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# Restrictive Covenants: Some Common Questions

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Covenants not to compete are a standard feature in many physician employment contracts. This article addresses certain commonly-asked questions concerning these covenants.

**What is the purpose of a covenant not to compete?** The purpose of a covenant not to compete – as well as restrictive covenants<sup>1</sup> in general – is to protect an employer against unfair competition. A practice that hires a physician, exposes the physician to the practice's patients and referral sources and helps the physician develop a practice is entitled to some protection against the physician using these advantages to compete against the practice.

**Are covenants not to compete involving physicians enforceable?** Generally yes. Although traditionally disfavored by New York courts, covenants not to compete may be enforced against physicians and other health care professionals. A covenant not to compete will be enforceable if it is (1) reasonable in geographic scope; (2) reasonable in time; (3) necessary to protect the legitimate interests of the employer; (4) not harmful to the public; and (5) not unduly burdensome.

Whether these criteria have been satisfied is highly fact specific. For example, the "reasonableness" of a covenant's geographic scope or time restriction will depend on the nature and location of the employer's practice. A covenant that may be enforceable by a subspecialty practice, which draws from a wide geographic area, may not be enforceable by a primary care practice. Likewise, a geographic radius of 20 miles may be reasonable for a rural practice, but not for an urban one. Determination of the "legitimate" interests of the employer, harm to the public and whether the covenant is "unduly burdensome" will be made on a case-by-case basis by the court or trier of fact.

**How are covenants enforced?** An employer seeking to enforce a covenant has a variety of remedies. It may initiate a lawsuit to obtain an injunction to prevent the employee from engaging in the restricted conduct or to recover damages caused by the breach.

The employer also may unilaterally exercise remedies under the employment agreement such as stopping severance or deferred compensation payments to the physician. In response, the employee will argue that the covenant is unenforceable because its terms are overbroad or the employer has somehow breached the employment agreement or has otherwise acted in bad faith.

**Can a physician challenge a covenant?** It is not uncommon for a departing physician to consider practicing in violation of the covenant – especially if the covenant would require the physician to leave the area. Assuming that the physician, after consultation with counsel, believes that the covenant is not "bulletproof," he or she will be faced with a decision: whether to proactively challenge the covenant by bringing a lawsuit seeking to invalidate the covenant or violate the covenant and hope that either the employer will not enforce it or that the physician's defense will be successful. The "agida" level for a physician opting for the latter strategy will usually be higher than that of the physician opting for the former strategy.

**May a practice hiring a physician subject to a covenant be exposed to liability?** Possibly. Employers must be very cautious when considering hiring a physician – or other health care provider – who is subject to a restrictive covenant. The new employer may want the right to terminate the physician's employment if the former employer seeks to enforce the covenant, or may require the physician to pay for attorneys' fees and damages incurred by the new employer if it is sued as a result of having hired the physician.

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