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.

1. If your non-competition agreement 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 healthcare 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.
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