms are not negotiable.

Being too aggressive may give label as difficult physician, so PROCEED WITH CAUTION.
2. HOW MUCH LEVERAGE DO YOU HAVE?

Focus negotiations on—

- reduce the time period/geographic scope of a non-compete;
- increase salary or bonus structure;
- unfavorable terms that are practical (input by physician is essential, what really is untenable);
- unfavorable terms that are legal (lawyer must distinguish between a perfect contract and an acceptable one; also need a crystal ball)—
2. HOW MUCH LEVERAGE DO YOU HAVE?

► Example— Requirement that physician terminate clinical privileges when employment terminates (any curtailment of privileges has possible reporting effects)—
  ● Hospital is employer (standard);
  ● Employer has an exclusive contract with hospital (pretty standard);
  ● Employer has a strong relationship with hospital and physician obtains privileges as a result (try to negotiate);
  ● Physician already has privileges at a hospital but termination required despite existing relationships (try to negotiate);
  ● Power of Attorney that requires physician to give power to resign privileges to Employer (remove or run like the wind!).

► Lessons— DETERMINE LEVERAGE AND PICK BATTLES!
3. NON-COMPETE OBLIGATIONS

► Will restrict a physician from practicing medicine—
  ● in physician’s sub-specialty
  ● in a certain geographic location
  ● for a certain amount of time
  ● after the termination of the employment contract.

► Be sure to understand what this means in reality.

► Section 15.50(a) of the Texas Business Code sets forth certain consideration requirements for a non-compete to be enforceable against physicians in Texas (must be given in the otherwise-enforceable agreement; must give rise to the interest being restrained).
3. NON-COMPETE OBLIGATIONS

Section 15.50(b) of the Texas Business Code—

(1) the covenant must:

   (A) **not deny the physician access** to a list of his patients whom he had seen or treated within one year of termination of the contract or employment;

   (B) **provide access to medical records** of the physician’s patients upon authorization of the patient and any copies of medical records for a reasonable fee as established by the Texas State Board of Medical Examiners under Section 159.008, Occupations Code; and

   (C) provide that any access to a list of patients or to patients’ medical records after termination of the contract or employment shall **not require such list or records to be provided in a format different** than that by which such records are maintained except by mutual consent of the parties to the contract;
3. NON-COMPETE OBLIGATIONS

Section 15.50(b) of the Texas Business Code (contd.) —

(2) the covenant must provide for a buy out of the covenant by the physician at a reasonable price or, at the option of either party, as determined by a mutually agreed upon arbitrator or, in the case of an inability to agree, an arbitrator of the court whose decision shall be binding on the parties;

(3) the covenant must provide that the physician will not be prohibited from providing continuing care and treatment to a specific patient or patients during the course of an acute illness even after the contract or employment has been terminated.
3. NON-COMPETE OBLIGATIONS

- But unless these requirements are facially deficient;
- Physicians should presume enforceable as part of the employment arrangement;
- Physicians should presume that employer will actually enforce it;
- Prevents physician from quitting and opening up shop across the street (arguably fair);
- Enforceable even if termination w/o cause (not fair);
- Texas statute was designed to protect physicians.
- But has it now become a road map to enforceable non-competes for employer?
3. NON-COMPETE OBLIGATIONS


► Example— “after acquired” locations
  ● Physician employee for 5+ years;
  ● Employer 6 mos ago acquires additional locations;
  ● Physician given notice of non-renewal;
  ● Contract written in present terms as to non-compete (“any practice location”);
  ● Contract on its face appears to recite all the statutory requirements needed in Texas.
3. NON-COMPETE OBLIGATIONS

Indefinite description of a geographical area should render non-compete an unenforceable as written—

- *Butts Retail, Inc. v. Diversifoods, Inc.*, 840 S.W.2d 770, 774 (Tex. App. 1992) (language “‘metropolitan area’ of the Parkdale Mall store in Beaumont, Texas” indefinite and unenforceable);

3. NON-COMPETE OBLIGATIONS

A reasonable area consists of the territory in which the employee worked while employed—


- *Evan's World Travel, Inc. v. Adams*, 978 S.W.2d 225, 232–33 (Tex.App.-Texarkana 1998, no pet.) (finding covenant not to compete that restricted the employee from working in any state in which the employer had conducted its business during the employee's term of employment was “greater than necessary” to protect the employer's legitimate business interest).
3. NON-COMPETE OBLIGATIONS

► If a covenant is determined overbroad, the court will reform its terms to make it reasonable. *Butler v. Arrow Mirror & Glass, Inc.*, 51 S.W.3d 787, 793 (Tex. App.—Houston [1st Dist.] 2001, no pet.)

► Other jurisdictions have held that expansion of the geographic scope should not be enforced if vague or unreasonable (see me for specific case cites).

► *Davis v. Albany Area Primary Health Care, Inc.*, 503 S.E.2d 909, 911 (Ga. App. 1998)—

  ● A non-compete prohibited a physician from practicing medicine within a 20 air-mile radius of any of the non-physician group's centers for a period of two years upon termination of the employment agreement;
  
  ● The non-compete barred her from working within 20 miles of the existing clinics where she never worked or even the new clinic opened during her tenure—ruled to be unenforceable.
  
  ● Georgia court observed that group could open a clinic within scope and require the physician to move—*but does this do us any good in Texas?*
3. NON-COMPETE OBLIGATIONS

► Public policy issues but may only help areas “in need”—
  ● 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.”
3. NON-COMPETE OBLIGATIONS

► Attack consideration (ALSO for non-solicitation and other obligations)
  ● Must be given in the otherwise-enforceable agreement;
  ● Must give rise to the interest being restrained;
  ● Covenant must be designed to enforce the promise's consideration or return promise in the otherwise enforceable agreement;
  ● Sources of professional services (referral physicians and patient lists/contact) are not protectable interests. See Philip H. Hunke v. Wilcox, 815 S.W.2d 855, 858 (Tex. App.—Corpus Christi 1991, writ denied).

► BUT TO WHAT END?
3. NON-COMPETE OBLIGATIONS

► Practical realities limit physician’s options—
  ● Physician has terminated or (worse) been terminated;
  ● Physician needs specificity, but contract will be broad;
  ● Next employer will inquire; physician best to disclose;
  ● Next employer (no matter how enthusiastic) does not want to be Defendant No. 2 in a non-compete litigation, which usually will involve immediate injunctive relief;
  ● Presume that employer will enforce as they have resources (David v. Goliath) and if they do not, other physician employees will assume that theirs won’t be enforced either.
  ● **Last option**—File a lawsuit for declaratory judgment as to enforceability.
  ● But is this is viable option to a physician who is now OUT OF A JOB?
  ► Makes front end discussions with an attorney **CRUCIAL** (Tip No. 1).
3. NON-COMPETE OBLIGATIONS

- Physician may use **arbitration process** to determine whether price of buyout is reasonable (is 2X yearly salary? 3X yearly salary = $1M?);
- But beware of turning a buy-out “option” into a requirement to pay. See *Sadler Clinic Ass’n, P.A. v. Hart*, 403 S.W.3d 891, 898 (Tex. App—Beaumont 2013, pet. denied)—
  - Court upheld a buyout provision of a non-compete agreement that required physician to pay 12-months' salary or not compete in designated area;
  - Reasoning was that if the physician elects to compete despite signing a valid noncompetition covenant with a buyout provision, the physician must pay the agreed amount or elect to have a reasonable price determined by an arbitrator.
  - Beware of using this as a venue to determine enforceability (litigation better option, if allowed; but what if arbitration is mandated?).
4. NON-SOLICITATION AND NON-OWNERSHIP OBLIGATIONS

► Not *per se* prohibition from practicing medicine;
► But may impact allowable ownership interests during contract as well as upon termination of the employment contract—
  ● the patients or referral sources to whom physician can market;
  ● the patients physician can treat;
  ● the employees whom physician can hire;
  ● the ownership interests that can be maintained;
  ● the clinical privileges that can be maintained;
► Employers draft these to be broad and indirect;
► Depending on leverage, could negotiate these to be more narrow –
  ● prohibit solicitation of *current* patients, referral sources, and employees rather than *potential*;
  ● prohibit ownership only where *directly conflicting*;
  ● clarify that restrictions do not apply to *after-acquired locations*. 
4. NON-SOLICITATION AND NON-OWNERSHIP OBLIGATIONS

► Any geographic radii (keep in mind for non-competes as well) —
  ● Specify that distance measured by “driving distances”;
  ● Otherwise, it will likely be air miles aka “as the crow flies.”

► Determine if any ownership interest is actually implicated—
  ● Does physician has ownership interests that need to be disclosed and excepted?
  ● Required to perform a certain number of cases at the facility?
  ● What other requirements to maintain “Qualified Physician” status as to the ownership interest?

► Determine if clinical privileges at other facilities are implicated—
  ● Does physician have clinical privileges at other facilities? Is there a reason to maintain? Are cases required to maintain privileges?
  ● Determine how to resolve (narrow or resign?).
5. HIPAA, PRIVACY, AND TRADE SECRET CONFIDENTIALITY

► Observe all employment policies, including HIPAA and patient privacy laws, at the outset of the employment relationship.

- Keep it simple by using the phone, pager, laptop, computer tablet supplied by employer;
- Avoid forwarding information to personal devices;
- Always use proper mobile device protocols (see HHS handout for guidance);
- Avoid taking hard copy information that is not secured to non-office locations.

► Just because there is access to confidential materials (such as the EHR, with its e-trail), does not mean physician should access them.

► Limit access to patient treatment or other proper purposes as specifically authorized by employer (avoid EHR “trolling” allegations as they can turn into HIPAA violations).
5. HIPAA, PRIVACY, AND TRADE SECRET CONFIDENTIALITY

► Use the trade secrets of employer for employment purposes only.
► What are trade secrets (aka “consideration” for non-competes)?
  ● Confidential information, maintained and protected by employer as secret (see Sadler Clinic Ass'n, P.A. v. Hart, 403 S.W.3d 891, 898);
  ● Specialized training and knowledge, more than at-will duties;
  ● Specific proprietary processes of practice (clinical assessment data, EHR software, billing software).
  ● Remember that employer has no proprietary interest in sources of professional services (referral physicians and patient lists/contact). See Philip H. Hunke v. Wilcox, 815 S.W.2d at 858, supra.
  ● In fact, TMB Rule 165.5 requires employer to not interfere with access to patient lists/contact information for all patients “seen” in the last 2 years when the physician separates from employer (physician must meet patient notification requirements).
6. IS THERE AN INCOME GUARANTY OR RECRUITMENT COMPONENT?

► Funds offered that enable support for salary payments as physician builds practice (triad between physician, employer, and hospital).

► Federally-regulated requirements allow such amounts to be forgiven as long as physician practices in certain service area for certain period of time.

► But an income guaranty greatly complicates matters—
  ● if physician’s employment is terminated (e.g., economics of practice fail, peer review issue surfaces, other unforeseen factor arises);
  ● otherwise need to relocate.

► Understand the risks and benefits (physician holds proverbial bag in the triad).

► Again, front-end discussions with an attorney are CRUCIAL (Tip No. 1).

► And certainly legal help needed if a decision made to leave the practice area or otherwise not meet forgiveness obligations.
7. ENVISION LOGISTICS

- Logistics are a crucial part of a physician’s practice,
- Control over them ceded when employed, so clarify—
  - Actual locations of clinical practice;
  - Which hospital or health care facilities expected;
  - Call coverage requirements/how scheduled;
  - Holidays and vacation amounts and expectations.
- Many employers now measure clinical “quality”—
  - Understand algorithms and formulas;
  - What is measured/how it is measured;
  - OUTLIER is an ugly word/avoid it all costs.
8. **MAKE A GOOD MATCH**

- Be realistic about decision to become employed.
- Compelling reasons will have tradeoffs—
  - salary/bonus structure v. how much actually paid;
  - benefits v. how much are these actually worth;
  - call coverage v. actual working and call coverage schedules;
  - shifting of overhead/admin (lease, EHR, employee costs, billing costs) v. unreasonable and unaccounted for charges/expenses;
  - clinical quality expectations v. physician independence;
- Look for an employer with reputation of treating physicians right;
- Spend time conducting thorough due diligence before you take the plunge.
- And if you are an employer, treat physicians right;
9. RECOGNIZE RED FLAGS

► Once the employment relationship starts—
  ● don’t be blind to signals that not working;
  ● Economics, personalities, politics, etc.

► Address red flags early to allow
  ● a jump on addressing concerning issues,
  ● before there is a crisis with limited options,
  ● an experienced health care attorney will help.
10. RESIST THE URGE TO RESIGN

► If actual crisis arises—
  ● DO NOT RESIGN EMPLOYMENT (please, please);
  ● seek guidance of an experienced health care attorney;
  ● will help with best decision;
  ● will guide physician through the process.

► Reporting obligations exist for all physicians—
  ● Interwoven state and federal reporting requirements;
  ● Coupled with self-reporting obligations;
  ● Must not unwittingly trigger affirmative report;
  ● Risk in resigning when there is an “investigation.”
10. **RESIST THE URGE TO RESIGN**

- Even if employer is not a hospital or health care entity (reporting entity), tread carefully—
  - Clinical privileges may be contractually tied to continued employment;
  - Some employers believe they need to report/have done so.
- Determine a strategic legal plan to—
  - Resolve issue and continue employment; OR
  - If continued employment not feasible, extricate from employment;
  - Top priority is minimizing damage to professional record;
  - Legal help is crucial to ensure best result!
- If you are “on the other side”— **BE FAIR AND DO WHAT IS RIGHT!**
Questions? Comments?
Thank you for this opportunity!

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