

2021-06-20 Medical Non-compete

So, what if you resigned your position, but your employer demanded that you pay \$20,000 dollars in order for you to take your new job at a new employer? Is that legal? It could be. Today we're discussing non-compete agreements in particular, we're going to be focusing on the medical industry and the healthcare profession. While we are discussing mostly doctors, these principles also apply to nurses, dentists, financial advisors, and other folks. We'll be discussing these points from the employee professional perspective but we'll also address the employer's legitimate rights.

So, first let's just talk about doctors. They're smart, hardworking, highly educated individuals. They usually have a fire, a passion, something driving them, right? I mean, it's a long road to becoming a licensed medical professional or any healthcare professional, and it comes at a great cost to whether paid out of pocket or if you're burdened with student loans. Or even if you receive grant monies that require you to work at certain federal facilities afterwards, they can be lower paying too. But then you finally are working, treating patients, then life happens, right?

Most people, they get married. They have children, responsibilities at work and at home change for various reasons. And maybe then all of a sudden, the work is just not as satisfying at that point in time. Or perhaps there's a change in management where you work or a change in your compensation. Regardless, times change and eventually many doctors want to move on to a different position. But can they? Are they free to move? They should be, right? After all that hard work, training, caring for patients. That's what it's all about, isn't it? Well, a doctor may be stopped by non-compete agreement or other restrictive covenant.

Let me tell you a couple stories.

First one, there's a young doctor who had worked for an employer for only about three months when this doctor realized that it just wasn't a good fit. Three months, right? You get three months in, you get the feel, you know the people, you know the rhythms and vibes, and it just wasn't right for this doctor. Sure, he was good at what he was doing and he did actually enjoy the people, but the management and the expected division of responsibilities were not exactly what had been promised when he accepted the position. Right, is that's shocking or surprising to anybody? Yeah, they change. I mean, they tell you everything in the beginning and you just misunderstand, or it was misrepresented to you.

So, nevertheless, not enjoying it after three months, this doctor applied for another job in the same city and was hired by a competitor practice. Now, this was an issue because the doctor had a non-compete provision in his employment contract. Considering that he had been there with the first employer for just a very short amount of time he didn't think it would be an issue, but it was. Not necessarily because of a doctor or the skills or the background, but the employer had its own reasons to enforce a non-compete. Employers always do. If it's whether making an example of somebody or trying to be consistent so they don't violate any discrimination laws. It can be many things that are not related to the doctor.

But ultimately here, this doctor hired an attorney, and the attorney was able to negotiate a way that non-compete in exchange for paying, that's right, \$20,000 dollars to the employer. \$20,000 dollars the doctor paid to the employer to go take a new job. Crazy, right? Wait till you hear this story.

There's another doctor who's more seasoned, been around maybe 20 years. Had been working with the same employer for about 15 years, doing a great job. But times change and management changes, compensation, structures change, and this experience doctor found herself being recruited away to another employer. Right? Somebody else knows her wants her, that's flattering. And maybe it's just a good time for a change after that long.

So, this new employer was about 30 miles away from the current employer and offered this doctor a paycheck that was greater than \$200,000 dollars more than what she was making at her current employer. Right? So, a \$200,000 dollar pay raise, if you changed jobs.

So being a professional, this doctor notified her supervisory change of her opportunity and desire to separate on amicable terms. Management agreed. They always respected this doctor. They had a strong, positive relationship and they informed her that they were not concerned with her non-compete agreement. Indeed. She was not even going to leave for another nine months or so. But as the time for her departure came near, about three other doctors, with less positive and weaker relationships with management, they decided to leave with less notice. This put the employer in a position where it felt it needed to enforce the non-compete agreement of the other doctors.

What did this mean for our seasoned doctor? That's right, the employer reversed its position and informed our doctor that it would now enforce her non-compete agreement against her, which meant she could no longer start her new position. What does she do? Stay? No, she hired an attorney. Did she sue? No, she had

the attorney negotiate away her non-compete agreement. But she first had to pay the employer \$105,000 dollars. Yep, expensive. So, is this legal? Yes, but it's never as black and white or a simply yes or no as many people think.

Employers say that every non-compete is enforceable. Employees always think that they are never enforceable. The answer lies in the middle. It's a very fact specific, analysis of law, that's based on your unique circumstances. There are rules governing the enforceability of the non-competes and some are particular to the medical profession. But, it really comes down to a fact-based analysis.

So, you see in New York state, non-compete agreements are not favored by public policy. We don't really like them, but they are enforceable by New York courts and there's other ways around them. But, let me just explain first the healthcare professionals. You see, the courts have determined that healthcare professionals have what are considered unique skills and provide extraordinary services. And therefore, while non-compete agreements are disfavored in New York, courts will enforce them. But, only if they're reasonable to protect what is perceived or considered to be the legitimate business interest of that employer and that the general public's not harmed.

So, here's a quick example of that. There was a thoracic surgeon, who is the only thoracic surgeon in that particular county in New York who is building a name, building a practice, networking, and providing care to patients for close to 20 years. He went and hired a new, young, junior, fresh out of school, fresh out of residency, a thoracic surgeon, to partner with him and he had him sign, not to partner in a business sense, but to be the young surgeon. And he had him sign a non-compete.

Well, sure enough. After about a year, this young surgeon did not like working with the older surgeon and decided that he was just going to go and set up his own thoracic surgery practice across the street. So, yes, this ended up in Court and what the Court said here was that first surgeon, the senior surgeon, really put in all this time and effort developing, effectively a market in that county. He was known and then he brought in this employee and leveraged all of the goodwill of his business, if you will, in the marketing and leveraging the senior doctors and the practices, relationships to benefit this younger doctor.

So, when the Courts were looking at this case, they said, of course, we're going to enforce the non-compete against the young doctor. The young doctor, just effectively trying to step into this market developed by the senior doctor. That's a legitimate business interest. This doctor put in the time, money and energy developing this market and there was no reason why this young surgeon should

be able to just capitalize off of it by crossing the street. And there was no general public harm because you still have the senior thoracic surgeon there who was doing this all by himself to begin with. So, it's not as if there were going to be patients who suffered by the Court saying no young doctor, you cannot practice surgery in this county for the two years. So that's one simple example of when it is appropriate to enforce it.

So, yes, you probably have heard that around the country. People have been talking about changing the rules and the enforceability of non-compete agreements. Certainly, in states like California and Massachusetts they've all but eradicated non-compete agreements in almost every industry. And there is talk at the federal level of providing federal protections to employees. But, it does remain that healthcare is a business and employers need protections as well. The legitimate business interest.

Policy makers are trying to balance the employee and employer interest. This can probably best be illustrated by Washington DC. Just in 2021, the beginning of 2021, they passed its own law to prohibit the enforcement of non-competes in the medical industry. If the doctor makes \$250,000 dollars or less, you got that? No, non-competes in Washington, DC for doctors, if the doctor makes \$250 or less, because the higher paid doctors tend to be specialists and are still bound by the non-competes because of those legitimate business interests But, we keep watching. We'll see how the changes are affecting here in New York. And in fact, in New York, as we've been watching some trends, they have been throwing out overly broad non-compete agreements more than they have been narrowing and redefining those.

I'll talk about that in a second, but why don't we start off here? Let's just talk about what are permissible non-competes here in New York State?

So, as I mentioned earlier, there has to be a legitimate business interest, legitimate business interests that the employer has to protect. And then it has to reasonably try to protect it by making the non-compete reasonable in scope. What does that mean? Typically, it means what's the least amount of restraint on the doctor that protects that legitimate business interest?

So, for example, two years, I'll just say it, two years in five to 10 miles around where a doctor would treat or see patients that tends to be considered reasonable, if they're trying to protect a legitimate business interest.

One example of where a doctor beat back recently, a noncompete, was a doctor, an OBGYN, joined a practice and brought in her own patients. After a couple of

years decided that they did not enjoy being at this practice. The practice had never marketed this doctor, never promoted this doctor, and it was effectively, this doctor paid all of her own licenses and chipped in on the insurance through the profit and the overhead. And effectively, there was nothing that the practice had really done for the doctor. So, the doctor said I'm leaving one day, and the practice went after her, went to court and said, judge, you got to stop her. And the OBGYN pointed out, she brought in her own patients, she left, she did not take any of the patients from the other doctors or from the practice. Yes, her patients who she had brought in, followed her, and that's fine. And she also pointed out that there was no harm to the public here because she did not affect the business. The business was still able to provide OBGYN services to others, and so is this doctor and the Court agreed. The Court said, no, no, non-compete here. Because while the two years and 20 miles, I think it was, in the non-compete were reasonable, there was no legitimate business interest. The company, the employer, the practice, had not invested any time or money in this doctor.

So, what could be a legitimate business interest? Like we're talking about the thoracic surgeon, goodwill, developing a market, marketing investment, you know, splashing the doctor's photo and name all over the place and sending out referral cards. And really, it's who's developing the referrals in the marketing for these patients. If it's the practice itself and then they are presenting these patients to the doctors well now there's arguably a legitimate business.

So, what can the doctor do to try to avoid being beholden to a non-compete? Because let's remember this doctor still wants to make some money, pay their bills, take care of their family, pursue their professional career goals and personal life goals. So, I mean, obviously, the best thing to do is think about all these issues ahead of time, prior to signing the employment agreement, you know, seek some advice from an experienced counsel before making decisions. Before you sign, also, certainly before you announced that you're going to leave.

You do have three options, at least. One is to litigate it, go fight it about it in court. Another one is to strategize around it and the final one is to negotiate and possibly end up settling and paying out some money for it. Like in our earlier stories.

So, let's first talk about litigating without getting into all the details. Either the doctor, him or herself has the right and opportunity to go to court, say, Hey Judge, declare this to be unenforceable. But more likely the employers tend to

run to Court and say, Hey, you need to stop this doctor from leaving because it's going to harm our business and we have a legitimate business interest, right?

So, in either of those scenarios, when you end up in Court, if the non-compete is proper, it can and will be enforced against you. If it's improper or what we call overly broad, then it will not be enforced against you. But let's remember, there's two things we're looking at. First, and the most important, is whether there is a legitimate business interest. Have they invested in you? Have they helped you develop your market and your, your patients? By you leaving, are you at some way harming or affecting the business? If the answer to all of those questions is no, well, then you can stop right there. This is just overly broad. It's unenforceable. It's invalid. Throw it out, generally speaking, again, very factual unique analysis. But if there is an argument or the employer presents an argument that there is a legitimate business interest, well, now we have to look at the language of the non-compete contract to see if it is reasonable in the scope. Right?

So, if it's a hundred miles for 10 years, No, that's overly broad. I would say nine out of 10 times a court's going to just throw out the whole non-compete agreement there as being invalid. But if it's close, let's say there is a legitimate business interest and let's then say that the non-compete agreement is for three years and 20 miles outside of where you would practice. You know, a court can do, what's called blue penciling, which is effectively narrowing and rewriting the words. So, maybe if the Court recognizes a legitimate business interest to protect, but just feels that three years and, whatever I said, 30 miles is too great, the Court could blue pencil, that narrow it down and say you know what, we're going to enforce the noncompete, but instead of three years, we're going to do it for two years. And instead of 30 miles, we're going to do it for 10 miles. That is blue penciling and narrowing. Courts used to do this very, very frequently. Again, our recent analysis, they seem to be trending towards more throwing out non-competes as overly broad, but you can never bank on that.

So, litigation of course includes hiring attorneys, losing focus from your career plan and your patients and your family, and having to focus a lot on Court and there's of course, some time and money in there. But again, once you get in and get out, you're done and you know, the answer. So that's definitely the pro there. Timewise you can get in, get out and be over. The con is it takes some time and some money. And you'll see that the realities of this situation as, it really does come down to a business decision and how you want to spend your money.

But, let's talk second about strategizing your way out. So, if you don't want to go to Court, how else could you go about making it out of this non-compete and going to fight about things?

Strategizing your way out, usually, one of the more cost-effective ways of doing it. It's effectively if you live in a couple Metro areas or in between Metro areas. If you're not allowed under a non-compete agreement to practice for a competitor for two years within 10 miles, you know, go outside that. What it would it really be challenging to you if you had to drive an extra 20 miles a day? I know nobody wants to, but if you drive an extra 20 miles a day, just for a couple of years, maybe you can go get a position in a neighboring town or a neighboring city. And you have those other options to think about, but again, you probably want to have a little bit of advice because it's a factual analysis.

So, before you decide to do a strategy to work around it, right, maybe sometimes you're, if you're dual board certified, sometimes you can take a different type of position, in lieu of what you're doing currently with your employer. But, these are all the issues that you want to be able to brainstorm with an attorney on, just to make sure that if you come up with a plan and you execute the plan, that you don't end up getting dragged into Court anyway.

So, the best thing to do, chat with an attorney, look at your facts and see if there's a way that you can, based on your life situation and the type of medicine that you may practice, if there's a way to get around those restrictions.

Finally, there's negotiate your way out, effectively settle. It's like those two stories that we discussed at the beginning of this cast. You know, many times employers don't want to spend money litigating in court. You don't want to spend money on lawyers, the employer doesn't want to spend more money on lawyers. So, if the business case exists for them, meaning that they feel comfortable that your departure is not really going to hurt their business, they are more than likely willing to. Altruistically, the employer will say the fee pays for the temporary replacement of you or for locums or for the hiring and screening costs and fees, etc. But the employer also knows that charging doctors to be released from the non-compete maintains a deterrence to other doctors. And it typically takes 90 days to six months' notice provisions in contracts anyway. So, they know how to keep you hanging around.

This is really what happened in the earlier stories. First that younger doctor, he had been there for a very short amount of time, three months, there was no risk of that doctor taking patients away from the employer. And in fact, with that

practice area, there's next to zero chance that the doctor could have, could have even taken away any of those patients. But, having the young doctor pay to be released becomes a story, a moral warning from the employer's perspective to the other doctors, we don't let you out of your obligations too easily. They're saying think twice before you try to leave us.

And with the second season doctor story we discussed, you know, that doctor paid higher fee as she was a more seasoned and tenured doctor. Just frankly, I had poor timing. It wasn't her fault. It was the fact that those other doctors were leaving and didn't have a great relationship. But what we saw here, the employers in that situation believed that they need to set an example and treat everyone equally. They don't want to be, you know, accused of discriminating under federal or state laws. So maybe they do, maybe they don't, that's a topic for another time. But here the employer was less concerned with losing patients and more concerned about losing more doctors. It wanted to set an example. And yes, the sum was very great, but the employer knew the different pay scale. It was really, effectively for that doctor, came down to the cost of doing business. She made that money back plus some just the very next year due to the higher compensation. I think it was over \$200,000 dollars more.

Many times, particularly, when no real threat is present to the employers practice and business, the employer will negotiate and release the doctor for a sum. The level of that amount, however, is determined by the unique facts. So, doctors and employers really just need to view the situation as a business decision. Will you profit by buying your way out? Will you otherwise benefit in some way? Would you pay to the employer the same sum as you would pay to an attorney to litigate? I mean, you may want to, and I totally respect people standing on principle, but principle is expensive. And, if you wanted to hire me, my family would appreciate it, but you should also be practical. It truly is a cost benefit decision, so you need to sit down and discuss it with an attorney to figure out which path is best for you.

So, in conclusion here, what's the best suggestion that I have for you? It's really, to just always plan a job change as early as possible. It is never too early to start thinking about how non-competes can affect you in the future. Before signing one is the best time. And always consider your options and have a plan before you give notice to your employer. Please, number one, have a plan before you give notice to your employer. Those are the two times when you can assess what is happening and what may happen. And you're still in full control at those points and not simply reacting with other pressures placed upon you.

So, if you don't pay attention before you sign your employment agreement. Then we have to get you out of it. So, at the beginning, maybe it's better to negotiate the terms of a non-compete. Perhaps you can explain that you plan to be moving in two years to a neighboring town that's 40 miles away so you can reduce the geographic limit of your non-compete. Also, learn about what or who triggers the clause of a non-compete before you sign it and certainly before you leave your employer.

If you're terminated, by the way, it's less likely to be enforceable against you. It's just the reason for that termination, that could be the sticky fly there. Regardless, I get calls routinely from doctors. They say, hey, I quit and now my employers after me and my friend said that the non-compete is not enforceable, but they're still threatening to tell my new employer so I'm good though, right? No, you're not. You need someone to analyze these issues before you resign to help you map out your exit, help advise you, and help you articulate what your plans are. Then, if need be, with the right plan, I can take you by the hand and lead you out of the forest safely.

Doctors can avoid paying or paying large sums. Doctors can avoid being beholden to or litigating a non-compete, all with a proper prevention.

Good luck.