



Navigating Non-Compete Agreements in the Health Care Sector

Present and Future

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Meet our Speakers



Salvatore G. Gangemi, Employment Partner

Sal is a veteran labor and employment lawyer with nearly 30 years of litigation and counseling experience in helping clients navigate today's complex local, state and federal employment laws.



Stephanie Sprague Sobkowiak, Health Care Partner

Stephanie represents hospitals and physician groups on a wide variety of compliance, regulatory, risk management and reimbursement issues including fraud and abuse analyses, payor and other contract negotiations, medical staff and credentialing matters, Certificate of Need and licensure issues and patient privacy.

Agenda

- State Law on Non-Compete Agreements
- Federal Proposal and Issues on the Horizon

Current Law in Connecticut (2016)

- Applies to employment and other contracts that create or establish a professional relationship with a physician
 - Applies to only physicians
 - Applies only in the context of the establishment of a professional relationship
 - Consider the sale of a practice . . . likely outside the statute

Current Law in Connecticut (2016), cont.

- A covenant that is entered into, extended or renewed after July 1, 2016 cannot:
 - Restrict a physician's competitive activities for more than 1 year after the relationship ends in a geographic region of more than 15 miles from the physician's primary site
 - Be enforced if the employer terminates the employment or contractual relationship unless such termination is for cause

Current Law in Connecticut (2016), cont.

- Be enforced if the contract was not made in anticipation of, or as part of, a partnership or ownership agreement and such contract expires and is not renewed, unless prior to expiration, the employer makes a bona fide offer to renew the contract on the same or similar terms
- Be enforced unless separately and individually signed by the physician

Effective Date of Current Connecticut Law

- July 1, 2016
 - The law does not apply to contracts entered prior to July 1, 2016... BUT if they were amended, extended or renewed on or after July 1, 2016, then the law applies
 - Be mindful of automatic renewals

New CT Law Effective July 1 (hot off the presses)

- A covenant not to compete that is entered into, amended, extended or renewed on or after October 1, 2023, shall not be enforceable if
 - the physician does not agree to a proposed material change to the compensation terms of the contract prior to or at the time of the extension or renewal of the contract, and
 - the contract expires and is not renewed by the employer or the employment or contractual relationship is terminated by the employer, unless such employment or contractual relationship is terminated by the employer for cause.

The above restrictions do not apply to physician groups of 35 or fewer physicians that have majority ownership comprised by physicians.

Note that the contract must now also prescribe the primary site of practice (for center of radius).

New CT Law Effective July 1, cont. (hot off the presses)

- Applies all of the above parameters and restrictions to both APRN and PA agreements entered into, amended, extended or renewed on and after October 1, 2023
- Does NOT have carve out for small physician practices

Case Law Tidbits

- Not surprisingly, not many Connecticut courts have addressed this issue – most disputes resolved through negotiation
- One court limited older non-compete to one year duration
- One court seemingly would have upheld older non-compete with two-year duration but rejected non-compete on grounds the physician was not actually competing with former employer

Current Law in Massachusetts

- Applies to any contract which creates or establishes the terms of a partnership, employment or other professional relationship with a physician, nurse, social worker or psychologist
- Prohibits any restriction on the above professionals to practice in any geographic area for any period of time after the termination of the relationship

Current Law in Rhode Island

- Applies to any contract which creates or establishes the terms of a partnership, employment or other professional relationship with a physician
- Prohibits any restriction on a physician to practice medicine, including:
 - Any geographic restriction
 - The right to solicit or seek to establish, or to actually establish, a physician/patient relationship with any current patient of the employer
 - Expressly excludes non-compete restrictions in the context of the sale of a physician practice, which are allowed for a period of time of no more than 5 years

Current Law in New York

- No state statute or regulation governing non-competes in employment generally.
 - New York does not treat physician non-compete agreements differently.
- New York law disfavors non-compete agreements as an unreasonable restraint of trade.

Current Law in New York

- A non-compete is enforceable to the extent that it:
 - Is no greater than required to protect an employer's legitimate protectible interests.
 - Does not impose undue hardship on the employee.
 - Does not cause injury to the public.***
 - Is reasonable in:
 - duration; and
 - geographic scope.

Current Law in New York

- Protectible Interest that may be sufficient to support a reasonable noncompete:
 - Trade secrets or confidential information
 - Customer goodwill, as long as the employee in question did not initiate the customer relationship prior to commencing employment with the employer.
 - Employer's interest in preventing loss to a competitor of an employees whose **services are special, unique, or extraordinary.**

Other States

- Colorado, Delaware, Massachusetts, New Hampshire, New Mexico, Rhode Island and South Dakota ban physician non-compete agreements.
- Other states, like California, Oklahoma and North Dakota, ban all non-competes more broadly.

Proposed FTC Regulation (January 5, 2023)

The FTC maintains that :

“Noncompetes block workers from freely switching jobs, depriving them of higher wages and better working conditions, and depriving businesses of a talent pool that they need to build and expand.”

Proposed FTC Regulation

- Potentially affects all healthcare providers/businesses
 - Clinicians
 - Hospitals
 - Life sciences
 - Manufacturers
 - Research

Proposed FTC Regulation

“Non-compete clause” under the proposed regulation is defined as

- (1) A contractual term between an employer and a worker that prevents the worker from seeking or accepting employment with a person, or operating a business, after the conclusion of the worker's employment with the employer
- (2) and **includes a contractual term that is a *de facto* non-compete clause** because it has the effect of prohibiting the worker from seeking or accepting employment with a person or operating a business after the conclusion of the worker's employment with the employer.

Proposed FTC Regulation

What is a “de facto” non-compete clause?

- A non-disclosure agreement between an employer and a worker that is written so broadly that it effectively precludes the worker from working in the same field after the conclusion of the worker's employment with the employer.
- A contractual term between an employer and a worker that requires the worker to pay the employer or a third-party entity for training costs if the worker's employment terminates within a specified time period, *where the required payment is not reasonably related to the costs the employer incurred for training the worker.*

Proposed FTC Regulation

What is a “worker”?

... means a natural person who works, whether paid or unpaid, for an employer. The term includes, without limitation, an employee, individual classified as an independent contractor, extern, intern, volunteer, apprentice, or sole proprietor who provides a service to a client or customer. The term worker does not include a franchisee in the context of a franchisee-franchisor relationship; however, the term worker includes a natural person who works for the franchisee or franchisor. Non-compete clauses between franchisors and franchisees would remain subject to Federal antitrust law as well as all other applicable law.

Proposed FTC Regulation

What are “unfair methods of competition”?

- It is an unfair method of competition for an employer to enter into **or attempt to enter into** a non-compete clause with a worker; **maintain** with a worker a non-compete clause; or **represent** to a worker that the worker is subject to a non-compete clause where the employer has no good faith basis to believe that the worker is subject to an enforceable non-compete clause.
- Existing non-compete clause. The proposed regulation requires **an employer that entered into a non-compete clause with a worker prior to the compliance date to rescind the non-compete clause no later than the compliance date.**

Proposed FTC Regulation

Notice of Rescission

- **The employer must provide the notice to the worker within 45 days of rescinding the non-compete clause. The notice must be provided to current as well as former workers, provided employer has contact information.**

Proposed FTC Regulation

Exceptions to Non-Compete Ban

Ban does not apply to:

- . . . a person who is selling a business entity or otherwise disposing of all of the person's ownership interest in the business entity . . .
- . . . a person who is selling all or substantially all of a business entity's operating assets, when the person restricted by the non-compete clause is a substantial owner of, or substantial member or substantial partner in, the business entity at the time the person enters into the non-compete clause . . .

Proposed FTC Regulation

What happens next?

- Although the FTC is an independent federal agency, it's required to consider public comments that were due within 60 days of the proposal (although extended from March 20, 2023 to April 19, 2023). The FTC has asked specifically for comments on alternatives to an outright ban.
- It is a virtual certainty that litigation will ensue to prevent a ban from taking effect. For instance, it's likely that the American Hospital Association, large health care systems, and their lobbyists will strongly oppose the ban.
- It is not clear whether the ban would apply to non-profit hospitals. The proposed regulations doesn't say, but the Federal Trade Commission Act relied upon by the FTC does not apply to an entity "that is not organized to carry on business for its own profit or that of its members."

National Labor Relations Board

- On May 30, 2023, NLRB official stated that non-competes are “usually” illegal.
- Memo from NLRB General Counsel to agency lawyers stated that non-compete agreements discourage workers from exercising their rights under labor law to advocate for better working conditions. E.g., they could prevent workers from resigning or threatening to do so to demand better pay or other improvements.

Questions



Connect with our Speakers



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