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Using Physician Noncompete Agreements in Washington

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To protect their valuable assets (patients, goodwill, and confidential information) and investments (recruiting, training and development costs), healthcare employers commonly require physicians to agree to restrictive covenants as a condition of employment. These restrictions typically provide that, upon termination, the physician will not: (1) work within a defined, surrounding geographical area for a prescribed time period; and/or (2) solicit or serve former patients for a prescribed time period. Both restrictions are frequently labeled "noncompete agreements," although the latter allows for competition while merely creating patient restrictions. Other common restrictions include non-solicitation of employees, confidentiality, and provisions to make clear who owns creations or inventions.

If a hospital provides any funding to induce a physician to relocate to the hospital's area, "Stark II" regulations may prohibit a medical practice from compelling that physician to sign a noncompete agreement. Some states prohibit or restrict physician noncompete agreements, and the American Medical Association considers them to be unethical in principle under many circumstances. However, a court applying Washington State law will enforce a "reasonable" noncompete agreement. Under Washington law, a noncompete agreement is reasonable if: (1) it is necessary to protect a legitimate business interest; (2) it is no greater than reasonably necessary to secure the employer's business or goodwill; and (3) the degree of injury to the public in the loss of the service and skill of the physician is so small as to warrant enforcement.

In analyzing element (1) above, courts tend to carefully examine factors such as the level of goodwill tied to the physician, status within the organization, level of compensation, training and patient access provided to the physician that the physician would otherwise not have obtained, the physician's tenure, whether the physician voluntarily quit or was terminated, whether severance was paid, access to sensitive business information or plans, whether the physician or new employer will gain an unfair advantage, and whether the physician engaged in bad acts while still employed (e.g., soliciting patients for the new business).

With regard to element (2), a noncompete agreement must be reasonable in both duration and geographic scope. The more restrictive the covenant, the more scrutiny and suspicion a court will exercise. As a general rule, time length should be limited to one to two years, although some courts have enforced three-year periods (especially in a sale of business context). Many judges disfavor going beyond one year. The geographic scope should correlate to the former practice area, not overreach. Washington courts can modify an unenforceable provision to make it enforceable to its maximum extent. However, some judges will not edit, choosing to instead strike entire paragraphs, which can gut a noncompete agreement. If a one-year non-solicitation agreement covering a particular county protects you, then strongly recon-

sider a longer, multi-county noncompetition agreement that might make a court question your motives. Courts ultimately rule in equity based on how they *feel* about the restraint under all of its circumstances. If it seems overly broad or punitive in black and white then you have hurt your case. A court will try to gain a clear sense of whether enforcement is more of an effort to squelch competition than it is to protect goodwill.

Few cases actually turn on the "injury to the public" factor. If a physician has such unique and important skills that no one else in the relevant geographic area can serve the public, this weighs against enforcing a noncompete agreement. For example, if demand exists for oncologists and only two oncologists practice in the area, the restrictions could be construed to be against the public interest by restricting patients' access to treatment.

Valid "consideration" is also required to form an enforceable noncompete agreement. Signing a noncompete agreement at or very near to initial employment constitutes sufficient consideration. A "mid-stream" noncompete agreement with continued at-will employment alone does not provide consideration under Washington law. In such circumstances, a pay increase, bonus, or other significant remuneration that the employee would otherwise not be entitled to would satisfy the consideration requirement.

Many noncompete agreements permit physicians to continue practicing unfettered if they pay a specified amount (commonly known as a buyout or liquidated damages) upon termination. If the formula is reasonable and not a penalty, this can provide for an amicable departure, or it can alternatively help establish that you have an even fairer, more enforceable agreement. Finally, if you use noncompete agreements, you should enforce them consistently to avoid impairing or waiving your enforcement rights with future departing physicians.

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