

Industry Spotlights Webinar Series: Non-Compete Agreements – Key Considerations for Health Care Employers

July 24, 2018

Presented by



David J. Clark

Member of the Firm – New York

dclark@ebglaw.com

212-351-3772



Denise Merna Dadika

Member of the Firm – Newark

ddadika@ebglaw.com

973-639-8294



Nathaniel M. Glasser

Member of the Firm – Washington, DC

nklasser@ebglaw.com

202-861-1863



Kevin J. Ryan

Member of the Firm – Chicago

kryan@ebglaw.com

312-499-1421

Agenda

1. Legal Landscape of Non-Compete Agreements in The Health Care Industry
2. Key Considerations When Drafting & Enforcing Agreements
3. Non-Competes and the Due Diligence Process
4. Integrating Providers Following a Health Care Transaction

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Legal Landscape of Non-Compete Agreements in the Health Care Industry

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dclark@ebglaw.com

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Restrictive Covenants – Health Care Industry

What Are They?



Non-competition



**Non-Solicitation of
Customers/Clients/Patients**



**Non-Solicitation of
Employees**



Confidentiality

Where do they commonly appear?



**Purchase
Agreements**



Service Agreements



**Management
Agreements**



**Employment
Agreements**

Restrictive Covenants – Health Care Industry

What Law Governs?

- 1 No federal statute (yet).
- 2 They are creatures of state law.
- 3 Which state law governs usually is specified in the agreement.
- 4 May be determined by location of individual, practice, or other factors.

State Laws Vary.

Several states regulate restrictive covenants affecting physicians or other health care professionals.

Public Policy Considerations

Restrictive Covenants – Health Care Industry

Patient Choice

Availability of medical services / specialties

Reasonable duration and geographic scope

Ability of physician / health care worker to earn livelihood

State Laws Prohibiting Physician Non-Competes



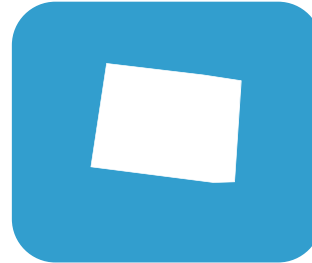
Massachusetts

Mass. Gen. Law Ch. 112 § 12X renders void any non-compete provision restricting “the right of a physician to practice medicine in a particular locale and/or for a defined period of time.”



Delaware

6 Del. Code Ann. § 2707: similar to Massachusetts but allows for provisions requiring physicians to pay damages “reasonably related to the injury suffered” by a breach of such non-compete provision.



Colorado

Colo. Rev. Stat. § 8-2-113: similar to Delaware, but no damages may be awarded with regard to patients with “rare diseases.”



Rhode Island

R.I. Gen. Laws § 5-37-33: similar to Massachusetts: physician non-competes are void.

State Laws Limiting Non-Competes

Tennessee

Tenn. Code Ann. § 63-1-148 allows physician non-competes if they last no longer than two years and have a geographic limit no greater than the county where the physician is employed or a ten mile radius of the primary practice site.

Texas

Tex. Bus. & Com. Code Ann. § 15.50 allows physician non-competes provided that the covenant must:

- (1) allow the physician access to a list of the patients seen or treated within one year of termination;
- (2) provide access to medical records of the physician's patients upon proper authorization;
- (3) provide for a buyout of the covenant by the physician at a reasonable price; and
- (4) allow the physician to provide continuing care and treatment to a specific patient or patients during the course of an acute illness.

State Laws Limiting Non-Competes

New Mexico

N.M. Stat. § 24-11-1 *et seq.* prohibits provisions in agreements which restrict the right of health care practitioners to *provide clinical health care services*. The law, however, does allow non-disclosure provisions relating to confidential information; non-solicitation provisions of no more than one (1) year; and imposes reasonable liquidated damages provisions if the practitioner does provide clinical health care services of a competitive nature after termination of the agreement.

Connecticut

Conn. Gen. Stat. § 20-14p(b)(2), regarding physician non-competes, limits the allowable duration (to one year) and geographical scope (up to 15 miles from the “primary site where such physician practices”) of any new, amended or renewed physician agreement.

State Laws Limiting Non-Competes

MORE TO COME?

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Key Considerations When Drafting & Enforcing Agreements

Presented by



Denise Merna Dadika
Member of the Firm – Newark
ddadika@ebglaw.com
973-639-8294

Drafting Considerations



Consideration

- Understand State Requirements
- Identify the consideration provided in the Agreement



Governing Law/Forum Selection

- Where employee works; not state of incorporation
- Hardship analysis

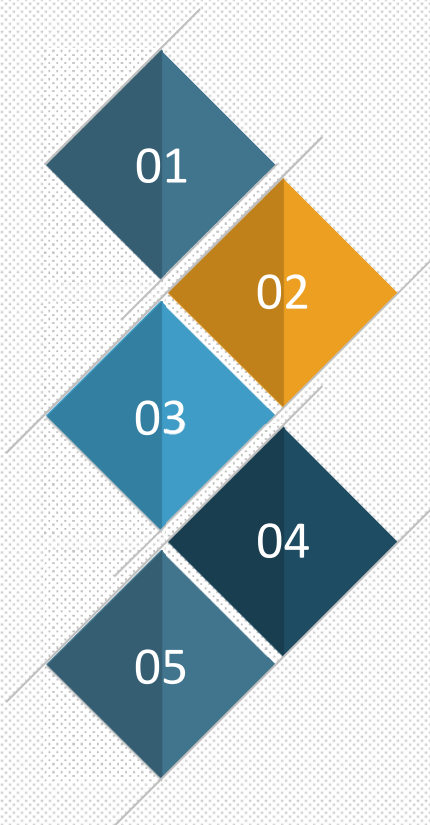


Definition of Business/Employer

- Affiliates
- Assignability

Drafting Considerations

Define the Protectable Interests



- Trade Secrets and Confidential Business Information
- Patients
- Relationships with Referral Sources
- Relationships with Hospitals
- Training

Drafting Considerations

Defining Restrictions

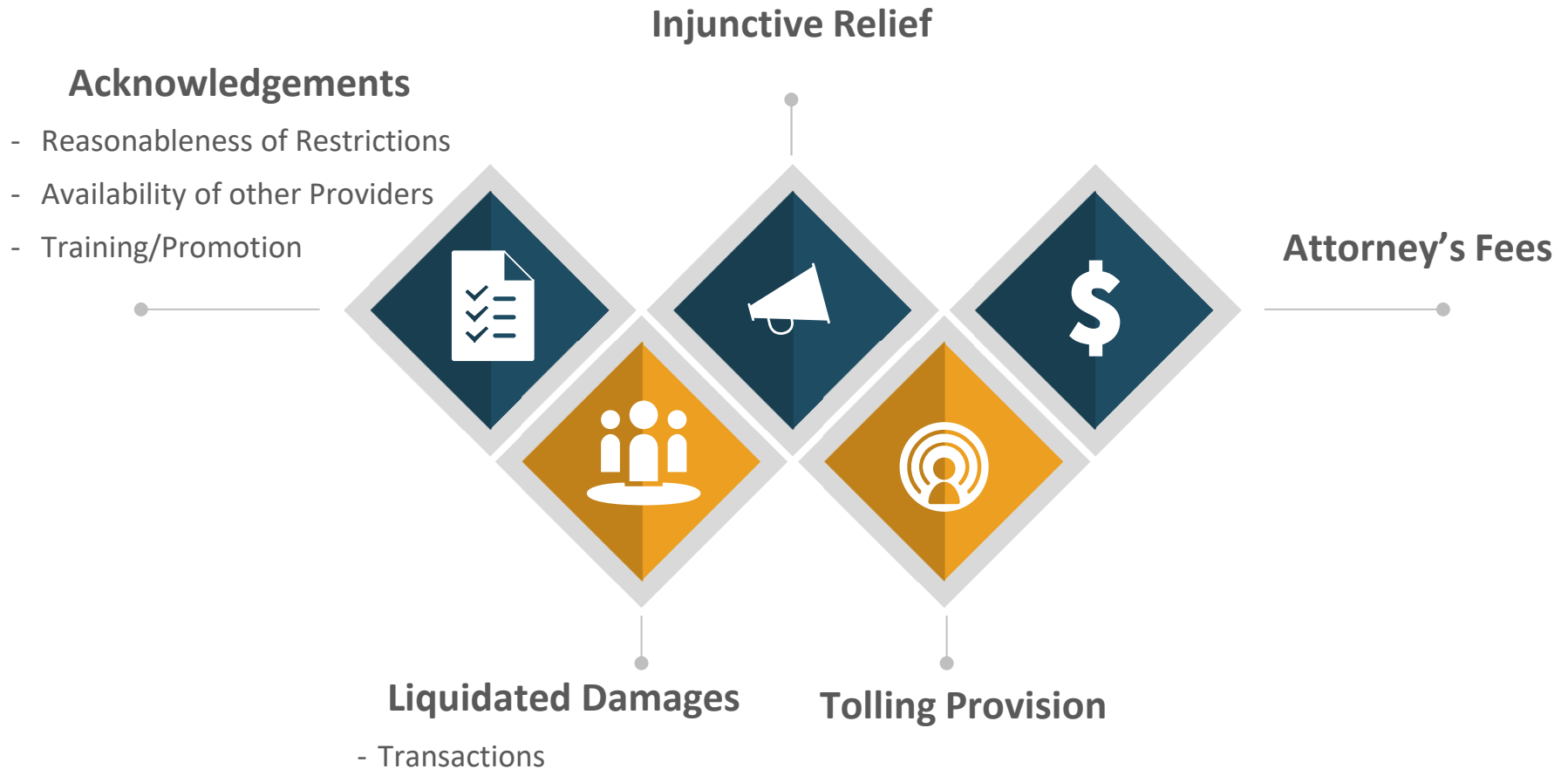
- Temporal
- Geographic
- Specialty
- Services
- Competitors
- Referral Sources

Exclusive Relationships/Privileges

Health Care and Hospital Systems

Identify Permitted Activities

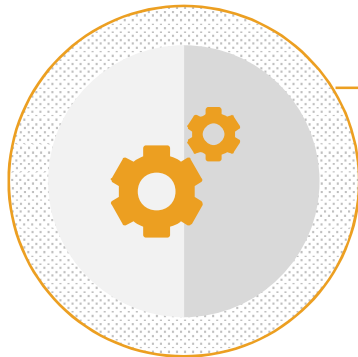
Drafting Considerations



Drafting Considerations



Modification and Severability



Reformation/Blue Pencil

- Most states allow for reformation of unreasonable language
 - Can rewrite the geographic restriction modifying it from 30 to 15 miles
 - Change temporal restriction from two to one year
- Some states permit “blue pencil” -- striking unreasonable terms; do not permit a rewrite
 - Strike certain entities from definition of competitor
 - Consider step-down provisions
- Some States (CA, VA) prohibit any modification
 - Unreasonable covenants will be unenforceable

Enforceability Analysis

Case-by-Case Assessment

Adequate Consideration



Reasonableness



- Time Period
- Geographic Scope
- Restriction on Activities
- Restriction on Practice of Medicine

Public Policy Arguments



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Non-Competes and the Due Diligence Process

Presented by



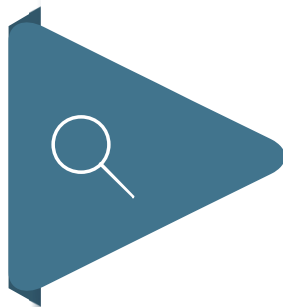
Kevin J. Ryan

Member of the Firm – Chicago

kryan@ebglaw.com

312-499-1421

Engaging In The Due Diligence Process



Due Diligence Review



Type of Transaction

- Purchase
 - Stock
 - Assets
- Joint Venture
- Merger



Parties to The Transaction

- Facility
- Licensed Providers
- Key Individuals

Engaging In The Due Diligence Process

Restrictive Covenants

Existing Agreements

- Employment Agreements
- Management Agreements
- Purchase Agreements
- Vendor/Supplier Contracts

Proposed Agreements

- Purchase Agreement
- Management Agreement
- Employment Agreement

Engaging In The Due Diligence Process

Enforcement of Existing Covenants

- ✓ Understanding Total Universe
- ✓ States Involved
- ✓ Individuals/Licenses Involved
- ✓ Enforcement History
- ✓ Litigation
 - Past History
 - Success/Failure
 - Current Litigation

Engaging In The Due Diligence Process



Change of Ownership Provisions

- Direct Change
- Indirect Change



Change of Control

- Definition of Control



Impact of Transaction on Covenants

Engaging In The Due Diligence Process



Finding Unenforceable Agreements

- State Doesn't Allow
- Time/Geographic Area Too Broad



Entity Can't Enforce Because of Corporate Practice of Medicine Prohibition (CPOM)

Engaging In The Due Diligence Process

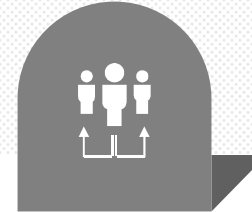
Corporate Practice of Medicine (CPOM)



Prohibition on General Business Corporation Providing a Profession (e.g. Medicine, Dentistry, Optometry)



State Specific



Profession Specific

Limitations on management company's ability to enforce restrictive covenant against professional in CPOM state.

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Integrating Providers Following a Health Care Transaction

Integrating Providers Following a Health Care Transaction



Are new covenants being entered into?

Are the covenants related to:

- Purchase
- Employment
- Both

Integrating Providers Following a Health Care Transaction

Who Are The New Provider Contracts With?

Licensed Entities

Professional Corporations

Management Companies

Sellers

Integrating Providers Following a Health Care Transaction



Multiple Restrictive Covenants With Multiple Parties

- Licensed Entity
- Professional Corporation
- Management Company



Third Party Rights

Integrating Providers Following a Health Care Transaction

If Restrictive Covenants Not Permitted



Are There Less Restrictive Alternatives?

Restrictions Limited to Certain Competitors



Restrictions Limited to Certain Activities

Restrictions Limited to Other Management Companies



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