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Stephanie Eckerle, Scott Morrison and Grant Achenbach: Physician non-competes — the old, the new and the future

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KEYWORDS

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Restrictive covenants in Indiana have long been a topic of litigation and debate for health care providers, private practices and health systems.

Historically, and before there were statutory restrictions for physician non-competes, there is a long line of cases that have required physician non-competes to be reasonable in scope, geography and length of time, and have been enforced or not accordingly. Indeed, the majority of Indiana published appellate decisions on non-compete issues are physician-related. At least twice the Indiana Supreme Court has provided material guidance on physician non-compete issues.

Most recently in 2023, the Indiana legislature took an active role in regulating physician non-competes. Whether your client is a healthcare employer or an individual physician, all health care and employment law attorneys must be familiar with Indiana Code 25-22.5-5.5-1 *et seq*., Physician Noncompete Agreements (the "statute").

The statute does provide some non-compete protection for physicians, but discussions to ban non-competes in their entirety for all physicians have failed for the time being. Further, the one single Indiana appellate decision to hold that enforcement of a non-compete agreement against certain specialty doctors is against public policy has never gained traction or been followed.

The first significant prohibition that the statute places on physician non-competes is that for physician non-compete agreements entered into after July 1, 2023, it prohibits non-compete agreements for primary care physicians, which includes family medicine, general pediatric medicine and internal medicine.

As a result of this statute, there has been a shift with some Indiana health care employers to allow all "primary care physicians" out of their non-compete agreements, even though many non-compete agreements with primary care physicians were entered into prior to July 1, 2023.

The second significant prohibition that the statute imposes is that beginning July 1, 2023, non-compete agreements are not enforceable if the employer terminates the physician's employment without cause, the physician terminates his or her employment for cause, or the "physician's employment contract has expired and the physician and the employer have fulfilled the obligations of the contract."

The language of this provision is less than precise and could well generate additional litigation in the future.

The third significant requirement that the statute imposes is mandatory terms required in all physician non-competes. Any new physician non-compete agreement must include the following provisions:

A provision requiring the employer to give the physician a copy of any notice that concerns the physician's departure from the employer and was sent to any patient seen or treated by the physician during the two years preceding the termination of employment. This provision is in line with 844 Indiana Administrative Code 5-2-4, which requires a physician to provide reasonable written notice to a patient when the practitioner withdraws from a case. Such notice is often given by the employer or jointly by the parties.

A provision that the employer provide the physician's last known or current contact and location information to a patient who requests it and was seen or treated by the physician during the two years preceding termination of employment or expiration of the physician's contract.

A provision that provides the physician with access to medical records associated with patients seen or treated during the two years preceding termination or contract expiration, upon receipt of the patient's consent.

A provision that prohibits any requested patient medical records from being provided in a format that differs materially from how the records were stored, unless agreed to by the parties.

Perhaps most notably, a provision that grants the physician an option to purchase a complete and final release from the terms of any enforceable physician non-compete at a "reasonable price." Many have predicted that this uncertain provision will span significant litigation, but there is no Indiana-reported appellate decision on this issue yet. Indiana law does not define what a "reasonable price" is, but Ind. Code 25-22.5-5-6 does require the parties to negotiate the reasonable purchase price in good faith and has a mechanism to resolve disputes through mediation.

Given the tighter restrictions imposed upon physician noncompete agreements over the past few years, healthcare employers have had to consider other alternatives that are still viable under Indiana law to protect their goodwill.

Health care employers still often impose reasonable patient non-solicitation restrictions and confidentiality clauses of their physician employees. In addition, many practice groups and ambulatory surgery centers will still include physician noncompete agreements in entity ownership documents, such as operating agreements.

The current proposed FTC rule that would generally ban most non-compete agreements contains exceptions to non-competes reached in the sale of business context, among other exceptions. As is well known, the proposed FTC rule is under attack, and one federal court in Texas enjoined the rule as to the named plaintiffs.

The future of physician employment agreements will likely remain lively and interesting to follow in the future.•

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