Medical LEGAL

JURY STILL OUT ON EXECUTIVE ORDER REGARDING NON-COMPETES

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In July, President Biden issued an executive order at least signaling his administration's disdain for covenants not to compete for physicians (often referred to as "non-competes"). The Executive Order (EO) encourages the Federal Trade Commission to ban or limit non-competes, including in healthcare. While the EO did not ban non-competes in the healthcare setting, it is perhaps instructive about the stance the administration may take in the future.

Are Covenants Not to Compete Enforceable Against Physicians?

In some states, covenants not to compete are unenforceable for physicians. In North Carolina, courts continue to enforce covenants not to compete involving physicians, even when doing so forces hundreds of patients to find a replacement physician. Valid covenants must be narrowly tailored to protect the "legitimate business interest" of the employer.

What is a Covenant Not to Compete?

A non-compete restricts a physician from participating in certain job-related activities in a geographic region for a specific period of time, which often extends the post-termination of employment.

Issues Regarding Enforceability

While courts in North Carolina enforce non-competes, there are certain restrictions. First, a covenant not to compete must be in writing. Thus, while an agreement of employment can be oral, a covenant not to compete must be in writing.

Second, the covenant must be supported by adequate consideration. Our courts have held that an offer of employment is deemed adequate consideration to support a covenant. Interestingly, our courts have held that mere continued employment is not adequate consideration to support a covenant. For example, if a physician has worked for an employer for several years, and the employer decides that it wants all of its providers to sign covenants not to compete, the employer must provide the employed physician consideration (e.g., a raise or bonus) to support the covenant. If the employer simply says, "sign this or you will be fired" and the physician signs, the covenant would be attacked for lacking supporting consideration. That is, the physician's continued employment is not adequate consideration to support the covenant.

Third, the restrictions contained in the covenant must be "reasonable" to protect the "legitimate business interest" of the employer. Reasonableness, like beauty, is in the eyes of the beholder, or in this case, the trial judge. Arguments regarding reasonableness usually gravitate to the three restrictions: activity prohibited, geographic scope, and temporal scope. The stakes are high; if any provision is deemed unreasonable by a North Carolina court, the judge is authorized to strike the unreasonable provision, but not re-write it.

Activity Prohibited

Generally, the activity prohibited should be the activity that the physician performs for the employer. Thus, to prohibit a physician from "working for another medical practice" might be too broad, since this would ostensibly prohibit the physician from, say, mopping floors. The "practice of medicine" is tighter, and, the "practice of cardiology" is even narrower.

Temporal Restriction

Generally, most of the covenants we draft or review are between six (6) months and twenty-four (24) months post-termination. Again, if a covenant restricts a physician for three years post-termination, and a court finds that only two years is necessary, the court will strike the three-year provision, and not rewrite the covenant to two years.

Geographic Restriction

This is often the hardest to evaluate, especially concerning employers that have multiple offices and with physicians who perform some administrative functions for all offices, or who float from office to office providing professional services. A practice probably has a good idea, by the zip codes of its patients, on the territory from which it draws most of its patients. If the restriction goes beyond that territory, it could be struck as unenforceable.

Public Policy Exception

Finally, even if a covenant passes the first three tests (in writing, supported by consideration, and reasonable), it can still be struck as being against public policy. If the court determines that if the covenant were enforced, the public would be deprived of a much-needed service. This is often an argument posited in cases involving sub-specialists.

What's Next

While the EO has not really changed things in North Carolina, it is instructive that President Biden's administration is concerned with competition in healthcare. President Biden has attempted to require vaccines for those working for healthcare facilities that receive Medicare dollars. It does not stretch the imagination that the administration could similarly direct CMS to prohibit restrictive covenants for those who receive Medicare dollars.