Medical Restrictive Covenants in 2022

New amendments to have direct impact on the drafting of enforceable non-competition and non-solicitation covenants **By David J. Tecson, JD**

Introduction and Overview

The Illinois legislature enacted amendments to the Illinois Freedom to Work Act (Amendments) in 2021 that restrict the use of post-employment non-competition and non-solicitation agreements. The Amendments, which went into effect on January 1, 2022, will have a direct impact on the drafting of enforceable non-competition and non-solicitation covenants that seek to limit physician competition for patients after the termination of employment.

The purpose of this article is to review the impact of the Amendments on drafting medical restrictive covenants and also review the nuanced area of law generated by courts that have reviewed the enforceability of contract terms designed to restrict post-employment competition by physicians. The Illinois Supreme Court confirmed in a 2006 decision that non-competition terms in physician agreements are enforceable, if the terms are reasonable and carefully drafted to protect the employer's interest in patient relationships.

Impact of the IFWA Amendments

Some of the key provisions of the Amendments focus on prohibiting non-competition terms for employees with modest earnings. For example, the Amendments prohibit employers from entering into non-competition agreements with employees who earn $75,000 per year or less and also prohibit employers from entering into non-solicitation agreements with employees who earn less than $45,000 on an annual basis.

Given the relatively high salaries and bonus structures provided to most physicians, these prohibitions will probably have no impact on physician employment agreements. However, physician restrictive covenants should be drafted or updated with the following provisions in mind:

- The Amendments require all employers to provide their employees with 14 calendar days to consider any restrictive covenants and employers are also required to advise their employees in writing to consult with an attorney before signing the agreement.
- An employer may not enforce restrictive covenants against employees who have lost their employment due to the Covid-19 pandemic (or other similar events) unless the employer pays the employee compensation equal to their base pay, less any compensation earned through subsequent employment during the enforcement.
- The Amendments effectively codify prior Illinois decisions regarding the adequacy of consideration to support non-competition agreements. Accordingly, pursuant to the Amendments, non-competition agreements will not be enforceable if the term of employment does not last at least 2 years subsequent to signing the agreement or the employee receives a "period of employment plus additional professional or financial benefits or merely professional and financial benefits adequate by themselves."

The foregoing terms are mandatory. Accordingly, an otherwise enforceable restrictive covenant will be rendered null and void if these terms are not followed in the agreement. In addition to requiring the terms described above, the Amendments also mandate the 5 essential requirements for an enforceable covenant that have been developed by Illinois case law, as follows:

§15. Enforceability of a covenant not to compete or a covenant not to solicit. A covenant not to compete or a covenant not to solicit is illegal and void unless (1) the employee receives adequate consideration, (2) the covenant is ancillary to a valid employment relationship, (3) the covenant is no greater than is

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required for the protection of a legitimate business interest of the employer, (4) the covenant does not impose undue hardship on the employee, and (5) the covenant is not injurious to the public.

Medical restrictive covenants carefully drafted to prevent former employee physicians from treating the same patients they cared for at a previous employer are more likely to be enforced than restrictions in other businesses, because the Illinois Supreme Court has recognized that physicians often enjoy a near-permanent relationship with their patients. In the Mohanty decision, the Illinois Supreme Court enforced restrictive covenants with a duration of 2 years and a geographic radius of 5 miles within the City of Chicago.

Illinois courts have enforced broader restrictions in the medical field, such as a 5-year prohibition on the practice of medicine within a 20-mile area and a 3-year prohibition on practicing medicine within the City of Rockford and a surrounding radius of 25 miles. A post-employment medical restrictive covenant that prevented competition for 2 years within a 10-mile radius was held to be enforceable in a 2002 case.

However, all Illinois restrictive covenants must be carefully drafted so the terms are not overly broad or unduly burdensome on the former employee. The U.S. District Court for the Central District of Illinois examined physician restrictive covenants in 2020. In the Christie Clinic case, the plaintiff alleged that the physician had pre-surgical photographs of patients and that his competitive practice mailed a solicitation targeted at Christie Clinic patients. The federal court in the Christie Clinic case held that the non-solicitation terms were overly broad and unenforceable because those terms attempted to prevent the physician defendant from soliciting "any patient," as opposed to only patients treated by the physician.

Notably, the court in the Christie Clinic case declined to revise the overly broad provision by stating that: "The court will not engage in the extensive modification necessary to make the non-solicitation enforceable, and declines to rescue Plaintiff from the risk it took in crafting a patently overly broad restrictive covenant."

Medical restrictive covenants remain a viable tool to prevent unfair competition for patients treated by a physician formerly employed by a medical practice or group. However, based on both Illinois case law and the Amendments, non-competition and non-solicitation covenants must be well written in order to survive judicial scrutiny.

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