

Physician Non-Competes

Recent court cases clarify elements of an enforceable restrictive covenant

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AGREEMENTS THAT restrict a medical professional's right to work for a competitor are precarious at best. When entering into an employment agreement, many physicians agree to abide by certain post-employment restrictive covenants prohibiting them from practicing medicine in competition with their employer in a defined area for a certain period of time. Most physicians sign their employment agreement when they are hired. The new employer and new employee are not thinking about how their new relationship will end. But, they should.

In Illinois, a medical practice has a protectable business interest in its practice and patients as a matter of law. Yet, Illinois courts also recognize that "the right of an individual to follow and pursue the particular occupation for which he is best trained is a most fundamental right." As such, a medical practice may require physicians and other medical professionals to enter into covenants prohibiting them from working in a competitive position for a competing medical practice or from soliciting patients of the practice, but only if such restrictions are appropriately limited in time, territory and scope.

Illinois' Post-Employment Restrictions

A physician who leaves a medical practice to work for a competing practice down the street must be careful not to violate such agreements. Illinois courts have found that post-employment restrictions on competition that are limited to a radius of between 10 to 25 miles and a timeframe of two years or less may be reasonable on a case-by-case basis and, as a result, enforceable. Yet, the consideration given by the employer to the employee is another element courts will review in deciding whether to enforce such agreements. Consideration is something of value that must be given to create a legally binding contract.

When physicians and other medical professionals are initially hired and agree to post-employment restrictions, they often are given only the promise of employment as consideration for their agreement. Even if the restriction is reasonable in geographic and temporal scope, this promise of continued employment may not be enough consideration to render the agreement enforceable under Illinois law.

In *Fifield v. Premier Dealer Services, Inc.*, the Illinois Appellate Court held that when the promise of at-will employment is the consideration supporting a restrictive covenant, "there must be at least two years or more of continued employment to constitute adequate consideration in support of a restrictive covenant."

Recent decisions in Illinois following *Fifield* have largely applied this decision and have expressly rejected the argument that new employment itself is adequate consideration for a restrictive covenant.

All Restrictive Covenants are Not Equal

Reiterating this principle, the Illinois Appellate Court in *Prairie Rheumatology Associates v. Francis* recently held that a physician's restrictive covenant with a medical group was unenforceable due to insufficient consideration. In the case, Dr. Francis, a physician specializing in rheumatology, signed an employment agreement that contained a restriction prohibiting her from engaging in any competitive activity for two years after the end of her employment within a 14-mile radius of Prairie Rheumatology's office. After 19 months on the job, Dr. Francis voluntarily resigned her employment. This was five months short of the two-year requirement set forth in *Fifield*. Shortly after her resignation, Dr. Francis began working for a competing medical group within the 14-mile radius prohibited by her employment agreement.

Prairie Rheumatology filed a lawsuit seeking to prohibit Dr. Francis from working for the competing practice within the 14-mile radius. The trial court enforced the restrictive covenant and entered a preliminary injunction against Dr. Francis. However, on appeal, the Court held that, other than the promise of at-will employment, the physician received no additional benefit from her employer in consideration for the restrictive covenant. Dr. Francis did not remain employed at Prairie Rheumatology for two or more years. Therefore, the Appellate Court reversed the injunction and held that the restriction on competition was unenforceable because it lacked adequate consideration.

This case is a cautionary tale that the parties to a restrictive covenant may not ultimately be agreeing to an enforceable covenant. Any employer seeking to protect its legitimate business interests through a post-employment restriction on an employee should ensure not only that the restrictions are reasonable, but that such restrictions are supported by adequate consideration to be enforceable in Illinois.

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