Can You Break a Noncompete Agreement?

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The Purpose Is to Limit Competition

If you're unhappy with your job and want to look for a new position or work for a different medical group, you probably face a noncompete clause in your employment or partnership contract.

Typically, it states that for a specified number of years after leaving your job, you won't be able to work in a certain territory around your former employer. In addition, a nonsolicitation clause states that you won't be able to ask your former patients to come with you.

Together, these clauses are part of the restrictive covenant, which probably exists in most employment or partnership contract in states where they are allowed.

If you take a new job or set up a new practice that violates the covenant, your former employer or partnership can go to court to try to strip you of your new job, prevent you from practicing in the area, or make you pay money to keep your new position.

Do you have any recourse? Usually not, but under certain conditions, you might.

Your Chances of Getting Out

It is possible to get out of some restrictive covenants, according to the American Medical Association (AMA). These agreements are "a restraint of trade and therefore viewed skeptically by the courts," an AMA report states.[1]

The courts' basic reasoning is that the covenant shouldn't make it impossible for you to find a job, and that giving you as wide access as possible to work will help patients and improve competition, contract attorneys say.

However, former employers and partnerships do vigorously enforce covenants—and usually succeed, says Michael A. Cassidy, an attorney at Tucker Arensberg in Pittsburgh, Pennsylvania.

"If you've heard that restrictive covenants aren't enforceable, you've heard wrong," he says. Losing a doctor is a big blow for organizations, and the courts want to help them protect their legitimate business interests, Cassidy says.

An organization's business interests include being able to keep patients, covering recruitment costs for a new doctor, and preserving patient lists, contract attorneys say.

If your own rights outweigh the rights of the employer to preserve its business interests, you might ultimately win your case, says Ericka L. Adler, an attorney at Roetzel & Andress in Lincolnwood, Illinois.

But it could mean spending tens of thousands of dollars in lawyers' fees and possibly putting your new career on hold for years as the case goes through the courts, according to Adler. "Even if you win, you lose," she says.

And if you lose, you'd have to buy your way out of the covenant. The cost can be high—typically the equivalent of 1 year's salary or more, according to many contract attorneys.

In view of these high hurdles, most doctors who leave their job decide to obey the covenant, finding a new job outside the noncompete area and not taking their patients with them, Adler says.

You'll Face a Great Deal of Uncertainty

Many new physicians who are employed are hemmed in by restrictive covenants. One quarter of new physicians leave their jobs in the first 3 years of employment—the amount of time that restrictive covenants are typically in force, according to the AMA report.

But it doesn't seem that many of these young physicians fight their covenants. The legal cases tend to involve older physicians in employment or partnerships.

If you still want to break your restrictive covenant, first hire an attorney experienced in contract law for physicians and see what your options are, says William J. Cantrell, an attorney at Cantrell Law in Tampa, Florida.

When seasoned attorneys examine the specific wording, your own particular circumstances, and the law in your state, they can get a good idea of whether you can break a covenant, Cantrell says. But no attorney, he says, can know for sure whether you can win.

Before you quit your job and find a new one, you would want to have a high degree of certainly that you wouldn't be sued and forced to give up your new job. But you can never get that kind of certainty at the start.

"There are no guarantees that you can break a covenant," Adler says. "Any lawyer who says it's easy to break a covenant is giving you bad advice." The reasons why?

1. Almost all of these cases are settled before they ever go to trial, so attorneys have very few judges' decisions to guide them, Adler says. "In my 20 years of doing these cases, only about one to three have ended up in court," she says. "With so few cases going through the system, you don't know for sure how the courts will react."

2. When judges do make decisions, they have a great deal of leeway. This can mean that no two judges would rule the same on a particular case, contract attorneys say. In Florida, for example, some judges are "pro-employee and some are pro-employer," according to one account.[2]

And yet many physicians win their cases, albeit on appeal many times. Perhaps owing to this high degree of uncertainty, both sides tend to fight these cases with a great deal of bravado, as if playing a game of chicken.

For example, Jonathan Pollard, an attorney in Fort Lauderdale, Florida, devoted a recent YouTube video[3] to the strategy of suing former employers before they can sue you for breaking your covenant.

"You are metaphorically punching them in the face," he says in the video. "The plaintiff's law firm is not expecting that. You gain the element of surprise." However, he adds that this strategy is recommended only for "a small number of clients who are in a very strong position."[3]

Potential Legal Defenses to the Restrictive Covenant

Physicians have access to a variety of legal defenses that could encourage the courts to overturn restrictive covenants. Here are some key defenses.

Citing overly broad provisions. Physicians can challenge the noncompete for being too open-ended. "The geographic area can be too wide or the duration can be too long," says Stephanie T. Eckerle, an attorney at Krieg DeVault in Indianapolis, Indiana.

In many states, courts simply strike down overly broad provisions. This has the effect of voiding the noncompete, because it then has no geographic limits at all.

But in many other states, courts can play with the wording of an overly generous clause. They can substitute a realistic geographic limit, as the Indiana court did by changing the 35-county noncompete territory to three counties.[4]

This judicial option, called "blue-penciling," is not good for the departing physician because it ensures that even a sloppily drafted noncompete remains effective.

Physicians providing needed services. Unlike other professions, physicians can cite patients' medical needs as a defense, according to Timothy W. Boden, executive director of Physicians & Surgeons Clinic in Amory, Mississippi, who has written about restrictive covenants.

Rather than letting noncompetes force physicians to leave the noncompete zone, he says courts may overturn noncompetes to make sure a particular service is still available.

Boden says this exemption can apply to primary care physicians in Health Professional Shortage Areas, which are common in Mississippi. But quite often, it is applied to specialists who have skills that few others in the area possess. For example, an Indiana court set aside the covenant for a doctor because he was the only physician in the area who could implant a left ventricular assist device.[4]

Continuity of care for patients. Some courts allow departing physicians to continue a course of treatment for a patient who needs ongoing care, according to says Peter Mavrick, an attorney at Mavrick Law in West Palm Beach, Florida. Mavrick says some Florida courts have not decided on this issue, but Texas law allows continuity of care as a defense against covenants.[5]

Challenging the legitimate business interest. Cantrell says another defense is to attack the employer's purported "legitimate business interest"—its reason for setting aside your right to find new work and forcing you to comply with the covenant.

"You have a better case if you can show that your departure won't hurt your former employer much at all," Cantrell says.

The former employer's business interest can involve the number of patients you'd be taking away, your use of its proprietary patient list, or your use of the employer's "goodwill" (ie, its reputation). If your departure didn't involve any of these things, the judge might decide that the former employer doesn't have a strong claim and might dismiss the case, Cantrell says.

Alleging breach of contract. One common way to try to get out of restrictive covenant is to claim a material (ie, significant) breach of any part of the contract, which would void the whole covenant.

"A material breach could be a wrongful termination or a significant underpayment of a promised amount," Eckerle says. Other attorneys say it could also involve a poor work environment or significant clinical errors.

When Maeve O'Connor, MD, an allergist in Charlotte, North Carolina, was sued by her former group practice for breaking her restrictive covenant, she alleged that the group had significant clinical errors that endangered patients, and that it failed to provide her with staff "reasonably necessary" to do her job, according to a newspaper account.[6]

The group practice adamantly denied these charges, but the judge refused to grant it a preliminary injunction. Shortly after the decision, O'Connor reached a settlement that cannot be discussed, according to a conversation with O'Connor's practice manager.

Cantrell says settlements of these cases usually come directly before or after the judge's decision on the preliminary injunction. At this point, uncertainties of the case have been clarified, and one party or the other realizes that it will be hard to prevail and wants to settle, he says.

Bad publicity. Defendants can often bring the plaintiff to the bargaining table simply by citing some potentially bad publicity, such as a sexual harassment case or harassment of a whistleblower, according to Cantrell.

"Large organizations really don't like bad publicity," he says. Even if these issues have nothing to do with breach of contract, "they might influence the judge to view the situation differently."

Which Doctors Are Most Affected by Noncompetes?

Restrictive covenants against physicians are not in force everywhere. They generally aren't allowed in California, Massachusetts, Colorado, Oregon, Oklahoma, Alabama, New Mexico, North Dakota, Montana, Delaware, and Rhode Island.[7]

However, there are limited instances where they are allowed even in these states, such as when physicians leave partnerships in California.[8]

Where restrictive covenants do exist, it's often impossible to negotiate them out of an employment contract, says Eckerle. "Employers generally don't want to make any exceptions," she says. They tend to think that one or two exceptions would prompt others to ask for exceptions, too.

Employers often say that a major point of the covenant is to protect an investment in a doctor. It's been estimated to cost $250,000 just to recruit a new family physician to replace a departing one.[9]

In addition to affecting employed physicians, restrictive covenants are placed on partners in medical practices and physicians who sell their practices to large systems. They are also placed on joint owners of ambulatory surgery centers, imaging centers, and other ventures, so that they will not leave and open a competing facility.

In these cases, doctors tend to face less sympathetic judges, Eckerle says. The thinking goes that these physicians had more leverage when negotiating these contracts, so they don't merit the kind of protection that employed physicians might get.

Another factor in attempting to break a covenant is the kind of doctor you are. Restrictive covenants affect doctors differently depending on their specialty.

Because the main concern is losing patients, targeting primary care physicians makes the most sense. They have long-term patients, and the goal of the covenant is to make sure they don't take patients with them.

When covenants target specialists, long-term patients aren't the issue; the covenants tend to focus on referral relationships. But Eckerle says preserving referral relationships is usually less successful in court.

For one thing, plaintiffs have to prove that they were responsible for providing referrals to the exiting doctor. In an Illinois case, a gastroenterologist was freed from a covenant imposed by his group practice in part because he could show that he managed his own referrals.[10]

Covenants are used against physicians who don't have their own patients, such as radiologists and anesthesiologists. They are also used against physicians who have patients but couldn't take them away, such as hospitalists and emergency physicians.

The hospitals that contract with these physicians have a hard time enforcing these covenants, according to Richard B. Weinman, an attorney at Winderweedle, Haines, Ward & Woodman in Winter Park, Florida. "The main article of value that physicians take with them is patients," he says, "and these physicians are not taking any patients away."

And yet many of these physicians have been prevented from breaking their covenants. In these cases, plaintiffs may argue that the contract with the physician is a legitimate business interest that must be protected, but this is a weaker argument, Weinman says.

How Noncompetes Actually Work

The noncompete clause is at the heart of the restrictive covenant, and it can vary widely in breadth depending on the state and the particular employer or partnership.

Noncompetes typically last 1-3 years. They are limited to 2 years by statute or by the courts in Florida, Louisiana, Ohio, Oregon, Tennessee, Arkansas, and Wyoming.[11] Connecticut limits them to 1 year.[12] But a 5-year limit has been upheld by courts in Kentucky.[13]

Noncompetes define the area in which they are enforced, either as a radius of miles around a central point or by counties. One rule of thumb limits them to where 75% of your patients come from, Adler says.

In cities, she says, courts may limit the radius to just a few miles. This means that departing physicians might be able to find a new job without moving their homes. But in many cases, the allowed distances are so large that physicians would have to move. Courts have allowed physician noncompetes with radiuses of 50 miles in Texas,[2] Kentucky and West Virginia,[13] and 30 miles in Georgia.[14]

In addition, health systems and large practices often count many different sites as part of their noncompete area, which can add up to vast swaths of territory. Courts often allow multiple sites, but they tend to limit them to places where the physician actually worked. In this way, an Indiana court reduced a noncompete area of more than 35 counties to three counties.[4]

In addition to stopping you from having an office within the restricted area, the noncompete might also prevent you from doing any kind of work within that area, such as surgery at a hospital.

According to the wording in some contracts, "if you perform surgery at a hospital in the restricted area, you would be violating the noncompete, even if your office was outside of the territory," Cantrell says. "It's up to the judge to decide whether this is valid."

What if physicians take up another line of work in their new jobs, such as orthopedic surgeons opening sports medicine practices? Some courts have ruled that physicians can only be prevented from using the skills they used at the former job. For example, an Indiana court overturned a covenant barring an ophthalmologist from taking medical histories.[15]

How Nonsolicitation Clauses Work

Because employers and partnerships are most concerned about losing patients, the nonsolicitation clause can be the most effective part of the restrictive covenant.

The clause also prevents physicians from taking away staff from their former jobs, but courts are more likely to uphold that provision than the patient solicitation provision, according to Richard C. Kraus, an attorney at Foster Swift in Lansing, Michigan.

"The nonsolicitation clause gets dicey for the doctor," he says. "It states exactly what is considered solicitation. You may not be allowed to contact patients by mail or by phone."

It's been noted that you might also be barred from telling patients about the new practice during an appointment, assuming that this could be found out. Some nonsolicitation agreements even stop you from any advertising in the geographic area, even if it's not directed toward former patients, Eckerle adds.

In many courts, physicians wouldn't be considered soliciting if their former patients just showed up at their new place of work. It's easy enough for a former patient to Google the physician. But Cantrell says a flood of former patients coming over might strengthen the former employer's case against the departing physician.

Indeed, some Florida courts honor clauses that ban acceptance of old patients, says Mavrick. He points to a 2010 Florida opinion,[16] but he notes that many Florida judges have yet to share this view.

Physicians are often concerned that honoring the nonsolicitation clause would force them to violate abandonment laws, which prevent them from dropping patients without helping them find a new doctor. But Cassidy, the Pittsburgh lawyer, argues that satisfying abandonment laws is the duty of the employer or practice, and not that of the departing physician.

"The employer is obligated to send your patients a letter stating that you're leaving the organization and providing the patient with a new doctor," he says. "However, they probably would not provide the doctor's new location."

Other Limitations in Your Contract

In addition to noncompete and nonsolicitation clauses, restrictive covenants and other parts of the contract can include more limitations that make it hard for physicians to leave their jobs.

Confidentiality clause. This separate clause in the covenant prevents departing doctors from taking "trade secrets" with them. It doesn't cover charts, which belong to the patient, but it does cover lists of patients. It also includes business plans, marketing strategies, and pricing information, but these items usually apply to physicians in management, and not to those just doing clinical work, contract attorneys say.

Buy-out option. Rather than having to give up one's new job, this option allows the departing physician to pay a lump sum to be freed from the restrictive covenant, such as a year's salary or more. However, courts have ruled that the amount must have some relationship to real damages to the employer, and not serve simply as a penalty.[17]

Loser pays attorneys' fees. If your case is litigated, this provision obligates the loser to pay some or all of the attorneys' fees of the winner. Because one side's attorney's fee can easily exceed $10,000 without even going to trial, this provision can be a powerful disincentive against breaking the covenant.

Forfeiture of benefits. This provision, used in North Carolina, forces the physician to forfeit certain post-termination benefits, such as retirement, severance, or salary continuation benefits.[18]

Should You Negotiate Before Leaving?

You should try to renegotiate the terms of your restrictive covenant before you leave, according to Adler, the Illinois attorney. "Ask [your employer] whether the contract could be changed, and even whether they intend to enforce it," she says.

To change the contract, "find out other side's pain points and work out a plan to meet them," she adds. For example, academic medical centers (AMCs) are sometimes only concerned if you were to work for another AMC, she says.

In some cases, however, Adler says it might not be a good idea to let management know you want to leave. In small partnerships, for example, "emotions can run high when you tell them you're leaving," she says.

Eckerle says the key to negotiating before you leave is to present a plan that addresses the organization's main fear: that you would work for a direct competitor or take a lot of patients with you. To answer this concern, you might negotiate a carve-out allowing you to work at the VA, for example, or they might agree to reduce the radius to accommodate the site you want, she says.

But Eckerle acknowledges that most employers simply won't back down. Even if you have a good argument, they don't want to send a message to other employees that they can get out of covenants.

Adler is experiencing an employer's refusal to negotiate in a current case involving a physician who would like to leave a health system in Florida. Adler says the physician would have a good case if she went to court, and she is offering to pay her employer 2 years' worth of wages to set aside the restrictive covenant. But the employer is refusing to budge.

"They seem to want to scare her into absolute compliance," Adler says. Health systems in particular often don't want to negotiate, because "they have lawyers on staff and it doesn't cost them anything to go forward," she says.

Cassidy, for his part, thinks negotiating before you leave is basically futile. "You're stuck with what you signed," he says.

Can You Be Hired if You'd Be Breaking Your Covenant?

If you want a new job, would it be wise to look for one that is inside the territory of your noncompete?

Adler says no. "No employer wants to hire someone who's not in compliance," she says. If you're ultimately prevented from taking the new job, your new employer would be left with a signed contract and an empty position, she says.

Moreover, your old employer may sue your new employer for tortious interference with its contract. But Mavrick says the new employer's risk of losing such a lawsuit is quite low.

"Your former employer would have to prove that your new employer intentionally lured you away from the old job," he says. "Simply knowing that you might be violating the old contract would not be enough to implicate the new employer."

Mavrick even thinks that some employers would overlook your risk of violating the covenant and would hire you. "If they really want you, they might be willing to put their concerns aside," he says.

In any case, it's important to be honest with prospective employers about your covenant and let them know the basic provisions, Adler says. But don't share the actual contract with them, she says, because it may be confidential.

Expect to Be Challenged

Some departing physicians think they can break a restrictive covenant and no one will notice. Indeed, sometimes a physician leaves and nothing happens, but that doesn't mean that no one noticed, Adler says. The former employer may have taken a look into the case and decided it wasn't a major threat. But this is rare, she says.

More likely, the former employer will send the physician a "cease and desist" letter, which is a warning shot before filing a lawsuit. Adler says you can expect the letter within days or weeks of breaking the covenant, but it could arrive at any time up until the covenant expires. That means you can never be sure you're off the hook.

The letter in effect orders the physician to drop the new job, but that's very hard to do at this point. The physician has already signed employment papers or, in the case of opening a new practice, has already rented space and hired staff.

Sometimes physicians simply ignore the cease and desist letter, which Cantrell, the Tampa attorney, says is a very bad idea.

He represented a hospital against a pediatrician who left the hospital and set up a practice just within the geographic limit of the noncompete. "She was easy to find out because she put out fliers and emails about the new practice," he recalls. "I sent her a cease and desist letter, but she didn't respond. Well, she ended up paying a lot of money."

Cantrell says not responding to a cease and desist letter tells your former employer that you're probably in violation. "If you didn't think so, you would answer and explain why," he says.

Going to Court

When the cease and desist letter comes, Cantrell agrees with Pollard, the Fort Lauderdale attorney in the video, that physicians should consider suing their former employers before they can sue you.

"Suing them lets you frame the narrative of the dispute and choose the jurisdiction," he says. "But it costs you more money."

When former employers file suit, their first step is to ask for a preliminary injunction, which, if granted, would force defendants to stop their new job while the case continues.

The preliminary injunction usually comes within a month of filing the lawsuit. It is a potent tool to force doctors to capitulate, because they would be out of a job while the case is resolved, which could take months or even years, according to Cantrell.

On the other hand, if the preliminary injunction is not granted, it is a sign that the plaintiff does not have a strong case, Cantrell says. For this reason, many settlements occur just before or just after the judge's decision preliminary injunction hearing, he says.

When physicians do not have a strong case, they have to make concessions in the settlement agreement, such as paying an amount to the other side (eg, a year or two of wages), or limit their practice (eg, promising not to treat former patients).

"In the settlement, the doctor pays money, makes promises, or both," Cantrell says.

Conclusion

It would be foolhardy to simply ignore restrictive covenants. Former employers and partnerships tend to enforce them, and in many states, the courts tend to uphold their cases. Physicians who lose often have to pay a great deal of money to get out of them.

To get out of a covenant, you will need the help of a seasoned attorney, and even then, there is no guarantee you would prevail. Courts are highly enigmatic in this area of the law.

Still, physicians can potentially defeat a covenant in many different ways. Successful strategies include everything from aggressive defenses against former employers to working with them to hammer out a solution.

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