

## Healthcare Employment Law

### IN Brief

By: Greg Kult

**Area of Concern:** Restrictive covenants for physicians.

**Potential Risk:** Covenant being deemed unenforceable; Counter-suit for compensatory and punitive damages for attempting to enforce an invalid restrictive covenant.

In Indiana, restrictive covenants in employment contracts are disfavored by the law. They are construed strictly against the employer and will be enforced only if reasonable. Courts give restrictive covenants for physicians particularly careful scrutiny.

The employer has the burden of proving reasonableness. The employer must first show that it has a legitimate interest to be protected. If the employer satisfies that burden, the employer must establish that the restrictive covenant is reasonable in scope as to time, activity, and geographic area.

When preparing a restrictive covenant for a physician, consider the following guidelines from the continually evolving body of case law in this area.

- If the employer cannot demonstrate that the physician gained a unique competitive advantage or ability to harm the employer, the restrictive covenant likely is not enforceable.
- Although the *employer's* patients often are a protectable interest, patients of the *employer's customers* generally are not. For example, a practice that contracts to provide ER services to a hospital might not have a protectable interest in the hospital's patients.
- Restrictions on the solicitation of patients and employees, as well as on the use/disclosure of confidential information, may provide protections that a standard geographical practice restriction would not.
- A restriction of one to three years post-employment generally has been accepted as reasonable. Longer periods have been deemed reasonable in some cases. In a multi-location practice, the time period begins to run when the physician leaves a particular location.
- The restricted activity should be narrowly tailored to the activity that the physician provided on behalf of the employer. Depending on the nature of the

physician's practice, restrictions such as "engaging in healthcare" may be too broad to be enforceable.

- A lack of geographic scope makes a restrictive covenant presumptively invalid. Employers might be able to overcome that presumption with a patient-specific restriction. Consider using both.
- If the only protectable interest is goodwill generated by contact with patients, the agreement should restrict only that area in which the physician developed patient relationships using the employer's resources. Multi-location practices might be overreaching if they restrict the physician from practicing within the entire area served by the practice.
- Indiana Administrative Code sections requiring physicians to provide patients with notice that they are leaving the community do not call into question the validity of a restriction in the area in which the physician may practice.
- A prior material breach by an employer may render a restrictive covenant unenforceable. Consider a provision that a prior breach by the employer and/or legal claim by the physician against the employer is not a defense to enforcement of the restrictive covenant.
- Restrictive covenants may provide for both injunctive *and* legal (financial) relief.
- Indiana courts have authority to cross out overbroad language under certain circumstances to save an otherwise unenforceable restrictive covenant. However, they do not have authority to add language.
- If you want the covenant to be assignable--for example, to a successor--expressly state that.
- A physician will have an opportunity to introduce evidence to show that the restriction would so injure the community that enforceability should be denied.
- Attempting to enforce an invalid covenant can lead to a lawsuit against the employer for "black-listing", resulting in compensatory and punitive damages.

To protect the goodwill and other interests that you have developed by investing resources in a physician, careful drafting is a must. If we can help, please call.

**\*This briefing does not constitute legal advice.  
Please see an attorney about any particular matter.**

*Greg is a partner and a member of the firm's Employment and Labor and Healthcare Groups. Since 1994, he has represented Indiana hospitals, physician practices, long term care facilities, and other healthcare employers and human services organizations in dealing with restrictive covenants and a wide variety of other employment matters. A substantial part of his practice involves counseling and training management teams on compliance with the various employment laws that impact operations.*