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Indiana's New Restrictions on Physician Non-Compete Agreements

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Marking a unique variation from Indiana's body of common law governing the enforceability of restrictive covenants in the state, a new Indiana statute regulating physician non-compete agreements is set to take effect on July 1, 2020. *See* Pub. L. No. 93-2020 (to be codified in part as Ind. Code § 25-22.5-5.5) (2020).

Background

In 2008, the Indiana Supreme Court held physician non-compete agreements with medical practice groups were not *per se* void as against public policy and enforceable if the restriction was otherwise reasonable. *Cent. Ind. Podiatry, P.C. v. Krueger*, 882 N.E.2d 723, 725 (Ind. 2008).

With respect to the geographic area restricted, the Court held that it must be limited only to the area in which the physician had patient contact.

The Court also discussed the public policy concern that completely restricting physicians from practicing within a geographic area might interfere with the physician-patient relationship and impair a patient's legitimate interest in selecting their physician of choice. It clarified that placing any restrictions on physicians from entering into non-compete agreements was a policy question better left to the state legislature.

New Law

Indiana's legislature has finally taken the Court up on its invitation by passing new law addressing the delicate balance between the right to prevent unfair competition and the right of a patient to physician choice, even as the country grapples with the greatest healthcare challenge in recent memory with the COVID-19 pandemic.

The restrictions on non-compete agreements in the new statute apply only to physicians, defined as "any person who holds the degree of doctor of medicine or doctor of osteopathy or its equivalent and who holds a valid unlimited license to practice medicine or osteopathic medicine in Indiana." Ind. Code § 25-22.5-1-1.1(g). Critically, the restrictions apply only to non-compete agreements effective on or after July 1, 2020.

The new law requires enforceable physician non-compete agreements to contain the following:

1. A provision requiring the employer to provide the physician a redacted copy of any notice the employer sent to patients of the physician seen or treated during the two years prior to the termination of the physician's employment or the end the physician's contract concerning the physician's departure from the employer;
2. A provision requiring the employer to provide the physician's last known contact and location information to patients the physician has seen or treated during the two years prior to the termination of the physician's employment or the end the physician's contract if requested by such a patient;
3. A provision providing the physician access to or copies of any medical records associated with a patient the physician has seen or treated during the two years prior to the termination of the physician's employment or the end the physician's contract upon receipt of patient consent;
4. A provision providing the physician an option to purchase a release from the terms of the enforceable physician non-compete agreement at a reasonable price; and
5. A provision prohibiting the employer from providing patient medical records to the physician in a format materially different from the ordinary course of business, unless the records are produced in paper, portable document format, or as otherwise mutually agreed upon by the parties.

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The statute permits the employer to charge a reasonable fee for creating, copying, or transferring requested patient medical records to the physician, so long as charging the reasonable fee is otherwise permitted under applicable federal and state laws.

Further, the statute clarifies that it should not be construed to impair the ability of an employer and physician to negotiate any other terms not specifically referenced or to negotiate for any other rights, remedies, or relief.

Open Questions

The new law creates more questions than it answers. Perhaps the most obvious question relates to the calculation of the "reasonable price" of the non-compete buyout option. The absence of guidance in assessing the value of this buyout option will become a topic of debate and litigation.

A related question is how placing a value on the buyout option affects the employer's ability to enforce the restriction, which, as a form of injunctive relief, requires demonstrating that the employer has no adequate monetary remedy. The statute provides an answer here, stating that, if the physician refuses to exercise it, the buyout option cannot be used in a manner restricting the employer's enforcement of equitable remedies such as the enforcement of the non-compete.

Another question relates to the operative definition of the term "non-compete." In some instances, the term "non-compete" is intended as a catchall for a wide range of restrictive covenants. This could include non-solicitation, confidentiality, and other restrictive provisions. In other circumstances, "non-compete" refers only to a restriction to not compete in a specified manner, but it does not include any other kinds of restrictive covenants. It is unclear whether the provisions required by the new statute also must be included in an agreement between a medical practice group and a physician if the restrictive covenant takes more of the form of a non-solicitation agreement than a non-compete agreement. Certainly, there are multiple layers to any such non-solicitation restriction on a physician, as physicians, at a minimum, are bound by Indiana's Standards of Professional Conduct to reach out and inform patients upon their departure from a practice. *See* 844 Ind. Admin. Code § 5-2-4. Physicians also have ethical restrictions on soliciting members of the general public to provide services. *See* 844 Ind. Admin. Code § 5-2-13(g).

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There are significant grey areas as the new law's effective date approaches. Given the complexities involved in the enforcement of non-compete agreements, healthcare employers would be well-served to address specific non-compete scenarios with the assistance of counsel.

Please contact a Jackson Lewis attorney with any questions.