Covenants non-compete agreement: What good are they, anyhow?

Thomas Godar, JD

Bob, a successful orthopedic specialist with a small clinic, has just had a very lucrative offer to join a new multi-specialty practice in a suburban location next to the newest hospital in the metro area. The new job would be about 16 miles from the current clinic. But Bob signed a non-compete when he started work 7 years ago. He really wants this new job, which he believes offers greater opportunity and compensation, and which is closer to home. Should he take the job in spite of the non-compete agreement? If you are the manager/owner of the multi-specialist clinic that wants to hire Bob, is this a reasonable risk to take, in spite of knowing he has a non-compete with another clinic?

These are real world questions that come up every day, and need answers by both medical professionals and their employers long before both sides have squared off on an expensive legal battle. The central question is: What will a Wisconsin court enforce in terms of a non-compete agreement? All savvy business managers know the courts do not favor non-competition agreements. Wisconsin Statute § 103.465 goes even further and instructs that if only 1 portion of a non-compete agreement is unenforceable, even as to those portions of the agreement that would otherwise be reasonable for the protection of the employer, the whole agreement is unenforceable. Furthermore, each case is fact specific, and what is reasonable in 1 case may not be reasonable in another.

The 5 elements that are assessed by the courts to determine enforceability is whether an agreement (1) is necessary for the employer's protection, (2) provides a reasonable time period, (3) provides a reasonable territory restriction, (4) has restrictions that are unreasonable as to the employee, and (5) would violate public policy. While the courts have consistently applied these 5 factors, the application has varied, and arguably has become more restrictive. For instance, in Heyde Companies, Inc. v. Dove Health Care, LLC, the court found that a no-hire provision in an agreement between a company that provided physical therapists to nursing homes and those nursing homes acted as a non-competition agreement and violated § 103.465. The Court further found that even without the statute, the no-hire provision was unreasonable.

So what are some practical tips for those faced with the task of either analyzing a current non-compete agreement for enforceability, or seeking to draft a non-compete agreement that the courts would favor?

1. If your non-competition agreements are more than 3 or 4 years old, have counsel review them to see if any recent judicial interpretations would make their enforceability unlikely.
2. Don't be greedy. Carefully assess the most egregious damage that could be caused by a competing former employee, and limit the protection sought to that significant damage. Reduce the length of the non-competition agreement if necessary. Perhaps an employer could limit the scope of the non-competition agreement only to those specific patients with whom the medical professional had significant influence and contacts. If using a territorial restriction, pare down the restriction to only that area in which a majority of your patients reside.
3. Consider different agreements for physicians and other health care professionals, and those in management or marketing, so each can be tailored to the particular activities and possible damage caused by competition.
4. When crafting prohibitions on solicitation by former employees, carefully identify whether non-solicitation of employees would be enforceable or needed. If so, give all employees notice of the non-solicitation provisions.

While the list of cautions could be further expanded, a final thought summarizes the world of non-competition agreements: One size does NOT fit all. Very careful and precise consideration should be given for each non-competition agreement to see that it is reasonable, not harmful to the employee, and consistent with public policy.

Author Affiliation: Whyte Hirschboeck Dudek S.C.
Corresponding Author: Thomas P. Godar, JD, Whyte Hirschboeck Dudek S.C., 1 E Main St, Ste 300, Madison, WI 53703-3300; phone 608.234.6064; fax 608.258.7138; e-mail tgodar@whdlaw.com.

Wisconsin Medical Journal

The mission of the *Wisconsin Medical Journal* is to provide a vehicle for professional communication and continuing education of Wisconsin physicians.

The *Wisconsin Medical Journal* (ISSN 1098-1861) is the official publication of the Wisconsin Medical Society and is devoted to the interests of the medical profession and health care in Wisconsin. The managing editor is responsible for overseeing the production, business operation and contents of the *Wisconsin Medical Journal*. The editorial board, chaired by the medical editor, solicits and peer reviews all scientific articles; it does not screen public health, socioeconomic or organizational articles. Although letters to the editor are reviewed by the medical editor, all signed expressions of opinion belong to the author(s) for which neither the *Wisconsin Medical Journal* nor the Society take responsibility. The *Wisconsin Medical Journal* is indexed in Index Medicus, Hospital Literature Index and Cambridge Scientific Abstracts.

For reprints of this article, contact the *Wisconsin Medical Journal* at 866.442.3800 or e-mail wmj@wismed.org.