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Connecticut Legislature Passes Non-Compete Act Concerning Contracts With Physicians

On May 18, 2016, the Connecticut legislature transmitted Public Act No. 16-95 (the "Act") to the Governor for his signature. The Governor is expected to sign the bill into law in the coming weeks. Once he does, it will become effective as of July 1, 2016. The Act, among other things, codifies rules relating to non-competition agreements with physicians, which differ from the rule of reason analysis applicable to such agreements in the past. Hospitals and physician practices should take note of these new standards, which affect non-competition agreements entered into both before and after the Act's July 1 effective date.

The Act defines a "covenant not to compete" as "any provision of an employment or other contract or agreement that creates or establishes a professional relationship with a physician and restricts the right of a physician to practice medicine in any geographic area of the state for any period of time after the termination or cessation of such partnership, employment or other processional relationship."[1] The Act thus applies to any non-compete entered into with a physician, whether the physician is a partner, owner, employee or independent contractor.

Currently, there are no statutory rules applicable to non-competition agreements in Connecticut. Generally, the enforceability of such an agreement in Connecticut is determined under a reasonableness analysis, by which a reviewing Court assesses whether the agreement is reasonably limited in time, geographic scope, the fairness of the protection it affords the employer, the extent of the restraint on the employee's opportunity to pursue his or her occupation and the extent to which the agreement interferes with the public's interest.[2] There are no hard and fast rules concerning the length of time or geographic radius within which a covenant not to compete will be considered "reasonable" and therefore enforceable. Moreover, traditionally, in a proceeding to challenge the enforceability of a covenant not to compete, the employee bears the burden of establishing that such an agreement is not reasonable.

While covenants not to compete with a physician have traditionally been considered under this rule of reason analysis,[3] the Act alters this standard for such agreements, both currently in existence and executed after the effective date of the Act.

The Act Flips the Burden of Establishing Enforceability of a Physician Non-Compete

The Act affirms the application of a reasonableness analysis to such agreements, but states that "[t]he party seeking to enforce a covenant not to compete shall have the burden of

1 P.A. No. 16-95.
2 *Robert S. Weiss & Assoc. v. Wiederlight*, 208 Conn. 525, 529 n.2 (1988).
3 *See e.g., Fairfield County Bariatrics v. Elrich*, No. FBTCV1050291046, 2010 Conn. Super. LEXIS 568 (Conn. Super. Ct. March 8, 2010).

proof in any proceeding."[4] The Act thus flips the burden of proof to the hospital, employer or practice to affirmatively prove that the covenant not to compete is reasonable – even where a suit is brought by a physician to challenge the enforceability of a non-competition agreement. This shifting of the burden of proof is applicable to all physician non-competes, not just those executed after the effective date of the Act.

The Act Restricts the Geographic and Temporal Scope of Physician Non-Competes

For agreements executed after July 1, 2016, the Act restricts both the geographic and temporal scope of any non-compete agreement with a physician. In particular, such a non-compete may not restrict a physician from competing for longer than one year and cannot extend to any more than 15 miles from the primary site where the physician practices. The "primary site where [the] physician practices" is defined in the Act as the "office, facility or location where a majority of the revenue derived from such physician's services is generated" or "any other office, facility or location where such physician practices and mutually agreed to by the parties and identified in the covenant not to compete." The Act also specifies that each covenant not to compete that is entered into, amended or renewed after July 1, 2016 must be separately and individually signed by the physician.

The Act Invalidates Certain Non-Compete Agreements

Lastly, the Act states that a non-competition agreement cannot be enforced against a physician under the following two circumstances: (1) where the non-compete agreement was not made as part of or in anticipation of a partnership or ownership agreement and the professional services or employment agreement containing the non-compete expires and is not renewed; or (2) the employment or professional services agreement is terminated without cause. Again, the Act significantly alters the rules applicable to physician non-competition agreements by rendering certain classes of those agreements unenforceable, regardless of the reasonableness of the restrictions.

Recommendations

We strongly encourage hospitals and physician groups to familiarize themselves with the changes to the law governing physician non-competes and review standard or template non-competition covenants contained in employment, professional services, partnership or ownership agreements to ensure compliance with Public Act No. 16-95, including without limitation a review of the temporal and geographic scope of such non-competition covenants. Hospitals and physician groups are also encouraged to consider expressly identifying office facilities or locations in which a physician practices in physician non-competes going forward and to consider the consequences of terminating any physician who is subject to a non-competition agreement without cause.

Questions?

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4 P.A. No. 16-95.

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