



## **Restrictive Covenants in Physician Employment Relationships**

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### **Introduction**

Most physicians are familiar with non-compete agreements (also referred to as restrictive covenants or covenants not to compete), whether as employees who have been asked to sign such an agreement upon beginning a new job, or as practitioners seeking to enforce such an agreement to protect their medical practices from competition. Non-compete agreements are often signed in conjunction with physician employment contracts, or when a physician joins a practice group as an owner. These agreements typically prohibit a doctor from competing against his or her former practice within a specific region for a specific amount of time after the relationship with the practice has ended. Medical practices often employ non-compete agreements to prohibit new physicians from leaving and setting up a competing practice nearby using information, training, or patient contacts that were provided by the practice.

There is no nationwide standard governing the enforcement of non-compete agreements. Rather, the enforcement of non-compete agreements is regulated by state law and, therefore, differs somewhat from state to state. Although general principles of contract law apply, additional issues arise when considering non-compete agreements and particularly physician non-compete agreements. Several states have statutes that prohibit outright any non-compete agreements in the employment context. Most states limit the enforcement of non-compete agreements generally in light of public policy concerns about restricting the ability of individuals to practice a trade or earn a living. Further, many states apply special rules, either by statute or by case law, to physician non-competes in light of the unique position the medical profession holds in the public interest.

This article begins with a discussion of the types and purposes of non-compete agreements, as well as the general issues that arise consistently from state to state. The article then focuses on certain issues that arise specifically in the healthcare context and how those issues are treated from state to state. Next, the article addresses certain tactics that proponents of non-compete agreements have used to avoid obstacles to enforcement, including careful drafting of the scope of restrictions, as well as the use of choice-of-law and forum selection clauses. The appendix includes a chart categorizing states according to their treatment of physician non-competes, along with a brief citation of applicable law.

## **Overview of Physician Non-Compete Agreements**

Healthcare providers in various business forms—whether professional corporations, limited liability companies, general partnerships, or sole practitioners—might employ a non-compete agreement when establishing a relationship with a physician. Because this article deals with non-compete agreements in the employment context, it refers to the medical practice wishing to enforce a non-compete as the employer, and the physician being bound by the non-compete as the employee. However, the use of non-compete agreements in the healthcare field is not limited to the employment relationship. For example, a hospital might contract with an independent contractor physician for professional services and ask that physician to agree not to provide similar services elsewhere.<sup>1</sup> A solo practitioner who wishes to bring on a new partner to expand his practice might require the new partner to enter into a non-compete. Finally, a buyer of a physician's practice might require the seller to execute a non-compete agreement in order to protect the value of its purchase of the physician's goodwill and patient base.<sup>2</sup>

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<sup>1</sup> Although a more detailed discussion is outside the scope of this article, healthcare providers should consult legal counsel if they wish to enter into non-compete agreements with independent contractor physicians. Some jurisdictions are less likely to enforce a restrictive covenant against independent contractors, even where such a covenant would be enforced against an employee. Alternatively, a court might consider such a restriction on a doctor's right to practice medicine as evidence of an employment relationship, thus jeopardizing the doctor's classification as an independent contractor.

<sup>2</sup> Although this article deals exclusively with non-compete agreements in the employment context, it is important to note that non-compete agreements associated with the sale of a business are generally

The advantages for those seeking enforcement of a non-compete agreement are self-evident. With the assurance that physician employees will not leave and take a portion of the employer's patient base, employers can freely expand their medical practices (and assist physician employees in doing the same), with the knowledge and comfort that their investment in such expansion is contractually protected from future competition by current employees. A practice might also have developed proprietary business techniques, such as billing or payment methods, that it wants to protect from use or disclosure if the physician goes elsewhere, especially if the physician has been involved in managing the practice. Finally, a practice might wish to protect its investment in the professional training it provides, especially to physicians hired fresh out of residency with little or no prior experience in a private practice.

On the other hand, non-competes present substantial disadvantages to employees. To comply with a typical restrictive covenant, the physician may need to move outside the restricted area, potentially uprooting his or her family and attempting to practice medicine in a less desirable location. Furthermore, new doctors, who have no established reputation and thus little bargaining power, may have difficulty negotiating an employment agreement without such restrictions on their future professional prospects. By the same token, however, non-compete agreements might enhance employment opportunities for less experienced doctors, since many employers might not hire new physicians at all without the protection of a restrictive covenant.<sup>3</sup>

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treated with more leeway. For example, if a doctor is a partner or shareholder in a medical practice, a non-compete agreement executed in conjunction with a buyout of the doctor's equity interest in the practice will typically be subject to fewer constraints on enforcement. *See, e.g., Wenzell v. Ingram*, 228 P.3d 103 (Alaska 2010) ("Unlike covenants not to compete ancillary to employment contracts, which 'are scrutinized with particular care because they are often the product of unequal bargaining power,' this level of scrutiny is not applied to covenants ancillary to the sale of a business because the contracting parties are more likely to be of equal bargaining power.").

<sup>3</sup> *See Mohanty v. St. John Heart Clinic*, 866 N.E. 2d 85, 95 (Ill. 2006) (noting that "[r]estrictive covenants protect the business interests of established physicians and, in this way, encourage them to take on younger, inexperienced doctors. Accordingly, restrictive covenants can have a positive impact on patient care."). *But see Eckert v. Lehigh Valley Women's Med. Specialties, P.C.*, 2012 Pa. Dist. & Cnty. Dec. LEXIS 226 (Pa. Common Pleas Ct. Feb. 29, 2012) (finding that physician's junior position with the practice and relatively brief duration of employment weighed against enforcement of non-compete).

## **Enforceability**

State courts generally disfavor employment non-competes as a “restraint of trade” and decline to enforce them against employees absent a showing by the employer of a need for protection as defined by state case law or statutes. First, the employer must show that it has a protectable business interest that would justify the restrictive covenant, beyond a mere desire to avoid competition. Second, the restriction at issue must be reasonably limited to the specific time period and geographical area necessary to protect the employer’s legitimate interest. Because restrictive covenants are generally disfavored, courts will interpret restrictions narrowly and will construe ambiguities in favor of the employee.<sup>4</sup> Even if a non-compete agreement otherwise meets the requirements of a legally enforceable, binding contract, courts will nevertheless only enforce the agreement to the extent that the employer can show it has a legally recognized, protectable business interest, and that the restrictions on the employee are necessary to protect that interest.

### *Legitimate Business Interest*

In considering whether to enforce non-compete agreements, courts generally recognize three “protectable interests” that an employer may demonstrate to justify enforcement: (1) confidential information; (2) investment in specialized training provided to the employee; and (3) customer or client relationships. The first such protectable interest is the employer’s confidential information, including trade secrets.

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<sup>4</sup> For example, in *General Surgery, P.A. v. Suppes*, 953 P.2d 1055 (Kan. Ct. App. 1998), a restrictive covenant read that “The Doctor agrees that *should she cease employment* with the Corporation, then she will not engage in the practice of medicine” within 25 miles of the city limits of Lawrence, KS, for two years (emphasis added). Stating that “[n]oncompetition covenants included in employment contracts are strictly construed against the employer,” the court interpreted the phrase “should she cease employment” to mean that the restrictive covenant applied only where the physician herself took action to end the employment relationship, and therefore declined to enforce the agreement where the physician did not voluntarily quit, but was fired. *Id.* at 1057.

Where an employer has established and maintained a body of proprietary information and has taken reasonable steps to keep that information from being publicly used or disclosed, it may be permitted to protect that information via a restrictive covenant. This issue arises often in the context of trade secrets. Protectable employer trade secrets can include business plans, product designs, marketing strategies, cost and profit margins, and information about customers or clients. Where an employee, in the scope of performing her duties, has had access to the employer's confidential information, courts generally conclude that the employee's use of that information to compete with the former employer results in unfair competition. As a result, a restrictive covenant prohibiting the former employee from engaging in such competition will generally be enforced to the extent necessary to protect that information.<sup>5</sup> Employers also often utilize confidentiality agreements, in addition to non-compete agreements, to protect proprietary information. In fact, the use of confidentiality agreements is often considered a factor in demonstrating that the employer has taken "reasonable precautions" to keep the information at issue private.

In the healthcare field, an employer will typically have protectable proprietary information in only a few specific circumstances. The most "valuable" information to a physician is most often the patient health information—including medical history, family history, even personal needs and idiosyncrasies—that is essential in providing effective care. This class of information, however, is typically treated as belonging to the patient, and not to the doctor or medical practice providing treatment.<sup>6</sup> Thus, it is unlikely that an employer will be able to enforce a restrictive covenant against a departing physician solely for the purpose of protecting "proprietary" patient information. If an employer has developed proprietary information that does not relate directly to patients, however,

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<sup>5</sup> For example, when the confidential information at issue is subject to change over time (such as pricing information in a volatile market), the information in the former employee's possession will likely become obsolete sooner, justifying a shorter restrictive covenant. *See, e.g., Girtman & Assocs. v. St. Amour*, 26 I.E.R. Cas. (BNA) 187, at \*20-21 (Tenn. Ct. App. 2007); *CDX Holdings, Inc. v. Heddon*, 2012 U.S. Dist. LEXIS 86041, at \*25 (N.D. Tex. Mar. 2, 2012) (finding that plaintiff failed to show one-year limitation was reasonable where "confidential information was continually changing and updated and had potentially a short shelf life").

<sup>6</sup> For example, the Health Insurance Portability and Accountability Act of 1996 requires healthcare providers to protect the privacy of patient health information and limits use and disclosure of such information without the patient's consent.

such information could still form the basis for a restrictive covenant in certain circumstances. For example, if a physician is employed in an administrative or executive capacity and has responsibility for business operations in addition to, or in lieu of, patient care, the employer may be able to establish that certain information developed solely for business use is confidential and proprietary. Consequently, to protect such information, the employer may be able to restrain the physician from working in an *executive or administrative capacity* for a competing practice, even where a restraint on direct patient care would be impermissible.<sup>7</sup>

The second protectable interest commonly recognized by state courts is the employer's investment in specialized training provided to the employee. To obtain enforcement of a non-compete based on specialized training, an employer must typically establish that it provided more than simple "on-the-job" training of the type the employee would have received from any employer in the industry. Rather, the employer must provide training of a unique character, which would provide an unfair advantage if the employee were to leave and use that training on behalf of a competitor.<sup>8</sup> This occurs most often where the employer has invested substantial resources in assisting the employee in developing professional skills. In the healthcare field, this standard means that an employer can enforce a restrictive covenant if it shows that it provided a physician with valuable

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<sup>7</sup> See, e.g., *Blue Ridge Anesthesia & Critical Care v. Gidick*, 389 S.E.2d 467, 469 (Va. 1990) (citing as a protectable interest a physician's knowledge about employer's methods of operation). Cf. *Patient First Med. Grp., LLC v. Blanco*, 83 Va. Cir. 3, 5 (Va. Cir. Ct. 2011) ("The covenant in this case is overbroad because its reach is not limited to occupations and businesses that are in competition with Patient First. It bars indirect involvement by the defendant in 'perform[ing] medical services of the type he performed for Patient First,' even as a shareholder. This would prohibit the defendant from owning stock in a publicly traded company if some part of that company provided the same medical services as the defendant . . . . [B]arring one from being a stockholder in a publicly traded company is virtually inherently overbroad."); *Lasership, Inc. v. Watson*, 79 Va. Cir. 205, 212 (Va. Cir. Ct. 2009) ("[A] covenant not to compete is functionally overbroad and unenforceable if it prevents an employee from working for companies not in competition with the former employer or it prevents an employee from pursuing noncompeting employment positions with *any* employer.").

<sup>8</sup> The analysis of whether training is sufficiently "unique" may often collapse into the analysis of whether the content of the training qualifies as protected confidential information. Thus, if an employer provides an employee with specialized training based on information it keeps private and from which it derives a competitive advantage, the employer can demonstrate that a restrictive covenant is necessary to protect both its confidential information and its investment in specialized training.

professional training that was essential in developing the physician's current marketability and earning power.<sup>9</sup>

The third interest commonly recognized by courts to justify enforcement of a non-compete agreement is the protection of customer or client relationships. The personal relationships and "goodwill" cultivated between an employee and the employer's customers are generally considered the property of the employer. Non-compete agreements are often sought where the employee has ongoing contact with customers over a prolonged time period, such that she becomes the "face of the company" to those customers. As a result, many states allow an employer to protect those customer relationships with a non-compete agreement, on the ground that it would be unfair to allow the employee to compete with his former employer using customer relationships that he cultivated on his former employer's behalf and at his former employer's expense. In the healthcare context, this rule equates with a medical practice's interest in protecting its patient base, when most patients associate the medical practice with their personal physician. Although the "ownership" of the patient-doctor relationship raises public policy issues discussed below, it has been recognized in several states as a legitimate interest justifying the enforcement of a non-compete agreement.<sup>10</sup>

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<sup>9</sup> See, e.g., *Community Hosp. Grp., Inc. v. Moore*, 869 A.2d 884 (N.J. 2005), and *Pierson v. Medical Health Ctrs., PA*, 869 A.2d 901 (N.J. 2005), in which the New Jersey Supreme Court held that an employer's investment in the training of a physician (among other items) was a legitimate interest protectable by a non-compete agreement; see also *Weber v. Tillman*, 913 P.2d 84, 92 (Kan. 1996) (finding a protectable interest based on employer's investment in setting up its practice and in recruiting and training defendant employee; and noting that the employee "acknowledged that he had benefitted by beginning his career in an established practice rather than starting his own."); *St. Clair Med., PC v. Borgiel*, 270 Mich. App. 260, 266 (2006) (emphasis added) ("In a medical setting, a restrictive covenant can protect against unfair competition by preventing the loss of patients to departing physicians, protecting an employer's investment in *specialized training* of a physician, or protecting an employer's confidential business information or patient lists.").

<sup>10</sup> See, e.g., *A&T Med. Inc. v. Mercadante*, 2011 Pa. Dist. & Cnty. Dec. LEXIS 200 (Pa. Common Pleas Ct. Feb. 28, 2011) ("[R]etaining patients is a compelling interest as is their interest in preventing existing and former employees from establishing a competing medical practice using their current patients."); *Blue Ridge Anesthesia*, 389 S.E.2d at 469 (citing "customer" contacts as a protectable interest for a medical practice); *Saliterman v. Finney*, 361 N.W.175 (Minn. Ct. App. 1985) ("[Minnesota] has long recognized the uniquely vulnerable goodwill of patients which belongs to the owner of a medical practice"); *Sharvelle v. Magnante*, 836 N.E.2d 432, 437 (Ind. Ct. App. 2005) (recognizing a clinic's legitimate interest in "its good will, its established patient base, and the time and resources spent to build its practice"); *Weber*, 913 P.2d at 91 (recognizing "referral sources" as a legitimate business interest); *Prairie Eye Ctr., Ltd. v. Butler*, 713 N.E.2d 610, 614-15 (Ill. Ct. App. 1999) (eye clinic has protectable interest in retaining patients treated by its employees); *Mohanty*, 866 N.E.2d at 93 (rejecting former employee's argument that physician non-

### *Reasonable Restrictions*

In addition to establishing a protectable business interest, an employer seeking to enforce a non-compete agreement must also show that the restrictions in place are no greater than what is reasonably necessary to protect its business. Courts generally require that a post-employment restriction be reasonably limited with respect to its geographical scope and its duration. Even where a protectable business interest exists, courts will often decline to enforce a restriction if it covers a territory that is broader than necessary to protect the employer's business, or if it lasts longer than necessary to protect that interest.

A non-compete agreement cannot be unlimited in scope. Rather, restrictions on post-employment conduct are typically enforced only within a reasonable geographical area. When considering whether a territorial restriction is reasonably limited, courts will most often consider the size of the employer's market and the size of the area serviced by the employee. Thus, a medical practice that draws patients from a limited area will not be able to prohibit a physician from treating patients outside that area, while a practice with a more regional scope might be able to enforce a broader restriction. "Reasonableness" is typically determined on a case-by-case basis, and therefore there can be substantial variation even within one state as to what restrictions are considered reasonable. Other relevant factors include the number of customers (or patients) existing within a specific region, the presence of other competitors within that region, and the scope of the employer's efforts to market itself within a specific region. For example, a restriction from practicing medicine within "a 10-mile radius" of the employer's office might be enforceable in a rural area where there are a limited number of patients within the restricted territory, while the same restriction might be unenforceable in an urban area

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compete agreements infringed on the doctor-patient relationship and interfered with patient's right to be treated by doctor of choice).

where it restricts the physician from treating thousands of potential patients and where other competing medical practices already exist.<sup>11</sup>

Because these factors are considered on a case-by-case basis, parties should look to specific examples in court decisions to determine whether a desired restriction will be considered reasonable. Permissible methods of defining a reasonable territorial limitation include: (1) “radius” restrictions like the one discussed above, in which the employer’s place of business is treated as a compass point and the employee is restricted from competing within a certain number of miles from that point; (2) zip code areas (typically zip codes within which a certain minimum number of the employer’s customers originate); and (3) municipal boundaries such as cities or counties. Courts will generally require a sufficient degree of specificity, so as to provide an employee adequate notice as to where competition is prohibited. For example, in Louisiana, a restriction prohibiting the employee from competing “in the Greater New Orleans area” was held to be vague and, therefore, unenforceable.<sup>12</sup>

In addition to a reasonable territorial limitation, non-compete restrictions must typically expire within a reasonable period of time to be enforced. Most non-compete agreements prohibit competition during the employment relationship and for a period of months or years afterward. If a court decides that the restriction lasts longer than necessary to protect the employer’s legitimate interest, it will decline to enforce the restriction. For example, a court might limit the duration of a non-compete restriction to the amount of time: (1) needed for the employer to hire and train a replacement employee; (2) it will take so that customers no longer associate the former employee with the employer’s business; (3) necessary to prove to the employer’s customers that it can continue to meet their needs in the absence of the former employee; or (4)

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<sup>11</sup> Lawyers should note, however, that when viewed from the standpoint of the employee, the opposite argument can be made: a 10-mile radius limitation can effectively freeze a physician out of an entire rural or suburban area, while the same restriction in an urban area could, depending on geographical circumstances, leave the employee with a sufficient patient base and thus allow him to earn a living.

<sup>12</sup> *Medivision, Inc. v. Germer*, 617 So.2d 69 (La. Ct. App. 1993) (citing LA. REV. STAT. 23:921 (permitting restrictive covenants only within a “specified parish or parishes, municipality or municipalities, or parts thereof.”)); see also *West Carroll Health Sys., LLC v. Tilmon*, 92 So. 3d 1131 (La. App. Ct. 2012) (reversing trial court’s enforcement of a non-competition agreement against a physician’s assistant that extended to a named parish and “other surrounding parishes” on the basis that the geographic restriction was too broad).

necessary for any confidential information in the employee's possession to become obsolete. As with reasonable territorial restrictions, this determination is typically made on a case-by-case basis, and parties should look to applicable court decisions in deciding what type of restriction to apply. In addition to these factors, some state non-compete statutes include express provisions establishing how long a non-compete restriction can last.<sup>13</sup>

When examining a non-compete covenant, courts may also compare the scope of prohibited activities with the services actually provided by the former employee during the employment relationship. If the restriction effectively precludes the employee from doing work *other* than what she did for the former employer, the court may find the restriction unduly broad. For example, if an employee worked for the employer solely as a sales representative, a court might refuse to enjoin the employee from going to work for a competitor if the employee's new role with the competitor has nothing to do with sales. Thus, the restrictions included in a physician non-compete agreement should relate directly to the services provided by the physician on behalf of the employer. For example, a surgical practice group could prohibit a former member from practicing surgery as he had for the group, but could not prevent the member from practicing medicine in a specialty other than that of the practice group.<sup>14</sup>

In many instances, a court will recognize that the employer has a protectable interest at stake but conclude that the restriction on the former employee is nevertheless overly broad. In such instances, a court might simply decline to enforce the agreement, or in

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<sup>13</sup> Florida establishes a statutory presumption that an employment non-compete restriction is reasonable if the term is less than six months, and unreasonable if it lasts longer than two years. FLA. STAT. § 542.335(1)(d)(1); *see also* MO. REV. STAT. § 431.202 (establishing conclusive presumption of reasonableness if the term of postemployment restrictive covenant is no more than one year); LA. REV. STAT. ANN. § 23:921(c) ("not to exceed two years from termination of employment"); OR. REV. STAT. § 653.295 ("may not exceed two years from the date of the employee's termination"); TENN. CODE ANN. § 63-1-148(a)(1)(B) ("two (2) years or less").

<sup>14</sup> *See, e.g., Fox Valley Thoracic Surgical Assocs., S.C. v. Ferrante*, 747 N.W.2d 527 (Wis. Ct. App. 2008) (upholding the lower court's conclusion that a non-compete provision was overbroad because, among other reasons, the restriction prohibited the surgeon from practicing thoracic medicine, in addition to heart surgery). *But see Fairfield Cnty. Bariatrics v. Ehrlich*, 2010 Conn. Super. LEXIS 568 (Conn. Super. Ct. Mar. 8, 2010) (enforcing a non-compete agreement prohibiting bariatric surgeon from practicing medicine for two years in a 15-mile radius, and practicing bariatric surgery for two years in several named towns; finding in part that operation of the covenant need not impair the public's need to secure the surgeon's services so substantially as to require invalidation).

those states in which the “blue pencil” or “reasonableness” rule is in effect, the court may narrow the terms of the restriction to make it consistent with applicable law. The so-called blue pencil rule means a judge may decide that a non-compete agreement is too broad as written, but instead of rejecting the provision entirely, he or she will cross out the unreasonable sections with a hypothetical “blue pencil” and will enforce the provisions that remain.<sup>15</sup> In strict “blue pencil” states, courts will not supply missing terms or otherwise reformulate an overly broad provision to bring it into compliance. The provision deemed unlawful must be severable from the remainder of the agreement, and an enforceable restriction must remain after the offending provision is stricken. For example, if an agreement provided that a physician was restricted from practicing medicine “in Jones County and in Smith County,” a court in a blue pencil jurisdiction might find that the restriction was not justified as to Smith County because the employer had not established a sufficient patient base there. Consequently, the court would strike the phrase “and in Smith County” and enforce the restriction as to Jones County only.

On the other hand, in states that employ the “reformation” or “rule of reason” standard, instead of simply striking overly broad provisions, a court will effectively rewrite the offending provision(s) and enforce the agreement as modified. For example, if a judge finds that a two-year, 25-mile restriction is overly broad, he might enforce the restriction only for one year and only up to 10 miles.<sup>16</sup> As discussed below in more detail, employers drafting non-compete agreements should determine if their jurisdiction employs the “blue pencil” or “reformation” standard (or neither), and draft restrictions accordingly.

### **State Law Prohibiting or Limiting Physician Non-Compete Agreements**

As discussed above, non-compete agreements are typically disfavored in the employment context, and many states have statutes that generally prohibit all such

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<sup>15</sup> See, e.g., *Class Action Claim Servs., LLC v. Clark*, 892 So.2d 595, 600 (La. Ct. App. 2004).

<sup>16</sup> See, e.g., *Cent. Ind. Podiatry, P.C. v. Krueger*, 882 N.E.2d 723 (Ind. 2008) (finding that a restriction covering 43 counties was overbroad, but enforcing the restriction as to three of the counties).

agreements as a matter of law.<sup>17</sup> Other states have statutes that restrict enforcement of employee non-compete agreements and establish factors that will be considered in determining whether those agreements are reasonable.<sup>18</sup> In most states, there is no statute governing enforceability, but court decisions have established the relevant factors to be considered. Some states, such as Delaware and Massachusetts, do not prohibit employee non-competes generally but will decline to enforce them against physicians. Still other states, such as Virginia, Tennessee, and Texas, do not prohibit physician non-competes but apply stricter standards to such agreements than they do to employee non-competes in general.

Many statutes governing physician non-competes have been enacted in response to court decisions announcing special standards with respect to such agreements. For example, in 2005, the Supreme Court of Tennessee, in contrast to several prior court decisions, held that covenants not to compete are unenforceable against physicians except in special circumstances established by statute.<sup>19</sup> In response to that decision, a law was passed in 2007 that expressly provided for the enforcement of physician non-compete agreements provided that the restrictions meet certain statutory limitations.<sup>20</sup> The Virginia Supreme Court ruled in 2007 that a medical practice, which had converted from a professional corporation to a general corporation upon the death of a physician shareholder, did not have a legitimate interest in enforcing a non-competition provision against a former employee, because the corporation did not hold a medical license and thus could not be “engaged in the practice of medicine.”<sup>21</sup> This ruling effectively

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<sup>17</sup> Those states include California, Montana, North Dakota, and South Dakota.

<sup>18</sup> Such states include Florida, Idaho, Michigan, Oregon, and Georgia. Please see the appendix for specific statutory citations.

<sup>19</sup> *Murfreesboro Med. Clinic, P.A. v. Udom*, 166 S.W.3d 674 (Tenn. 2005). At the time of the *Murfreesboro Med. Clinic* case, Tennessee statutes only expressly *permitted* physician non-compete agreements if the employer was a hospital, an affiliate of a hospital, or a faculty practice plan associated with a medical school. See TENN. CODE ANN. § 63-6-204(f).

<sup>20</sup> TENN. CODE ANN. § 63-1-148. The statute was amended in 2010 and again in 2011. The 2011 amendment removed limitations on the enforceability of non-compete covenants against physicians who have been employed for longer than six years. Previously, a non-compete covenant could not extend beyond six years without the parties agreeing to renew it in writing based on additional negotiations and fresh consideration (and even then, for no longer than an additional six-year period, which could again be renewed by the same process). In addition, the 2011 amendment also extended the applicability of TENN. CODE ANN. § 63-1-148 to osteopathic physicians.

<sup>21</sup> *Parikh v. Family Care Ctr., Inc.*, 641 S.E.2d 98 (Va. 2007). At the time of this decision, the applicable statute provided for enforcement of physician non-compete agreements by those “engaged in the practice

invalidated non-compete agreements with nonprofessional corporations and any entity that did not hold a medical license. In response, the Virginia legislature amended the statute in 2008 to clarify that professional corporations and limited liability companies are entitled to enforce non-compete agreements.<sup>22</sup>

## Public Policy Issues Arising from Physician Non-Compete Agreements

Many states treat physician non-competes differently than similar agreements in other fields, due to the special public interest associated with the medical profession. For example, when asked to enforce a physician non-compete agreement, courts may consider additional factors such as whether enforcement will cause a shortage of doctors in a particular region, or within a particular specialty.<sup>23</sup> In addition, some states may apply different standards to different medical specialties.<sup>24</sup> Furthermore, some courts give great weight to the right of citizens to obtain treatment from the physician of their choice, concluding that the doctor-patient relationship trumps any interest an

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of medicine.” This issue arises in connection with the so-called corporate practice of medicine doctrine. For example, a doctor might sign a restrictive covenant as a wholly owned professional corporation, rather than in an individual capacity. The restriction, however, might still be enforced against both the professional corporation and against the physician in an individual capacity. *See, e.g., Regional Urology, L.L.C. v. Price*, 966 So.2d 1087 (La. Ct. App. 2007) (affirming that a non-compete agreement was enforceable against a physician even though the contract was technically with his wholly owned professional corporation; and stating that “a juridical person, such as a corporation, is distinct from its members. However, the privilege of separate corporate identity is not without limits . . . [the physician’s] argument that he is not individually bound because his professional medical corporation was the independent contractor are attempts to circumvent his contractual obligations under the noncompetition agreement. . . . [The physician] is the controlling party with regard to his medical practice, regardless of its formation as a corporate entity”).

<sup>22</sup> VA. CODE ANN. § 54.1-111(D).

<sup>23</sup> *See, e.g., Emerick v. Cardiac Study Ctr., Inc.*, 286 P.3d 689 (Wash. Ct. App. 2012) (“Public policy requires a court to consider possible harm to the public from enforcing the covenant. Such harm may include restraint of trade, limits on employment opportunities, and denial of public access to necessary services. But the court must still balance these concerns against the employer’s right to protect his business.”); *Board of Regents v. Warren*, 2008 Iowa App. LEXIS 1192 (Iowa Ct. App. 2008) (unpublished) (finding a non-compete agreement overbroad where it prohibited physician from practicing any medicine, not just oncology, and because the physician’s practice was in an area suffering from a shortage of oncologists, making enforcement detrimental to the public interest). *See also, e.g., Akkad v. Neb. Heart Inst., P.C.*, 2012 Neb. App. LEXIS 82 (Neb. Ct. App. Apr. 10, 2012); *Wenzell v. Ingrim*, 228 P.3d 103 (Alaska 2010), *Dick v. Geist*, 693 P.2d 1133 (Idaho App. 1985); *Iredell Digestive Disease Clinic, P.A. v. Petrozza*, 373 S.E.2d 449 (N.C. Ct. App. 1988).

<sup>24</sup> For example, a Tennessee non-compete statute permitting physician non-competes, and establishing guidelines for enforceability, does not apply to physicians who specialize in emergency medicine. TENN. CODE ANN. § 63-1-148.

employer might have in protecting its patient base. The American Medical Association's (AMA's) code of medical ethics, for similar reasons, disfavors non-compete agreements, stating that they restrict competition, disrupt continuity of care, and potentially deprive the public of access to medical care. AMA does not state that non-compete agreements are per se unethical, but instead concludes that they are unethical if they "fail to make reasonable accommodation of patients' choice of physician."<sup>25</sup>

In considering these issues as factors governing whether a physician restriction was reasonable, the New Jersey Supreme Court has held:

Significant here is the demand for the services rendered by the employee and the likelihood that those services could be provided by other physicians already practicing in the area. If enforcement of the covenant would result in a shortage of physicians within the area in question, then the court must determine whether this shortage would be alleviated by new physicians establishing practices in the area. It should examine also the degree to which enforcement of the covenant would foreclose resort to the services of the 'departing' physician by those of his patients who might otherwise desire to seek him out at his new location. If the geographical dimensions of the covenant make it impossible, as a practical matter, for existing patients to continue treatment, then the trial court should consider the advisability of restricting the covenant's geographical scope in light of the number of patients who would be so restricted.<sup>26</sup>

For these reasons, many states will not enforce physician non-compete agreements where they are viewed as restricting patients' rights to choose their own doctor.<sup>27</sup> Even

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<sup>25</sup> See Opinion 9.02, "Restrictive Covenants and the Practice of Medicine," available at [www.ama-assn.org/ama/pub/physician-resources/medical-ethics/code-medical-ethics/opinion902.page](http://www.ama-assn.org/ama/pub/physician-resources/medical-ethics/code-medical-ethics/opinion902.page).

<sup>26</sup> *Community Hosp. Grp., Inc. v. More*, 869 A.2d 884, 898 (N.J. 2008).

<sup>27</sup> See, e.g., *Valley Med. Specialists v. Farber*, 982 P.2d 1277 (Ariz. 1999) (finding that a restrictive covenant prohibiting a physician from providing any and all forms of "medical care," including pulmonology, emergency medicine, brachytherapy treatment, and human immunodeficiency virus-positive and acquired immune deficiency syndrome patient care, for three years within a five-mile radius of any office maintained or utilized by the employer practice was unreasonable and unenforceable; the

where the non-compete agreement is otherwise enforceable, in many instances courts will construe the restriction so as not to prohibit patients from independently seeking out treatment by the departing physician.<sup>28</sup> Moreover, states often draw a distinction between restrictions on the right to practice medicine and restrictions on owning or operating a business, which do not raise the same policy concerns about patient care. For example, a non-compete agreement could be drafted explicitly to preserve the physician's right to see patients, but to restrict the physician from owning or operating a practice similar to that of the employer.<sup>29</sup>

Even where states have no broad rules governing enforcement of physician non-competes, the same factors may weigh in a public policy analysis in the overall determination of whether an individual restriction is reasonable. Such factors might include: (1) whether enforcement of the restriction will create an effective monopoly on medical services (either with respect to the area of specialty or the provision of healthcare services generally) within the restricted area; (2) whether the restriction would prevent the area from having a physician available at all times to handle medical emergencies; (3) whether patients will be able to continue a course of treatment without disruption; (4) whether the physician's termination was caused by the employer or by the physician herself; (5) whether the employer seeks to gain an unfair competitive advantage by enforcement of the restriction; and (6) whether employment opportunities for the physician exist outside the restricted area.

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practice's protectable interests were minimal compared to the patients' right to see the doctor of their choice, which was entitled to substantial protection); *Intermountain Eye & Laser Ctrs., PLLC v. Miller*, 127 P.3d 121, 132 (Idaho 2005) (declining to establish a categorical ban on physician non-competes but holding that the employer's protectable interest "is limited by those patients' interest in continuity of care and access to the health provider of their choice. . . . [T]he public interest in freedom of contract must be balanced against the public interest in upholding the highly personal relationship between the physician and his or her patient."). *But see, e.g., Owusu v. Hope Cancer Ctr. of Northwest Ohio, Inc.*, 2011 Ohio 4466 (Ohio Ct. App. 2011) ("Ohio courts have repeatedly rejected the argument that covenants are not enforceable against physicians solely because it impairs the patient's choice.").

<sup>28</sup> Ohio recently enacted legislation requiring healthcare entities to send "notice of the termination of a physician's employment to each patient who received physician services from the physician in the two-year period immediately preceding the date of employment termination." OHIO REV. CODE § 4731.228.

<sup>29</sup> See, e.g., TEX. BUS. & COM. CODE § 15.50 (providing that the restraints placed on physician non-competes do not "apply to a physician's business ownership interest in a licensed hospital or licensed ambulatory surgical center").

If any of the foregoing factors weigh against enforcement of the non-compete agreement, the court may rule that the entire non-compete agreement is null and void, or it may narrow the restriction and enforce it as modified.

### **Special Considerations Under Contract Law**

Even if an agreement meets the special requirements applicable to restrictive covenants, it must also comply with general principles of contract law. First, because employment agreements containing non-compete restrictions typically exceed one year in duration, such agreements should be in writing as required by applicable statutes of frauds. Second, the agreement must be supported by adequate consideration.<sup>30</sup> If a non-compete restriction is included as a provision in an employment contract, then in most cases, the initial offer of employment itself will be deemed adequate consideration for the restriction.<sup>31</sup> However, if the restriction is not included in the original employment agreement but it is added (by amendment or supplement) to an existing agreement with no additional benefit to the employee, then it may be unenforceable for lack of consideration. Some courts do not view “continued” at-will employment as sufficient consideration to justify enforcement of a non-compete agreement. Thus, an agreement that is not executed until after employment has begun might only be enforced if the employer provides additional compensation or benefits at the time of execution, or extends employment for a definite term.<sup>32</sup>

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<sup>30</sup> See, e.g., *Calhoun v. WHA Med. Clinic, PLLC*, 632 S.E.2d 563, 571 (N.C. Ct. App. 2006) (stating that “Under North Carolina law, covenants not to compete are valid and enforceable if: . . . (3) based on valuable consideration . . . This Court has held ‘the promise of new employment is valuable consideration and will support an otherwise valid covenant not to compete contained in the initial contract.’ However, ‘when the employment relationship is established before the covenant not to compete is executed, there must be separate consideration to support the covenant, such as a pay raise or other employment benefits or advantages for the employee.”) (internal citations omitted).

<sup>31</sup> Because an at-will employee can be discharged at any time and has no guarantee of continued employment, some states hold that an employer’s offer of at-will employment, without more, is not adequate consideration to support a restrictive covenant. See, e.g., *CRC-Evans Pipeline Int’l, Inc. v. Myers*, 927 S.W.2d 259, 263 (Tex. Ct. App. 1996); *Burgess v. Permian Court Reporters, Inc.*, 864 S.W.2d 725, 727-28 (Tex. Ct. App. 1993).

<sup>32</sup> See, e.g., *Diederich Ins. Agency, LLC v. Smith*, 952 N.E.2d 165, 168 (Ill. Ct. App. 2011); *Preston v. Marathon Oil Co.*, 2012 WY 66, 86 (Wyo. 2012); *CRC-Evans Pipeline Int’l, Inc. v. Myers*, 927 S.W.2d 259, 263 (Tex. Ct. App. 1996); *Burgess v. Permian Court Reporters, Inc.*, 864 S.W.2d 725, 727-28 (Tex. Ct. App. 1993); see also, e.g., *Freeman v. Duluth Clinic, Ltd.*, 334 N.W. 2d 626 (Minn. 1983); *Calhoun v.*

## Choice-of-Law and Choice-of-Venue Provisions

In general, contracting parties are permitted to choose the terms of enforcement for their agreement. Thus, many non-compete agreements will contain a provision stating that the agreement will be construed according to the laws of a state chosen by the parties (i.e., a “choice-of-law” provision), or that any disputes over the agreement will be litigated in a certain place (i.e., a “choice-of-venue” or “forum-selection” provision). Many employers, in seeking the best chances of enforcement, will insert choice-of-law and choice-of-venue provisions for a jurisdiction that treats non-compete agreements more favorably. Most states will enforce choice-of-law and forum-selection provisions as long as the chosen jurisdiction bears a reasonable relationship to the agreement. In practical terms, this means that the chosen jurisdiction will be the employer’s place of business, or more likely, where the employee is expected to be working. This issue arises most often when an employer that operates in more than one state enters into a non-compete agreement with an employee located in a state other than the employer’s primary place of business. In such circumstances, the employer may favor a clause requiring enforcement in the state that treats non-compete agreements most favorably, while the employee will favor a clause providing for enforcement in the state with more employee-friendly rules.

Employers should not assume, however, that a choice-of-law provision will permit them to avoid unfavorable state law in their efforts to enforce non-compete agreements. Many states that disfavor non-compete agreements also decline to enforce choice-of-law and venue provisions, when enforcement would conflict with the state’s public policy against non-competes.<sup>33</sup> This issue often leads to a so-called race to the courthouse between

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*WHA Med. Clinic, PLLC*, 632 S.E.2d 563, 571 (N.C. Ct. App. 2006). Of note, Senate Bill No. 353, introduced in the Hawaii Senate on January 18, 2013, would prohibit “any covenant or agreement that is executed by an employee or agent after the commencement of employment or term of agency as a condition of employment or continued employment.”

<sup>33</sup> See, e.g., *Bunker Hill Int’l, Ltd. v. Nationsbuilder Ins. Servs.*, 309 Ga. App. 503, 508 (Ga. Ct. App. 2011) (“It follows that the agreement’s forum-selection provision is void because its application would likely result in the enforcement by an Illinois court of at least one covenant in violation of Georgia public policy.”); *Bell v. Rimkus Consulting Grp., Inc. of La.*, 983 So.2d 927, 933 (La. Ct. App. 2008) (“Application of Texas Law to this dispute would thwart Louisiana’s longstanding public policy” to “prohibit or severely restrict non-competition provisions in employment agreements which curtail an employee’s right to earn his livelihood.”); *Beilfuss v. Huffly Corp.*, 685 N.W.2d 373 (Wis. Ct. App. 2004) (declining to enforce Ohio

employers seeking to enforce non-compete agreements and former employees seeking to have them declared unenforceable. If lawsuits arising from the same dispute are filed in different states, courts will generally defer to the state in which the lawsuit was filed first. This standard is commonly known as the “first-to-file” rule.

In many instances, parties can anticipate that a dispute over a non-compete agreement will arise. Often, an employer has sent a “cease-and-desist” letter alleging a violation and requesting that the former employee stop conducting business in alleged breach of the agreement. In such circumstances, the employer has an incentive to file suit in its forum of choice (typically the state in which the choice-of-law and choice-of-venue provisions apply) as soon as possible, so as not to be preempted by the former employee, who has a similar incentive to file a declaratory judgment action as soon as possible in his forum of choice (typically another state in which an employee resides or is conducting business) seeking to have the non-compete invalidated. Whichever party files suit first has a greater chance of having the non-compete agreement construed under the laws of his chosen state. These incentives tend to encourage parties to litigate when the enforceability of a non-compete agreement is at issue.

The winner of the race to the courthouse does not always prevail. Sometimes, a state may enforce an out-of-state forum-selection clause or choice-of-law provision despite its own strong policy against restrictive covenants.<sup>34</sup> In a somewhat surprising decision, the California Supreme Court refused to enjoin an employer’s pending action in Minnesota to enforce a non-compete agreement, despite the fact that the employee had filed suit first in California seeking a declaratory judgment to invalidate the agreement. California

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choice of law and choice of venue provisions, because enforcement would violate Wisconsin’s public policy controlling non-competes); *Frame v. Merrill Lynch*, 20 Cal. App. 3d 688, 673, 97 Cal. Rptr. 811 (Cal. Ct. App. 1971) (refusing to enforce New York choice-of-law clause contained in restrictive covenant agreement because to do so would violate California’s strong public policy against such covenants); *Wolff v. Protégé Sys., Inc.*, 506 S.E.2d 429, 434 (Ga. 1998) (declining to apply out-of-state law where such application would violate Georgia public policy).

<sup>34</sup> Although sometimes used interchangeably by courts and lawyers, parties should be careful to distinguish a choice-of-law provision, which provides for the body of law to be applied in interpreting an agreement, from a forum-selection clause, which establishes the location at which disputes will be litigated.

has a strong policy against the enforcement of non-compete agreements,<sup>35</sup> and had generally declined to enforce out-of-state choice-of-law and venue provisions.

However, in *Advanced Bionics, Inc. v. Medtronic*,<sup>36</sup> an employee, then located in Minnesota, entered into a non-compete agreement with his employer, also located in Minnesota. The agreement contained a provision requiring the agreement to be construed under Minnesota law, and required that all disputes arising under the agreement to be litigated in Minnesota. The employee then resigned after obtaining employment with a competitor in California. The employee and the new employer filed a declaratory judgment in California seeking to have the non-compete agreement invalidated. The former employer filed an action in Minnesota the next day, seeking enforcement of the agreement. After competing restraining orders had been issued in each court (with the California trial court going so far as to enjoin the Minnesota lawsuit), the California Supreme Court heard the employer's appeal of the California action. The supreme court reversed the lower court's decision to enjoin proceedings in Minnesota. Although the stated basis for its holding was simply that the California court could not enjoin an out-of-state proceeding, the supreme court recognized that there are circumstances in which a California court may not be entitled to take jurisdiction over a non-compete agreement executed between two non-residents. Concurring justices opined that despite California's strong public policy against enforcement of non-compete agreements, the choice of law factors weighed heavily in favor of Minnesota jurisdiction over the dispute: the parties to the contract were located in Minnesota, and the contract itself provided for the application of Minnesota law and that all disputes would be litigated in Minnesota. The California court's holding gives some indication that choice-of-law and venue provisions will be honored if one state's interest predominates.

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<sup>35</sup> CAL. BUS. & PROF. CODE § 16600 prohibits all employee non-compete agreements.

<sup>36</sup> 29 Cal. 4th 697 (Cal. 2002).

## Drafting Issues and Practice Tips

There are several common contract issues that take on greater significance in drafting and negotiating restrictive covenants. First, although strict prohibitions on competition are subject to special considerations as discussed above, parties may be able to obtain more leeway by the use of liquidated damages provisions or a “buy-out” requirement for a departing physician who wishes to set up a competing practice. For example, an employment agreement might provide that if a departing physician practices medicine within the same zip code as the employer within one year of leaving the practice, the physician must “buy” the practice’s goodwill by paying \$25,000. Where a departing physician is not strictly prohibited from competing but is instead required to make some stipulated payment if she chooses to compete, a court might be more willing to enforce such a provision.<sup>37</sup> In effect, the parties are permitted to agree ahead of time on the “price” of post-employment competition. Although liquidated damages clauses and buy-out options have essentially the same economic effect as an affirmative restriction (the departing physician pays some monetary penalty in the event that he competes with his former employer), buy-out clauses indicate a choice on the part of the departing physician, whereas liquidated damages provisions also specifically anticipate the possibility that the employee might engage in competition in the future.

As with all contracts, a liquidated damages provision in a non-compete agreement cannot constitute a penalty but must have some relationship to actual, anticipated damages.<sup>38</sup> Delaware and Colorado statutes, for example, limit enforcement of

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<sup>37</sup> See, e.g., *Sisters of Charity Health Sys., Inc.*, 21 A.3d 110 (Me. 2011) (citing *Brignull v. Albert*, 666 A.2d 82, 84 (Me. 1995)) (enforcing \$100,000 liquidated damages clause against physicians for breach of two-year, 25-mile restrictive covenant); *Hightower v. Midwest Orthopedic Inst., P.C.*, 782 N.E.2d 1006, 1012 (Ind. Ct. App. 2003) (suggesting that a non-compete would be enforceable that required the departing doctor to forfeit all claims to any accounts receivable of the employer if he competed during the restricted time period).

<sup>38</sup> See *Wichita Clinic, P.A. v. Louis*, 185 P.3d 946, 956 (Ct. App. Kan. 2008) (stating that “a liquidated damages provision will be enforced if (1) the amount stipulated is reasonable in view of the value of the subject matter of the contract and of the probable or presumptive loss if a party breaches the contract, and (2) the nature of the transaction is such that actual damages resulting from the breach would not be easily or readily determinable . . . . To recover liquidated damages, the amount must have some reasonable relationship to the actual injury caused by the breach; if there is no relationship, the provision is a penalty”). Of note, in Tennessee, a physician whose practice has been purchased by a hospital or hospital affiliate must be given an opportunity to “buy back the physician’s medical practice for the original purchase price of the practice, or, in the alternative, if the parties agree in writing, at a price not to exceed

physician non-competes, but expressly provide for reasonable liquidated damages provisions.<sup>39</sup>

Rather than relying on the limitations imposed by law, in negotiating an employment contract a physician employee should attempt to make sure that the restrictions on the right to practice medicine are as narrow as possible. For example, the physician might request an exception to the restrictive covenant if his employment is terminated without cause, on the grounds that the employee should not have his employment options limited through no fault of his own. Furthermore, when a physician already has an established patient base before entering into employment, she should attempt to preserve the right to continue seeing those patients after employment has ended.

An employer, on the other hand, will want to be able to enforce the contractual restrictions in as many circumstances as possible, regardless of the reason for the physician's departure from the practice. Terminations can occur for many reasons that do not rise to the level of "cause" for termination, as that term is typically defined. Those reasons could include unsatisfactory performance, personality issues, or other factors that would not necessarily diminish an employer's interest in enforcing a post-employment restriction. In fact, if a practice has to fire a physician, it would likely wish to rely on its negotiated right to restrict that physician's ability to engage in conduct potentially detrimental to the employer's business.<sup>40</sup>

In addition to the foregoing, employers drafting a non-compete agreement should include a provision authorizing a reviewing court to modify the post-employment restrictions to the extent the court finds them overly broad or unreasonable. In "reformation" or "rule of reason" states, this provision permits employers to save an otherwise unenforceable restriction and still obtain enforcement of a narrower one. Non-

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the fair market value of the practice at the time of the buy back, at which time any such restriction on practice shall be void." TENN. CODE. ANN. § 63-6-2014(A)(iii)(a).

<sup>39</sup> 6 DEL. CODE § 2707; COLO. REV. STAT. § 8-2-113(3).

<sup>40</sup> Restrictions on hiring away other employees are often treated more favorably by courts than categorical restrictions on practicing medicine in a certain area. Although restrictions on the solicitation of patients are subject to many of the same public policy concerns raised above, courts are generally more willing to enforce non-solicitation-of-patients provisions, on the ground that those restrictions are narrower in scope than a blanket non-compete. Consequently, many employment agreements contain non-solicitation provisions in addition to non-compete provisions.

competive agreements should also include a “severability” clause providing that if one clause or section of the agreement is found to be unenforceable, the parties intend for the remaining provisions to be enforced as written. This provision authorizes courts to “blue pencil” unreasonable provisions, and helps preserve the remainder of an employment agreement that might include many important provisions other than a restrictive covenant. However, even with these sorts of provisions, many states will simply refuse to enforce a restrictive covenant deemed unreasonable as a matter of law.<sup>41</sup>

Finally, employers should include in a non-compete agreement a provision stating that if the agreement is breached, the employer is entitled to recover the attorneys’ fees it incurs in seeking enforcement. As should be apparent to the reader by now, the issues surrounding enforcement of physician non-compete agreements are varied and complex. In addition, because of the irreparable harm associated with non-compete violations and the “race to the courthouse” that often occurs, parties often need significant legal help on the front end of a dispute. As a result, attorneys’ fees can accumulate quickly before the issue of enforcement is even resolved. An attorneys’ fees provision allows a party to recover those costs and also can provide a significant element of damages in the event the agreement is enforced.

An employee, on the other hand, should resist any “one-sided” attorneys’ fees provision. Employees should instead insist on a provision awarding attorneys’ fees to the “prevailing party” in any dispute over enforcement, or for a provision specifically providing attorneys’ fees to the employee in the event that the agreement is declared unenforceable or if the employer does not obtain a substantial portion of the relief requested in any suit for enforcement.

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<sup>41</sup> See *Valley Med. Specialists*, 982 P.2d at 1286.

## **Resources**

The appendix contains a table listing states with statutes specifically governing physician non-competes, statutes governing non-competes generally, and a summary of applicable case law in states with no such statutes. This information is current as of December 2012. Please note that case citations and blurbs represent only a sampling and are not intended to be exhaustive.

*See the appendix on the next page.*

**Appendix – Table of Statutes and Case Law by State**

**I. STATES WITH STATUTES SPECIFICALLY REGARDING PHYSICIAN RESTRICTIVE COVENANTS**

<b>STATE &amp; STATUTE</b>	<b>STATUTE LANGUAGE</b>
<p align="center"><b>Colorado</b> COLO. REV. STAT. § 8-2-113</p>	<p>Any covenant not to compete provision of an employment, partnership, or corporate agreement between physicians which restricts the right of a physician to practice medicine, as defined in section 12-36-106, C.R.S., upon termination of such agreement, shall be void; except that all other provisions of such an agreement enforceable at law, including provisions which require the payment of damages in an amount that is reasonably related to the injury suffered by reason of termination of the agreement, shall be enforceable. Provisions which require the payment of damages upon termination of the agreement may include, but not be limited to, damages related to competition.</p>
<p align="center"><b>Massachusetts</b> MASS. GEN. LAW CH. 112, § 12X</p>	<p>Any contract or agreement which creates or establishes the terms of a partnership, employment, or any other form of professional relationship with a physician registered to practice medicine pursuant to section two, which includes any restriction of the right of such physician to practice medicine in any geographic area for any period of time after the termination of such partnership, employment or professional relationship shall be void and unenforceable with respect to said restriction; provided, however, that nothing herein shall render void or unenforceable the remaining provisions of any such contract or agreement.</p>
<p align="center"><b>Delaware</b> 6 DEL. CODE ANN. § 2707</p>	<p>Any covenant not to compete provision of an employment, partnership or corporate agreement between and/or among physicians which restricts the right of a physician to practice medicine in a particular locale and/or for a defined period of time, upon the termination of the principal agreement of which the said provision is a part, shall be void; except that all other provisions of such an agreement shall be enforceable at law, including provisions which require the payment of damages in an amount that is reasonably related to the injury suffered by reason of termination of the principal agreement. Provisions which require the payment of damages upon termination of the principal agreement may include, but not be limited to, damages related to competition.</p>
<p align="center"><b>Tennessee</b> TENN. CODE ANN.</p>	<p>TENN. CODE ANN. § 63-1-148:</p>

STATE & STATUTE	STATUTE LANGUAGE
<p>§§ 63-1-148, 68-11-205, 63-6-204(f)(2)</p>	<p>(a) (1) A restriction on the right of an employed or contracted healthcare provider to practice the healthcare provider's profession upon termination or conclusion of the employment or contractual relationship shall be deemed reasonable if:</p> <p style="padding-left: 40px;">(A) The restriction is set forth in an employment agreement or other written document signed by the healthcare provider and the employing or contracting entity; and</p> <p style="padding-left: 40px;">(B) The duration of the restriction is two (2) years or less and either:</p> <p style="padding-left: 80px;">(i) The maximum allowable geographic restriction is the greater of:</p> <p style="padding-left: 120px;">(a) A ten-mile radius from the primary practice site of the healthcare provider while employed or contracted; or</p> <p style="padding-left: 120px;">(b) The county in which the primary practice of the healthcare provider while employed or contracted is located; or</p> <p style="padding-left: 80px;">(ii) There is no geographic restriction, but the healthcare provider is restricted from practicing the healthcare provider's profession at any facility at which the employing or contracting entity provided services while the healthcare provider was employed or contracted with the employing or contracting entity.</p> <p style="padding-left: 40px;">(b) An agreement entered into in conjunction with the purchase or sale of a healthcare provider's practice, or all or substantially all of the assets of the healthcare provider's practice, may restrict the healthcare provider's right to practice the healthcare provider's profession; provided, that the duration of the restriction and the allowable area of the restriction are reasonable under the circumstances. There shall be a rebuttable presumption that the duration and area of restriction agreed upon by the parties in such an agreement are reasonable.</p> <p style="padding-left: 40px;">(c) This section shall apply to healthcare providers licensed under chapters 3, 4, 5, 6, 8, 9 and 11 of this title.</p> <p style="padding-left: 40px;">(d) This section shall not apply to physicians who specialize in the practice of emergency medicine.</p> <p>TENN. CODE ANN. § 68-11-205:</p>

STATE & STATUTE	STATUTE LANGUAGE
	<p>(b) (2) Employing entities<sup>42</sup> shall not restrict the employed physician’s right to practice medicine upon the termination or conclusion of the employment relationship, except as allowed by § 63-6-204(f)(2).</p> <p>(3) Notwithstanding subdivision (b)(2), in the event that the employment contract with a physician employed independently of a bona fide practice purchase is terminated by the employing entity for reasons other than breach by the employee, any such restrictions shall be void.</p> <p>TENN. CODE ANN. § 63-6-204(f)(2):</p> <p>(f)(2) Employing entities<sup>43</sup> shall not restrict the employed physician’s right to practice medicine upon the termination or conclusion of the employment relationship, except as follows:</p> <p>(A) For physicians from whom the employing entity has made a bona fide purchase of the physician’s practice, the employing entity may impose reasonable geographic restrictions upon the employed physician’s practice; provided, that:</p> <ul style="list-style-type: none"> <li>(i) The maximum allowable area of the restriction is the greater of: <ul style="list-style-type: none"> <li>(a) The county in which the primary practice site is located; or</li> <li>(b) A ten (10) mile radius from the primary practice site;</li> </ul> </li> <li>(ii) The duration of the restriction is two (2) years or less, unless a longer period, not to exceed five (5) years, is determined by mutual agreement of the parties in writing to be necessary to comply with federal statutes, rules, regulations, or IRS revenue rulings or private letter rulings;</li> <li>(iii) Any employment agreement or medical practice sale agreement restricting the right of a physician to practice shall:</li> </ul>

<sup>42</sup> “Employing entity” means a hospital licensed under this chapter or title 33, chapter 2, or an affiliate of such an entity that employs one or more physicians. ‘Employing entity’ does not mean, however, a health maintenance organization licensed under title 56, chapter 32. TENN. CODE ANN. § 68-11-205(e)(4)(A).

<sup>43</sup> “Employing entity’ means a hospital licensed under title 68, chapter 11, or title 33, chapter 2, or an affiliate of such an entity, that employs one or more physicians. ‘Employing entity’ does not mean, however, a health maintenance organization licensed under title 56, chapter 32.” TENN CODE ANN. § 63-6-204(f)(7)(D).

STATE & STATUTE	STATUTE LANGUAGE
	<p>(a) Allow the physician to buy back the physician’s medical practice for the original purchase price of the practice, or, in the alternative, if the parties agree in writing, at a price not to exceed the fair market value of the practice at the time of the buy back, at which time any such restriction on practice shall be void; and</p> <p>(b) Not require that the physician give more than thirty-day’s notice to exercise the repurchase option; provided, that this provision shall not otherwise affect the contract termination notice requirements; and</p> <p>(iv) If the buy back provision is dependent upon a determination of the fair market value of the practice, the contract shall specify the method of determining fair market value by independent appraisal, in the event that the parties cannot agree as to the fair market value. The contract shall also include the following language:</p> <p>“In the event that the employing entity and the physician cannot agree upon the fair market value of the practice within ten (10) business days of the physician’s notice of intent to repurchase the practice, the physician may remove any contractual restrictions upon the physician’s practice by tendering to the employing entity the amount that was paid to the physician for the practice. The employing entity or the physician may then seek a determination of the fair market value of the practice by the independent appraisal method specified by contract.”</p> <p>(B) For physicians employed independently of a bona fide practice purchase, employing entities shall not restrict the employed physician’s right to practice medicine upon the termination or conclusion of the employment relationship, except as allowed by § 63-1-148 or any successor section.</p>
<p><b>Texas</b>  TEX. BUS. &amp; COM. CODE § 15.50(b)-(c); TEX. GOV’T CODE § 848.101(c)</p>	<p>TEX. BUS. &amp; COM. CODE § 15.50(b)-(c):</p> <p>(b) A covenant not to compete relating to the practice of medicine is enforceable against a person licensed as a physician by the Texas Medical Board if such covenant complies with the following requirements:</p> <p>(1) the covenant must:</p> <p>(A) not deny the physician access to a list of his patients whom he had seen or treated within one year of termination of the contract or employment;</p>

STATE & STATUTE	STATUTE LANGUAGE
	<p>(B) provide access to medical records of the physician’s patients upon authorization of the patient and any copies of medical records for a reasonable fee as established by the Texas State Board of Medical Examiners under Section 159.008, Occupations Code; and</p> <p>(C) provide that any access to a list of patients or to patients’ medical records after termination of the contract or employment shall not require such list or records to be provided in a format different than that by which such records are maintained except by mutual consent of the parties to the contract;</p> <p>(2) the covenant must provide for a buy out of the covenant by the physician at a reasonable price or, at the option of either party, as determined by a mutually agreed upon arbitrator or, in the case of an inability to agree, an arbitrator of the court whose decision shall be binding on the parties; and</p> <p>(3) the covenant must provide that the physician will not be prohibited from providing continuing care and treatment to a specific patient or patients during the course of an acute illness even after the contract or employment has been terminated.</p> <p>(c) Subsection (b) does not apply to a physician’s business ownership interest in a licensed hospital or licensed ambulatory surgical center.</p> <p>TEX. GOV’T CODE § 848.101(c):</p> <p>(c) A health care collaborative may not use a covenant not to compete to prohibit a physician from providing medical services or participating in another health care collaborative.</p>
<p><b>Virginia</b> VA. CODE § 54.1-111(D)</p>	<p>D. Nothing in this section, nor §§ 13.1-543, 13.1-1102, 54.1-2902, and 54.1-2929, shall be construed to prohibit or prevent any entity of a type listed in § 13.1-542.1 or 13.1-1101.1, which employs or contracts with an individual licensed by a health regulatory board, from (i) practicing or engaging in the practice of a profession or occupation for which such individual is licensed, (ii) providing or rendering professional services related thereto through the licensed individual, or (iii) having a legitimate interest in enforcing the terms of employment or its contract with the licensed individual. VA. CODE § 54.1-111(D).</p> <p>A covenant not to compete between an employer and an employee will be enforced if the covenant is narrowly written to protect the employer’s legitimate business interest, is not unduly burdensome on the employee’s ability to earn a</p>

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	<p>living, and does not violate public policy. Restrictive covenants are disfavored restraints on trade and, therefore, the employer bears the burden of proof and any ambiguities in the contract will be construed in favor of the employee. <i>Parikh v. Family Care Ctr., Inc.</i>, 273 Va. 284, 288 (Va. 2007).</p>

**II. STATES WITH STATUTES GENERALLY CONCERNING EMPLOYEE RESTRICTIVE COVENANTS**

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<p align="center"><b>Alabama</b> ALA. CODE § 8-1-1</p>	<p>Every contract by which anyone is restrained from exercising a lawful profession, trade, or business of any kind otherwise than is provided by this section is to that extent void. ALA. CODE § 8-1-1(a).</p> <p><b>Exceptions:</b> (1) sale of the good will of a business; (2) in connection with an employment relationship; or (3) upon or in anticipation of dissolution of the partnership. ALA. CODE § 8-1-1(b)–(c).</p>	<p>Section 8-1-1(a) places a broad general ban on every contract that restrains anyone from exercising a lawful profession. There are only “two exceptions [Sections 8-1-1(b) and (c)] to this otherwise uncompromising provision.” <i>Walker Reg’l Med. Ctr., Inc. v. McDonald</i>, 775 So. 2d 169, 171 (Ala. 2000).</p> <p>The practice of medicine is a profession under the terms of this statute. However, the inclusion of a covenant not to compete in a contract does not necessarily render void the entire contract. The statute itself provides that a contract containing a covenant not to compete “is to that extent void.” The contract remains otherwise valid. Therefore, the entire agreement in this case was not made</p>

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		<p>void by the fact that it included the disputed clause. <i>Salisbury v. Semple</i>, 565 So. 2d 234, 236 (Ala. 1990).</p> <p>Not every contract that imposes a restraint on trade or competition is void. The fact that a contract may affect a few or several individuals engaged in a like business does not render it void under ALA. CODE § 8-1-1 (1975). Every contract to some extent injures other parties; that is, it necessarily prevents others from making the sale or sales consummated by such contract. The court held that the fact that Southeast's physicians are denied staff privileges at certain facilities did not restrain them from practicing their profession in violation of § 8-1-1, ALA. CODE 1975. <i>Southeast Cancer Network, P.C. v. DCH Healthcare Auth., Inc.</i>, 869 So. 2d 452, 458 (Ala. 2003).</p> <p>It is well settled in Alabama that to the extent a contract restrains the practice of a lawful profession, it is void, under § 8-1-1(a), as against public policy. There is universal agreement that the law looks with disfavor upon contracts that restrain employment. A contract that requires the payment of damages in the event one of the contracting parties competes with the other is a contract "by which . . . one is restrained from exercising a lawful profession." <i>Anniston Urologic Assocs., P.C. v. Kline</i>, 689 So. 2d 54, 57 (Ala. 1997).</p>

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<p><b>California</b> CAL. BUS. &amp; PROF. CODE §§ 16600 – 16602.5</p>	<p>Except as provided in this chapter, every contract by which anyone is restrained from engaging in a lawful profession, trade, or business of any kind is to that extent void. CAL. BUS. &amp; PROF. CODE § 16600.</p> <p><b>Exceptions:</b> (1) sale of goodwill or corporate shares; (2) the dissolution of the partnership or dissociation of the partner from the partnership; or (3) agreements by members of LLCs not to carry on similar business within specified locality so long as any other member of the limited liability company carries on a like business. CAL. BUS. &amp; PROF. CODE §§ 16600–16602.5.</p>	<p>CAL. BUS. &amp; PROF. CODE § 16600 presently sets out the general rule in California—covenants not to compete are void. This provision is an expression of public policy to ensure that every citizen shall retain the right to pursue any lawful employment and enterprise of their choice. CAL. BUS. &amp; PROF. CODE §§ 16600 and 16601 do not exclude professional medical corporations. <i>Hill Med. Corp. v. Wycoff</i>, 2001 Cal. App. LEXIS 58 (Cal. App. 2d Dist. 2001).</p> <p>In <i>Hill Med. Corp.</i>, the court concluded that the covenant not to compete at issue was void and unenforceable. As defendant’s professional practice consisted solely of providing radiology and associated medical imaging services, the noncompetition provision effectively excluded him from the practice of his profession and was void. Substantial evidence supported the trial court’s finding that the covenant not to compete did not fall within the exception of § 16601. This was not a situation in which an otherwise valid covenant covered an unreasonably large geographical area or was unreasonably long in duration. Since there had been no compensation for goodwill, it was impossible to re-write this void covenant. To re-write the covenant would have undermined California’s public policy of open competition as set forth in § 16600. <i>Id.</i></p>
<p><b>District of Columbia</b></p>	<p>Every contract, combination in the form of a trust or otherwise, or</p>	<p><i>Deutsch v. Barsky</i>, 795 A.2d 669, 674 (D.C. 2002) (holding that covenant not</p>

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D.C. CODE § 28-4502	conspiracy in restraint of trade or commerce all or any part of which is within the District of Columbia is declared to be illegal.	to compete between dentists was not a <i>per se</i> violation of public policy; restraint must be no greater than necessary to protect a legitimate business interest); <i>Erikson v. Hawley</i> , 56 App. D.C. 268, 12 F.2d 491 (D.C. Cir. 1926) (upholding preliminary injunction restraining orthodontist from violating restrictive covenant).
<p style="text-align: center;"><b>Florida</b> FLA. STAT. § 542.335</p>	Notwithstanding s. 542.18 and subsection (2), enforcement of contracts that restrict or prohibit competition during or after the term of restrictive covenants, so long as such contracts are reasonable in time, area, and line of business, is not prohibited.	<p>So long as the covenant not to compete fits within the parameters of FLA. STAT. ch. 542.335 (1999), it may be enforced by the injunctive power of the courts. One applying for a temporary injunction to enforce a noncompete agreement must show, among other things, a likelihood of success on the merits. The person against whom the injunction is sought may offer as a defense that the moving party has materially breached the contract. If the employee introduces evidence of the employer's breach, as the employee is entitled to do pursuant to FLA. STAT. ch. 542.335(g)3 (1999), the employer must then demonstrate that it is likely to succeed on the merits of the proffered defense, as well. <i>Supinski v. Omni Healthcare</i>, 853 So. 2d 526 (Fla. Dist. Ct. App. 5th Dist. 2003).</p> <p>Where a non-competition restraint is neither six months or less, nor more than two years in duration, it is neither presumed reasonable nor unreasonable. FLA. STAT. ch. 542.335(1)(h) (2003) directs that a court shall construe a restrictive covenant in favor of providing</p>

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		<p>reasonable protection to all legitimate business interests established by the person seeking enforcement. <i>Southernmost Foot &amp; Ankle Specialists v. Torregrosa</i>, 891 So. 2d 591 (Fla. Dist. Ct. App. 3d Dist. 2004).</p> <p>In Florida, the enforceability of restrictive covenants is controlled in large part by FLA. STAT. § 542.335 (2004). Under § 542.335, a restrictive covenant is not enforceable unless supported by a legitimate business interest. If the party seeking to enforce the restrictive covenant pleads and proves a legitimate business interest, it must also then demonstrate that the contractually specified restraint is reasonably necessary to protect its identified business interest. With respect to patients of a medical practice, FLA. STAT. § 542.335 (2004) expressly defines “legitimate business interest” to include only those specific prospective or existing patients with whom a party has a substantial relationship. <i>Florida Hematology &amp; Oncology v. Tummala</i>, 927 So. 2d 135 (Fla. Dist. Ct. App. 5th Dist. 2006).</p>
<p><b>Georgia</b> GA. CONST. Art. III, Sec. VI, Par. V(c)1; GA. CODE ANN. § 13-8-50 et seq.</p>	<p><i>In 2010, Georgia voted to amend its Constitution which forbade the state’s legislature, the General Assembly, from authorizing restrictive covenants. GA. CONST. Art. III, Sec. VI, Par. V(c)(1)). The amendment granted the General Assembly the power to enact laws providing for the enforcement of agreements restricting or regulating certain competitive activities. As a result of the amendment, the General Assembly enacted the Georgia</i></p>	<p>The RCA only applies to restrictive covenant agreements entered into after May 11, 2011. <i>Becham v. Crosslink Orthopaedics</i>, 482 F. App’x 387 (11th Cir. 2011).</p> <p>Prior to the enactment of the RCA, Georgia courts generally treated restrictive covenants in physicians’ employment contracts like such clauses in other employment contracts—if they were sufficiently</p>

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	<p><i>Restrictive Covenants Act (“RCA”).</i></p> <p>(a) Enforcement of contracts that restrict competition during the term of a restrictive covenant, so long as such restrictions are reasonable in time, geographic area, and scope of prohibited activities, shall be permitted. However, enforcement of contracts that restrict competition after the term of employment [as distinguished from a customer nonsolicitation provision or a nondisclosure of confidential information provision in Ga. Code. Ann. § 13-8-53(b) and (e), respectively] shall not be permitted against any employee who does not, in the course of his or her employment:</p> <p>(1) Customarily and regularly solicit for the employer customers or prospective customers;</p> <p>(2) Customarily and regularly engage in making sales or obtaining orders or contracts for products or services to be performed by others;</p> <p>(3) Perform the following duties:</p> <p>(A) Have a primary duty of managing the enterprise in which the employee is employed or of a customarily recognized department or subdivision thereof;</p> <p>(B) Customarily and regularly direct the work of two or more other employees; and</p> <p>(C) Have the authority to hire or fire other employees or have particular weight given to suggestions and</p>	<p>limited and reasonable, considering the interest to be protected and the effects on both parties to the contract, they were upheld. See <i>Pittman v. Coosa Med. Grp., P.C.</i>, 300 Ga. App. 529 (Ga. Ct. App. 2009); see also <i>Peachtree Fayette Women’s Specialists, LLC v. Turner</i>, 699 S.E.2d 69 (Ga. Ct. App. 2010) (declining to enforce a restrictive covenant that prohibited physician from providing obstetric and gynecological services in a geographic area where she had never worked during her employment and where her former employer did not maintain an office); <i>Keeley v. Cardiovascular Surgical Assocs.</i>, 510 S.E.2d 880 (Ga. Ct. App. 1999) (finding that in order to be enforceable, a non-compete covenant must be reasonably necessary to protect the interests of the party in whose favor it is imposed); <i>Augusta Eye Ctr. v. Duplessie</i>, 506 S.E.2d 242 (Ga. Ct. App. 1998) (finding that one-year duration of a non-competition clause is well within the time frame permitted by law).</p>

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	<p>recommendations as to the hiring, firing, advancement, promotion, or any other change of status of other employees; or</p> <p>(4) Perform the duties of a key employee or of a professional.</p> <p>(b) Notwithstanding any other provision of this chapter, an employee may agree in writing for the benefit of an employer to refrain, for a stated period of time following termination, from soliciting, or attempting to solicit, directly or by assisting others, any business from any of such employer's customers, including actively seeking prospective customers, with whom the employee had material contact during his or her employment for purposes of providing products or services that are competitive with those provided by the employer's business. No express reference to geographic area or the types of products or services considered to be competitive shall be required in order for the restraint to be enforceable. Any reference to a prohibition against "soliciting or attempting to solicit business from customers" or similar language shall be adequate for such purpose and narrowly construed to apply only to: (1) such of the employer's customers, including actively sought prospective customers, with whom the employee had material contact; and (2) products or services that are competitive with those provided by the employer's business.</p> <p>(e) Nothing in this article shall be construed to limit the period of time for</p>	

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	<p>which a party may agree to maintain information as confidential or as a trade secret, or to limit the geographic area within which such information must be kept confidential or as a trade secret, for so long as the information or material remains confidential or a trade secret, as applicable.</p>	
<p><b>Hawaii</b> HAW. REV. STAT. § 480-4(c)</p>	<p>It shall be lawful for a person to enter into any of the following restrictive covenants or agreements ancillary to a legitimate purpose not violative of this chapter, unless the effect thereof may be substantially to lessen competition or to tend to create a monopoly in any line of commerce in any section of the State:</p> <p>(1) A covenant or agreement by the transferor of a business not to compete within a reasonable area and within a reasonable period of time in connection with the sale of the business;</p> <p>(2) A covenant or agreement between partners not to compete with the partnership within a reasonable area and for a reasonable period of time upon the withdrawal of a partner from the partnership;</p> <p>(3) A covenant or agreement of the lessee to be restricted in the use of the leased premises to certain business or agricultural uses, or covenant or agreement of the lessee to be restricted in the use of the leased premises to certain business uses and of the lessor to be restricted in the use of premises reasonably proximate to</p>	<p><i>Technicolor, Inc. v. Traeger</i>, 57 Haw. 113, 551 P.2d 163 (1976) (holding that a restrictive covenant is “not reasonable” if (1) it is greater than required for the protection of the employer; (2) it imposes undue hardship on the person being restricted; or (3) injury to the public outweighs the benefit to the employer); <i>UARCO, Inc. v. Lam.</i>, 18 F. Supp. 2d 1116, 1121 (D. Haw. 1998) (“[F]or restrictive covenants that are not <i>per se</i> illegal, courts should determine as a matter of law whether a restrictive covenant is reasonable. ‘In making this analysis, the court must examine such factors as geographical scope, length of time, and breadth of the restriction placed on a given activity.’”).</p>

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	<p>any such leased premises to certain business uses;</p> <p>(4) A covenant or agreement by an employee or agent not to use the trade secrets of the employer or principal in competition with the employee's or agent's employer or principal, during the term of the agency or thereafter, or after the termination of employment, within such time as may be reasonably necessary for the protection of the employer or principal, without imposing undue hardship on the employee or agent.</p> <p><i>**Pending Legislation:</i> S.B. No. 353, introduced in the Hawaii Senate on January 18, 2013, would prohibit "any covenant or agreement that is executed by an employee or agent after the commencement of employment or term of agency as a condition of employment or continued employment."</p>	
<p><b>Idaho</b> IDAHO CODE § 44-2701 et seq.</p>	<p>A key employee or key independent contractor may enter into a written agreement or covenant that protects the employer's legitimate business interests and prohibits the key employee or key independent contractor from engaging in employment or a line of business that is in direct competition with the employer's business after termination of employment, and the same shall be enforceable, if the agreement or covenant is reasonable as to its duration, geographical area, type of employment or line of business, and does not impose a greater restraint</p>	<p>The Idaho Supreme Court addressed physician non-competes in <i>Intermountain Eye &amp; Laser Ctrs. v. Miller</i>, 127 P.3d 121 (Idaho 2005), which was decided prior to the enactment of IDAHO CODE § 44-2701 et seq. (2008). In <i>Intermountain Eye &amp; Laser Centers</i>, the court found:</p> <p>A non-competition provision must be no more restrictive than necessary to protect the interest or interests at issue. Non-competitive activity is generally not protectable, at least in the medical profession. When considering the degree to which a</p>

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	<p>than is reasonably necessary to protect the employer's legitimate business interests. IDAHO CODE § 44-2701.</p> <p>"Key employees" and "key independent contractors" shall include those employees or independent contractors who, by reason of the employer's investment of time, money, trust, exposure to the public, or exposure to technologies, intellectual property, business plans, business processes and methods of operation, customers, vendors or other business relationships during the course of employment, have gained a high level of inside knowledge, influence, credibility, notoriety, fame, reputation or public persona as a representative or spokesperson of the employer, and as a result, have the ability to harm or threaten an employer's legitimate business interests. IDAHO CODE § 44-2702(1).</p>	<p>particular non-compete provision affects the "public interest," courts focus on both the general public's interest in access to care, and the patients' interests in continuity of care and access to the physician of their choice. <i>Id.</i></p> <p>Medical services firms, particularly those providing specialized care, generally have protectable interests in referral sources. <i>Id.</i></p> <p>Doctor-patient relationships are different from most other relationships between service providers and their customers. While the public has a strong interest in freedom of contract, that interest must be balanced against the public interest in upholding the highly personal relationship between the physician and his or her patient. While doctor-patient relationships are somewhat analogous to attorney-client relationships, requiring closer scrutiny than other consumer-provider relationships, regulating the practice of law is the business of the court; regulating the practice of medicine is not. For that reason, an outright ban is unwise. Instead, the reasonableness of a particular non-compete provision should be left to the finder of fact in light of the interests involved. <i>Id.</i></p>
<p><b>Louisiana</b> LA. REV. STAT. ANN. § 23:921(c)</p>	<p>Any person, including a corporation and the individual shareholders of such corporation, who is employed as an agent, servant, or employee may agree with his employer to refrain from carrying on or engaging in a business similar to that of the employer and/or</p>	<p>In <i>Kimball v. Anesthesia Specialists of Baton Rouge, Inc.</i>, 809 So. 2d 405 (La. Ct. App. 2001), the plaintiff, a physician, former employee, and shareholder of an incorporated anesthesiology provider, filed suit against defendants, the corporation</p>

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	<p>from soliciting customers of the employer within a specified parish or parishes, municipality or municipalities, or parts thereof, so long as the employer carries on a like business therein, not to exceed a period of two years from termination of employment.</p>	<p>and the individual doctors/shareholders of the corporation, following his termination from employment. The court of appeals found that the non-compete clause of plaintiff's employment contract was unenforceable as it failed to conform to LA. REV. STAT. ANN. § 23:921(C) by not specifying geographic restrictions.</p> <p><i>See also West Carroll Health Sys., LLC v. Tilmon</i>, 92 So. 3d 1131 (La. App. Ct. 2012) (reversing trial court's enforcement of a noncompetition agreement against a physician's assistant that extended to a named parish and "other surrounding parishes" on the basis that the geographic restriction was too broad).</p> <p><i>Regional Urology, L.L.C. v. Price</i>, 966 So.2d 1087 (La. Ct. App. 2007) (finding that public policy arguments regarding patient choice would not trump a non-compete that complies with LA. REV. STAT. ANN. § 23:921(c)).</p>
<p><b>Michigan</b> MICH. COMP. LAWS § 445.774a</p>	<p>An employer may obtain from an employee an agreement or covenant which protects an employer's reasonable competitive business interests and expressly prohibits an employee from engaging in employment or a line of business after termination of employment if the agreement or covenant is reasonable as to its duration, geographical area, and the type of employment or line of business. To the extent any such agreement or covenant is found to be unreasonable in any respect, a court</p>	<p>In <i>St. Clair Med., P.C. v. Borgiel</i>, 715 N.W.2d 914 (Mich. Ct. App. 2006), the employee signed a contract that contained a restrictive covenant. The covenant stated that the employee was prohibited from practicing medicine within a seven mile radius of two clinics. After the employee left, he allegedly breached the agreement by seeing patients within this radius. The employer then filed a breach of contract action, which sought liquidated damages under the contract. The trial court granted</p>

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	<p>may limit the agreement to render it reasonable in light of the circumstances in which it was made and specifically enforce the agreement as limited.</p>	<p>summary disposition to the employer, and the employee sought review. In affirming, the appellate court determined that the covenant protected the employer from unfair competition by the employee and therefore protected a reasonable competitive business interest, as required by MICH. COMP. LAWS § 445.774a. The restrictive covenant was modest in geographical scope and was not unreasonable in relation to the employer's competitive business interests. <i>Id.</i></p>
<p><b>Minnesota</b> MINN. STAT. § 325D.51</p>	<p>A contract, combination, or conspiracy between two or more persons in unreasonable restraint of trade or commerce is unlawful.</p>	<p>In <i>Kari Family Clinic of Chiropractic v. Bohnen</i>, 349 N.W.2d 868 (Minn. Ct. App. 1984), a chiropractor signed an employment agreement with the clinic, three months after he began full time employment. He stated that he signed the contract because he understood he would be fired if he did not. Following a disagreement between the parties, the chiropractor left his employment and began practicing within 20 miles of the clinic. The clinic sought an injunction prohibiting the chiropractor from practicing, alleging that he violated a covenant not to compete contained in the parties' employment agreement. The trial court denied the motion for an injunction, and the clinic appealed. The court affirmed, finding that there were no facts to support a temporary injunction because the covenant was clearly not supported by adequate consideration or by additional consideration for the non-compete agreement as required by Minnesota law.</p>

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		<p>Enforcement of restrictive covenants against professional employees is based on the relationship that is created, as for example, between a doctor and his patients. Once this relationship is formed, it is beyond question that a doctor's patients will seek his aid regardless of this doctor's employment situation. <i>Saliterman v. Finney</i>, 361 N.W.2d 175, 177 (Minn. Ct. App. 1985).</p>
<p><b>Missouri</b> MO. REV. STAT. § 431.202</p>	<p>1. A reasonable covenant in writing promising not to solicit, recruit, hire or otherwise interfere with the employment of one or more employees shall be enforceable and not a restraint of trade pursuant to subsection 1 of section 416.031, RSMo, if:</p> <p>(1) Between two or more corporations or other business entities seeking to preserve workforce stability (which shall be deemed to be among the protectable interests of each corporation or business entity) during, and for a reasonable period following, negotiations between such corporations or entities for the acquisition of all or a part of one or more of such corporations or entities;</p> <p>(2) Between two or more corporations or business entities engaged in a joint venture or other legally permissible business arrangement where such covenant seeks to protect against possible misuse of confidential or trade secret business information shared or to be shared between or among such</p>	<p>Generally, because covenants not to compete are considered restraints on trade, they are presumptively void and are enforceable only to the extent that they are demonstratively reasonable. <i>Armstrong v. Cape Girardeau Physician Assocs.</i>, 49 S.W.3d 821 (Mo. Ct. App. 2001).</p> <p>The court has held that a permissible purpose of a non-compete agreement is to protect an employer from unfair competition by a former employee without imposing unreasonable restraint on the latter. An employer may only seek to protect certain narrowly defined and well-recognized interests, namely its trade secrets and its stock in customers. The enforcing party must also show that the agreement is reasonable in scope, both as to place and as to time. The burden of demonstrating the covenant's validity is on the party seeking to enforce it. <i>Id.</i></p> <p>Missouri has no <i>per se</i> rule against enforcing covenants not to compete between medical practitioners. <i>Id.</i> (summarizing Missouri case law</p>

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	<p>corporations or entities;</p> <p>(3) Between an employer and one or more employees seeking on the part of the employer to protect:</p> <p>(a) Confidential or trade secret business information; or</p> <p>(b) Customer or supplier relationships, goodwill or loyalty, which shall be deemed to be among the protectable interests of the employer; or</p> <p>(4) Between an employer and one or more employees, notwithstanding the absence of the protectable interests described in subdivision (3) of this subsection, so long as such covenant does not continue for more than one year following the employee's employment; provided, however, that this subdivision shall not apply to covenants signed by employees who provide only secretarial or clerical services.</p> <p>2. Whether a covenant covered by this section is reasonable shall be determined based upon the facts and circumstances pertaining to such covenant, but a covenant covered exclusively by subdivision (3) or (4) of subsection 1 of this section shall be conclusively presumed to be reasonable if its postemployment duration is no more than one year.</p> <p>3. Nothing in subdivision (3) or (4) of subsection 1 of this section is intended to create, or to affect the validity or enforceability of, employer-employee</p>	<p>addressing physician non-compete agreements).</p>

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	<p>covenants not to compete.</p> <p>4. Nothing in this section shall preclude a covenant described in subsection 1 of this section from being enforceable in circumstances other than those described in subdivisions (1) to (4) of subsection 1 of this section, where such covenant is reasonably necessary to protect a party's legally permissible business interests.</p> <p>5. Nothing is this section shall be construed to limit an employee's ability to seek or accept employment with another employer immediately upon, or at any time subsequent to, termination of employment, whether said termination was voluntary or non-voluntary.</p> <p>6. This section shall have retrospective as well as prospective effect.</p>	
<p><b>Montana</b> MONT. CODE ANN. §§ 28-2-703, 28-2-704, 28-2-705</p>	<p>Any contract, by which anyone is restrained from exercising a lawful profession, trade, or business of any kind, otherwise than is provided for by 28-2-704 or 28-2-705, is to that extent void. MONT. CODE ANN. § 28-2-703.</p> <p><b>Exceptions:</b> (1) sale of goodwill of business; (2) dissolution of partnership. MONT. CODE ANN. §§ 28-2-704, 28-2-705.</p>	<p>In <i>Western Mont. Clinic v. Jacobson</i>, 544 P.2d 807 (Mont. 1976), the court declared a covenant not to compete incident to an orthopedic surgeon's employment contract unenforceable because it violated Montana statute prohibiting contracts restraining the exercise of a lawful profession.</p> <p><i>See also Mungas v. Great Falls Clinic, LLP</i>, 221 P.3d 1230 (Mont. 2009) (finding that clause in partnership agreement providing for the forfeiture of accounts receivable and certain other capital account amounts if partner-physician left the medical clinic and practiced in the same county or</p>

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		contiguous counties within three years did not constitute the sale of goodwill of a business and thus § 28-2-704 did not apply).
<p style="text-align: center;"><b>Nebraska</b> NEB. REV. STAT. § 59-801</p>	<p>Every contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce, within this state, is hereby declared to be illegal. Every person who shall make any such contract or engage in any such combination or conspiracy shall be deemed guilty of a Class IV felony.</p>	<p>A licensed physician who purchases the good will and other property of a sanitarium and agrees not to practice his profession within a radius of 150 miles may be enjoined from violating his restrictive agreement, when that remedy is essential to the protection of the seller's contractual rights. <i>Tarry v. Johnston</i>, 208 N.W. 615 (Neb. 1926).</p> <p>A licensed physician who purchases the good will and other property of a sanitarium may bind himself by an agreement not to practice his profession within a radius of 150 miles if the restriction is necessary for the protection of the seller's contractual rights and does not injure the public by restraining trade. <i>Id.</i></p> <p>A contract which fails to specify in direct terms the time limit of restraint on a physician's right to practice medicine in a restricted area is not for that reason void, a reasonable time being implied. <i>Id.</i></p> <p><i>Akkad v. Nebraska Heart Inst., P.C.</i>, 2012 Neb. App. LEXIS 82 (Neb. Ct. App. Apr. 10, 2012) (finding that depriving the state of Nebraska of the services of a highly specialized cardiologist was injurious to the public thus non-compete that prevented cardiologist from working anywhere in the state, regardless of how he secured patients, was overbroad).</p>

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<p><b>New Hampshire</b>  N.H. REV. STAT.  ANN. § 275:70</p>	<p>Prior to or concurrent with making an offer of change in job classification or an offer of employment, every employer shall provide a copy of any non-compete or non-piracy agreement that is part of the employment agreement to the employee or potential employee. Any contract that is not in compliance with this section shall be void and unenforceable.</p>	<p>Covenants not to compete run for various durations. Given that restraints on competition must be narrowly tailored as to duration, it is likely that the issues raised by a covenant not to compete between a physician and a professional association will recur but continue to evade review. The questions as to the validity of such a covenant as a matter of law and public policy warrant attention because the issue of access to physicians greatly affects the public at large. <i>Concord Orthopedics v. Forbes</i>, 702 A.2d 1273 (N.H. 1997).</p> <p>New Hampshire courts uphold a limited restraint if reasonable as applied to the particular circumstances of the parties. A restraint on employment is reasonable only if it is no greater than necessary for the protection of the employer's legitimate interest, does not impose undue hardship on the employee, and is not injurious to the public interest. If the covenant fails one prong, the covenant is unenforceable. The traditional test of reasonableness to determine whether a covenant not to compete is enforceable applies to covenants between physicians and their employers. The test sufficiently protects the public interest; there is no reason to declare such covenants void <i>per se</i> or enunciate a new test applicable to physicians. <i>Id.</i></p> <p>Covenants not to compete are valid only to the extent that they prevent employees from appropriating assets</p>

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		<p>that are legitimately the employer's. As applied to new patients the noncompetition provision was overbroad. While a professional medical partnership possesses a legitimate business interest in prohibiting a physician who had been its employee from competing for existing patients, no such legitimate interest exists as to new patients. <i>Id.</i></p> <p>A restraint on competition must be narrowly tailored in both geography and duration to protect the employer's legitimate interest in its goodwill. The geographic limits imposed on an employee by a covenant not to compete generally must be limited to that area in which the employee had client contact, as that is usually the extent of the area in which the employer's goodwill is subject to appropriation by the employee. A covenant not to compete should last no longer than necessary for the employees' replacements to have a reasonable opportunity to demonstrate their effectiveness to customers. A court, when evaluating duration, must consider the time necessary to obliterate in the minds of the public the association between the identity of the physician with his employer's practice. <i>Id.</i></p>
<p><b>Nevada</b> NEV. REV. STAT. § 613.200</p>	<p>1. Except as otherwise provided in this section, any person, association, company or corporation within this state, or any agent or officer on behalf of the person, association, company or corporation, who willfully does anything intended to prevent any</p>	<p>In <i>Hansen v. Edwards</i>, 426 P.2d 792 (Nev. 1967), a podiatrist commenced an action for injunctive relief and damages based upon a breach of a post-employment covenant not to engage in the practice of surgical chiropody within 100 miles of the city.</p>

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	<p>person who for any cause left or was discharged from his or its employ from obtaining employment elsewhere in this state is guilty of a gross misdemeanor and shall be punished by a fine of not more than \$5,000.</p> <p>2. In addition to any other remedy or penalty, the Labor Commissioner may impose against each culpable party an administrative penalty of not more than \$5,000 for each such violation.</p> <p>3. If a fine or an administrative penalty is imposed pursuant to this section, the costs of the proceeding, including investigative costs and attorney's fees, may be recovered by the Labor Commissioner.</p> <p>4. The provisions of this section do not prohibit a person, association, company, corporation, agent or officer from negotiating, executing and enforcing an agreement with an employee of the person, association, company or corporation which, upon termination of the employment, prohibits the employee from:</p> <p>(a) Pursuing a similar vocation in competition with or becoming employed by a competitor of the person, association, company or corporation; or</p> <p>(b) Disclosing any trade secrets, business methods, lists of customers, secret formulas or processes or confidential information learned or obtained during the course of his employment with the person, association, company or corporation,</p>	<p>The employee terminated the contract and opened his own office and acquired approximately 180 of podiatrist's customers. The court held that the podiatrist should have the opportunity to recoup his loss and, in addition, to readjust his office routine, which had previously been geared to the employee's association. The court held that a review of the record showed that the covenant was valid, and the court modified it to make it reasonable. The court held that the circumstances warranted a confinement of the area of restraint to the boundary limits of the city and a time interval of one year commencing on the date of the injunction. The court dismissed the arguments of the employee that NEV. REV. STAT. § 613.200 prohibited the covenant, holding that the statute concerned only persons seeking employment with someone else, not those who intended self-employment.</p> <p>Where the public interest is not directly involved, the test usually stated for determining the validity of the covenant as written is whether it imposes upon the employee any greater restraint than is reasonably necessary to protect the business and good will of the employer. A restraint of trade is unreasonable, in the absence of statutory authorization or dominant social or economic justification, if it is greater than is required for the protection of the person for whose benefit the restraint is imposed or imposes undue hardship upon the person restricted. The period of time during which the restraint is to</p>

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	<p>if the agreement is supported by valuable consideration and is otherwise reasonable in its scope and duration.</p>	<p>last and the territory that is included are important factors to be considered in determining the reasonableness of the agreement. <i>Id.</i> at 793; see also <i>Ellis v. McDaniel</i>, 596 P.2d 222 (Nev. 1979) (noting that the medical profession is not exempt from a restrictive covenant provided that the covenant meets the test of reasonableness).</p>
<p><b>North Carolina</b> N.C. GEN. STAT. § 75-4</p>	<p>No contract or agreement hereafter made, limiting the rights of any person to do business anywhere in the State of North Carolina shall be enforceable unless such agreement is in writing duly signed by the party who agrees not to enter into any such business within such territory: Provided, nothing herein shall be construed to legalize any contract or agreement not to enter into business in the State of North Carolina, or at any point in the State of North Carolina, which contract is now illegal, or which contract is made illegal by any other section of this Chapter.</p>	<p>Under North Carolina law, covenants not to compete are valid and enforceable if: (1) in writing; (2) made part of a contract of employment; (3) based on valuable consideration; (4) reasonable both as to time and territory; and (5) not against public policy. <i>Calhoun v. WHA Med. Clinic</i>, 632 S.E.2d 563, 571 (N.C. Ct. App. 2006).</p> <p>North Carolina courts have long held covenants not to compete are not <i>per se</i> unenforceable, and medical doctors are by no means immune from such agreements. <i>Id.</i></p>
<p><b>North Dakota</b> N.D. CENT. CODE § 9-08-06</p>	<p>Every contract by which anyone is restrained from exercising a lawful profession, trade, or business of any kind is to that extent void.</p> <p><b>Exceptions:</b> (1) one who sells the goodwill of a business; (2) partners, upon or in anticipation of a dissolution of the partnership.</p>	<p><i>Spectrum Emergency Care, Inc. v. St. Joseph's Hosp. &amp; Health Ctr.</i>, 479 N.W.2d 848 (N.D. 1992) (refusing to enforce physician non-compete and holding that such covenant violated North Dakota statute prohibiting restraints of trade).</p>
<p><b>Ohio</b> OHIO REV. CODE</p>	<p>No person shall issue or own trust certificates, and no person shall enter</p>	<p>A covenant restraining an employee from competing with his former</p>

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ANN. § 1331.02	<p>into a combination, contract, or agreement, the purpose and effect of which is to place the management or control of such combination, or the product or service thereof, in the hands of a trustee with the intent to limit or fix the price or lessen the production or sale of an article or service of commerce, use, or consumption, to prevent, restrict, or diminish the manufacture or output of such article or service, or refuse to buy from, sell to, or trade with any person because such person appears on a blacklist issued by, or is being boycotted by, any foreign corporate or governmental entity.</p> <p><i>**Recent Legislation:</i> HB 417 was signed into law on December 20, 2012 and will take effect March 22, 2013. The law provides, “a health care entity shall send notice of the termination of a physician’s employment to each patient who received physician services from the physician in the two-year period immediately preceding the date of employment termination. Only patients of the health care entity who received services from the physician are to receive the notice.” Specific requirements regarding the content and timing of the notice are set forth in the law, which is codified at Ohio Rev. Code § 4731.228.</p>	<p>employer upon termination of employment is reasonable if it is no greater than is required for the protection of the employer, does not impose undue hardship on the employee, and is not injurious to the public. The purpose in allowing non-competition agreements is to foster commercial ethics and to protect the employer’s legitimate interests by preventing unfair competition—not ordinary competition. Therefore, the agreement must be reasonable before it will be enforced, and there must be a weighing of the interests of the employer, the employee, and the public to determine what is reasonable. If there is no legitimate interest of the employer to protect, then any non-competition agreement is not reasonable. <i>Premier Assocs. v. Loper</i>, 778 N.E.2d 630, 635 (Ohio Ct. App. 2002).</p> <p>While covenants not to compete are disfavored in the medical profession, they are not <i>per se</i> unreasonable. <i>Id.</i>; see also <i>Owusu v. Hope Cancer Ctr. of Northwest Ohio, Inc.</i>, 2011 Ohio 4466 (Ohio Ct. App. 2011) (finding that an oncologist’s non-compete agreement was reasonably limited to only two years and to his former employer’s primary service area; and noting that “Ohio courts have repeatedly rejected the argument that covenants are not enforceable against physicians solely because it impairs the patient’s choice”); <i>General Med., P.C. v. Manolache</i>, 2011 Ohio 340 (Ohio Ct. App. 2011) (restrictive covenants concerning mobility of physicians are not <i>per se</i></p>

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		unenforceable). However, courts must strictly construe non-compete agreements in favor of professional mobility and access to medical care and facilities. <i>Riverhills Healthcare, Inc. v. Guo</i> , 2011 Ohio 4359 (Ohio Ct. App. 2011).
<p><b>Oklahoma</b> 15 OKLA. STAT. §§ 217-219A</p>	<p>Every contract by which any one is restrained from exercising a lawful profession, trade or business of any kind, otherwise than as provided by Sections 218 and 219 of this title, or otherwise than as provided by Section 2 of this Act, is to that extent void. 15 OKLA. STAT. § 217.</p> <p><b>Exceptions:</b> (1) sale of goodwill; (2) partners, upon or in anticipation of a dissolution of the partnership; (3) non-solicitation of “established customers.” 15 OKLA. STAT. §§ 218-219A.</p>	<p><i>Cardiovascular Surgical Specialist Corp. v. Mammana</i>, 61 P.3d 210 (Okla. 2002) (decision predating the current non-compete statute and upholding one-year prohibition on physician’s active solicitation of former employer’s patients, excluding where the patient affirmatively requested continued medical treatment by the physician, rather than the plaintiff employer).</p>
<p><b>Oregon</b> OR. REV. STAT. § 653.295</p>	<p>(1) A noncompetition agreement entered into between an employer and employee is voidable and may not be enforced by a court of this state unless:</p> <p>(a)(A) The employer informs the employee in a written employment offer received by the employee at least two weeks before the first day of the employee’s employment that a noncompetition agreement is required as a condition of employment; or</p> <p>(B) The noncompetition agreement is entered into upon a subsequent bona fide advancement of the employee by the employer;</p>	<p>In <i>Ladd v. Hikes</i>, 639 P.2d 1307 (Or. Ct. App. 1982), the plaintiff medical partnership contracted with defendant physician to work as an associate for two years. The contract of employment had a non-competition provision. It did not so provide, but it was contemplated that at the end of the contract period plaintiff, if satisfied with defendant, would offer him a partnership and that defendant, if he then desired, would accept. There was no requirement that a partnership be either offered or accepted. When the contract ended, defendant left plaintiff’s practice and started practicing on his own within the prohibited geographical area,</p>

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	<p>(b) The employee is a person described in ORS 653.020 (3);</p> <p>(c) The employer has a protectable interest. As used in this paragraph, an employer has a protectable interest when the employee:</p> <p>(A) Has access to trade secrets, as that term is defined in ORS 646.461;</p> <p>(B) Has access to competitively sensitive confidential business or professional information that otherwise would not qualify as a trade secret, including product development plans, product launch plans, marketing strategy or sales plans . . . .</p> <p>(d) The total amount of the employee's annual gross salary and commissions, calculated on an annual basis, at the time of the employee's termination exceeds the median family income for a four-person family, as determined by the United States Census Bureau for the most recent year available at the time of the employee's termination. This paragraph does not apply to an employee described in paragraph (c)(C) of this subsection.</p> <p>(2) The term of a noncompetition agreement may not exceed two years from the date of the employee's termination. The remainder of a term of a noncompetition agreement in excess of two years is voidable and may not be enforced by a court of this state.</p> <p>(3) Subsections (1) and (2) of this</p>	<p>attracting a considerable number of plaintiff's former patients. Plaintiff brought an action seeking to enjoin defendant from practicing within the city area. The trial court denied the injunction because defendant was in a weak position in negotiating his contract, so it was unconscionable, and because the restrictive provision was against public policy. On appeal, the court reversed and remanded, concluding that the provision was enforceable because the state supreme court had approved physician covenants not to compete. <i>Id.</i></p>

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	<p>section apply only to noncompetition agreements made in the context of an employment relationship or contract and not otherwise.</p> <p>(4) Subsections (1) and (2) of this section do not apply to:</p> <p>(a) Bonus restriction agreements, which are lawful agreements that may be enforced by the courts in this state; or</p> <p>(b) A covenant not to solicit employees of the employer or solicit or transact business with customers of the employer.</p> <p>(5) Nothing in this section restricts the right of any person to protect trade secrets or other proprietary information by injunction or any other lawful means under other applicable laws.</p> <p>(6) Notwithstanding subsection (1)(b) and (d) of this section, a noncompetition agreement is enforceable for the full term of the agreement, for up to two years, if the employer provides the employee, for the time the employee is restricted from working, the greater of:</p> <p>(a) Compensation equal to at least 50 percent of the employee's annual gross base salary and commissions at the time of the employee's termination; or</p> <p>(b) Fifty percent of the median family income for a four-person family, as determined by the United States Census Bureau for the most recent</p>	

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	year available at the time of the employee's termination.	
<p><b>South Dakota</b> S.D. CODIFIED LAWS §§ 53-9-8–12</p>	<p>Any contract restraining exercise of a lawful profession, trade, or business is void to that extent, except as provided by §§ 53-9-9 to 53-9-11, inclusive, and 53-9-12. S.D. CODIFIED LAWS § 53-9-8.</p> <p>An employee may agree with an employer at the time of employment or at any time during his employment not to engage directly or indirectly in the same business or profession as that of his employer for any period not exceeding two years from the date of termination of the agreement and not to solicit existing customers of the employer within a specified county, city or other specified area for any period not exceeding two years from the date of termination of the agreement, if the employer continues to carry on a like business. S.D. CODIFIED LAWS §§ 53-9-9.</p>	<p><i>Loescher v. Policky</i>, 84 S.D. 477, 173 N.W.2d 50 (1969) (holding that a non-compete signed after employment had begun was validated by the employee's continued employment after signing).</p>
<p><b>Washington</b> WASH. REV. CODE § 49.44.190</p>	<p>(1) If an employee subject to an employee noncompetition agreement is terminated without just cause or laid off by action of the employer, the noncompetition agreement is void and unenforceable.</p> <p>(2) Nothing in this section restricts the right of an employer to protect trade secrets or other proprietary information by lawful means in equity or under applicable law.</p> <p>(3) Nothing in this section has the effect of terminating, or in any way</p>	<p>Public policy requires a court to consider possible harm to the public from enforcing the covenant. Such harm may include restraint of trade, limits on employment opportunities, and denial of public access to necessary services. But the court must still balance these concerns against the employer's right to protect his business. <i>Emerick v. Cardiac Study Ctr., Inc.</i>, 286 P.3d 689 (Wash. Ct. App. 2012).</p> <p><i>Boyd v. Davis</i>, 127 Wash. 2d 256, 897</p>

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	<p>modifying, any rights or liabilities resulting from an employee noncompetition agreement that was entered into before December 31, 2005.</p> <p>(4) The definitions in this subsection apply throughout this section unless the context clearly requires otherwise.</p> <p>(a) “Employee” means an employee of a broadcasting industry employer other than a sales or management employee.</p> <p>(b) “Employer” means any person, firm, corporation, partnership, business trust, legal representative, or other entity which engages in any business, industry, profession, or activity in this state and employs one or more employees, and includes the state, counties, cities, and all municipal corporations, public corporations, political subdivisions of the state, and charitable organizations.</p> <p>(c) “Employee noncompetition agreement” means an agreement, written or oral, express or implied, between an employer and employee under which the employee agrees not to compete, either alone or as an employee of another, with the employer in providing services after termination of employment.</p>	<p>P.2d 1239 (Wash. 1995) (upholding arbitrator’s decision to sever non-compete restrictions from other agreements executed in conjunction with sale of a medical practice); see also <i>Ashley v. Lance</i>, 75 Wash. 2d 471 (1969); <i>Partlow v. Mathews</i>, 43 Wash. 2d 398, 261 P.2d 394 (1953).</p>
<p><b>Wisconsin</b> WIS. STAT. § 103.465</p>	<p>A covenant by an assistant, servant or agent not to compete with his or her employer or principal during the term of the employment or agency, or after the termination of that employment or</p>	<p>In <i>Fox Valley Thoracic Surgical Assocs. v. Ferrante</i>, 2008 Wisc. App. LEXIS 150 (Wis. Ct. App. 2008), the practice asserted that the circuit court erred by concluding that the covenant</p>

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	<p>agency, within a specified territory and during a specified time is lawful and enforceable only if the restrictions imposed are reasonably necessary for the protection of the employer or principal. Any covenant, described in this subsection, imposing an unreasonable restraint is illegal, void and unenforceable even as to any part of the covenant or performance that would be a reasonable restraint.</p>	<p>not to compete in the surgeon's employment contract was invalid pursuant to WIS. STAT. § 103.465 (2005-06). The appellate court agreed with the circuit court that the covenant was void under the statute. The contract's prohibition was overbroad because it prevented the surgeon from practicing thoracic medicine, not just heart surgery, and because the geographic restraint was greater than reasonably necessary to protect the practice. Because the contract was invalid, there was no basis for the tortious interference claim.</p> <p>Under WIS. STAT. § 103.465, a covenant not to compete within a specific time and a specific territory is lawful only if the restrictions imposed are reasonably necessary for the protection of the employer. Five inquiries are made in evaluating the enforceability of a covenant not to compete. The covenant must: (1) be necessary for the protection of the employer; (2) provide a reasonable time restriction; (3) provide a reasonable territorial limit; (4) be reasonable as to the employee; and (5) be reasonable as to the general public. WIS. STAT. § 103.465 provides that any unreasonable portion of the covenant not to compete voids the entire covenant even if the remaining portions would be enforceable. <i>Wausau Med. Ctr., S.C. v. Asplund</i>, 514 N.W.2d 34, 38 (Wis. Ct. App. 1994); see also <i>Prpa v. Wheaton Franciscan Med. Grp., Inc.</i>, 2013 Wis. App. LEXIS 57 (Wis. Ct. App. Jan. 23, 2013) (same).</p>

### III. STATES WITH NO STATUTE CONCERNING RESTRICTIVE COVENANTS

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<p><b>Alaska</b></p>	<p>Unlike covenants not to compete ancillary to employment contracts, which “are scrutinized with particular care because they are often the product of unequal bargaining power,” this level of scrutiny is not applied to covenants ancillary to the sale of a business because the contracting parties are more likely to be of equal bargaining power. <i>Wenzell v. Ingram</i>, 228 P.3d 103 (Alaska 2010).</p> <p>A covenant not to compete is unenforceable on grounds of public policy if it unreasonably restrains trade, either because: (a) the restraint is greater than is needed to protect the promisee’s legitimate interest, or (b) the promisee’s need is outweighed by the hardship to the promisor and the likely injury to the public. <i>Id.</i></p> <p>This case, however, presents a rare instance where a party is attempting to enforce a covenant not to compete against a person employed by a federally funded nonprofit organization that provides free or low-cost healthcare services. In such a case, competition will not be presumed and must be proven. <i>Id.</i></p> <p>It appears from the record that [defendant] is employed by an organization providing an important, low-cost service to a population in need of such care. In a case that implicates such considerations, it is appropriate for a court to closely scrutinize the covenant not to compete to determine whether it is void for public policy reasons. <i>Id.</i></p> <p><i>Metcalf Ins. Invs. v. Garrison</i>, 919 P.2d 1356 (Alaska 1996) (finding that although customer lists are a protectable interest, a customer non-solicitation restriction would be unreasonable if it prevented former employee from practicing his or her “specialty”).</p>
<p><b>Arizona</b></p>	<p>To be enforced, the restrictive covenants must do more than simply prohibit fair competition by the employee. In other words, a covenant not to compete is invalid unless it protects some legitimate interest beyond the employer’s desire to protect itself from competition. Despite the freedom to contract, the law does</p>

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	<p>not favor restrictive covenants. By restricting a physician’s practice of medicine, this covenant involves strong public policy implications and must be closely scrutinized. <i>Valley Med. Specialists v. Farber</i>, 982 P.2d 1277 (Ariz. 1999).</p> <p>This covenant must be put through a reasonableness analysis. Reasonableness is a fact-intensive inquiry that depends on the totality of the circumstances. A restriction is unreasonable and, thus, is not enforced: (1) if the restraint is greater than necessary to protect the employer’s legitimate interest, or (2) if that interest is outweighed by the hardship to the employee and the likely injury to the public. <i>Id.</i></p> <p>The continued success of a specialty practice, which is dependent upon patient referrals, is a legitimate interest worthy of protection. The restriction cannot be greater than necessary to protect VMS’s legitimate interests. A restraint’s scope is defined by its duration and geographic area. <i>Id.</i></p> <p>Restrictive covenants between physicians are strictly construed. The burden is on the party wishing to enforce the covenant to demonstrate that the restraint is no greater than necessary to protect the employer’s legitimate interest, and that such interest is not outweighed by the hardship to the employee and the likely injury to the public. A court must evaluate the extent to which enforcing a covenant would foreclose patients from seeing the departing physician if they desire to do so. <i>Id.</i></p>
Arkansas	<p>In <i>Mercy Health Sys. of Northwest Ark., Inc. v. Bicak</i>, 2011 Ark. App. LEXIS 341 (Ark. Ct. App. May 11, 2011), the Arkansas Court of Appeals held that “[t]he circuit court did not err in granting partial summary judgment to [defendant-physician] on [his] covenant-not-to-compete claim because [the hospital] did not counter [defendant-physician’s] evidence demonstrating that it had no interest sufficient to warrant its enforcement; that it was designed only to eliminate competition; and that it would unreasonably interfere with the public’s right of access to the physicians of their choice and [defendant-physician’s] ability to earn a living.”</p> <p>In <i>Jaraki v. Cardiology Assocs. of Northeast Ark.</i>, 55 S.W.3d 799 (Ark. Ct. App. 2001), a doctor and the corporation entered into an employment agreement under which the doctor agreed not to practice within a 75-mile radius of the corporation’s principal office for a period of two years if he terminated his employment before the end of the contract term.</p> <p>The court held that covenants not to compete are not looked upon with favor by the law. In order for such a covenant to be enforceable, three requirements</p>

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	<p>must be met: (1) the covenantee must have a valid interest to protect; (2) the geographical restriction must not be overly broad; (3) a reasonable time limit must be imposed. A party challenging the validity of a covenant is required to show that it is unreasonable and contrary to public policy. Without statutory authorization or, some dominant policy justification, a contract in restraint of trade is unreasonable if it is based on a promise to refrain from competition that is not ancillary to a contract of employment or to a contract for the transfer of goodwill or other property. However, the law will not protect parties against ordinary competition. Covenants not to compete in employment contracts are subject to stricter scrutiny than those connected with a sale of a business. <i>Id.</i></p> <p>The court stated that it is contrary to public policy to unduly restrict the public's right of access to the physicians of their choice. <i>Id.</i></p> <p>Where a covenant not to compete grows out of an employment relationship, the courts have found an interest sufficient to warrant enforcement of the covenant only in those cases where the covenantee provided special training, or made available trade secrets, confidential business information, or customer lists, and then only if it is found that the associate was able to use information so obtained to gain an unfair competitive advantage. <i>Id.</i></p> <p>The geographic area in a covenant not to compete must be limited in order to be enforceable. The restraint imposed upon one party must not be greater than is reasonably necessary for protecting the other party. In determining whether the geographic area is reasonable, the trade area of the former employer is viewed. Where a geographic restriction is greater than the trade area, the restriction is too broad and the covenant not to compete is void. <i>Id.</i></p>
Connecticut	<p><i>Fairfield County Bariatrics v. Ehrlich</i>, 2010 Conn. Super. LEXIS 568 (Conn. Super. Ct. Mar. 8, 2010) (enforcing a non-compete agreement prohibiting bariatric surgeon from practicing medicine for two years in a 15-mile radius, and practicing bariatric surgery for two years in several named towns; finding in part that operation of the covenant need not impair the public's need to secure the surgeon's services so substantially as to require invalidation).</p> <p>When the employer hired the employee, the employee signed an employment contract containing a non-compete clause. The clause prohibited the employee from competing with the employer for a year after the termination of the contract and within a 15 mile radius of the employer. The employee terminated the contract without notice and a day later opened a competing practice within 15 miles of the employer's practice. <i>Nesbitt v. Satti</i>, 2001 Conn. Super. LEXIS 2825 (Conn. Super. Ct. Sept. 27, 2001).</p>

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	<p>The five factors to be considered in evaluating the reasonableness of a restrictive covenant ancillary to an employment agreement are: (1) the length of time the restriction operates; (2) the geographical area covered; (3) the fairness of the protection accorded to the employer; (4) the extent of the restraint of the employee's opportunity to pursue his occupation; and (5) the extent of interference with the public's interest. <i>Id.</i></p> <p>The court held that the non-compete clause was reasonable, as the restriction's length of operation and geographic area were limited, and the employee failed to show that the agreement contravened public policy. <i>Id.</i></p>
<p><b>Illinois</b></p>	<p>Historically, covenants restricting the performance of medical professional services have been held valid and enforceable in Illinois as long as their durational and geographic scope are not unreasonable, taking into consideration the effect on the public and any undue hardship on the parties to the agreement. The vast majority of jurisdictions follow the modern view, which is that restrictive covenants are enforceable if they are supported by consideration, ancillary to a lawful contract, and reasonable and consistent with the public interest. <i>Mohanty v. St. John Heart Clinic</i>, 866 N.E.2d 85 (Ill. 2006).</p> <p>When a party seeks to show that a contract term is against the public policy of Illinois, that party bears the burden of showing that the contract term is clearly contrary to what the constitution, the statutes, or the decisions of the courts have declared to be the public policy or that the contract is manifestly injurious to the public welfare. <i>Id.</i></p> <p>In determining whether a restraint imposed by a covenant not to compete is reasonable it is necessary to consider whether enforcement will be injurious to the public or cause undue hardship to the promisor and whether the restraint imposed is greater than is necessary to protect the promisee. <i>Id.</i></p> <p>Restrictive covenants precluding the practice of medicine against physicians who practice a specialty have been upheld as reasonable. <i>Id.</i></p> <p><i>See also International Eyecare Ctr., Inc. v. Hayden</i>, 2011 Ill. App. Unpub. LEXIS 615 (Ill. Ct. App. Apr. 7, 2011) (finding covenant not to compete that prohibited optometrist from competing within 20 miles of and soliciting patients and/or interviewing or hiring employees from former employer enforceable).</p>
<p><b>Indiana</b></p>	<p>Non-competition agreements between a physician and a medical practice</p>

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	<p>group are not <i>per se</i> void as against public policy and are enforceable to the extent they are reasonable. To be geographically reasonable, the agreement may restrict only that area in which the physician developed patient relationships using the practice group’s resources. The Indiana Supreme Court has rejected the claim that public policy precludes medical doctors from entering into or enforcing non-competition covenants, and has adopted a reasonableness standard for physician noncompetition agreements. <i>Central Ind. Podiatry v. Krueger</i>, 882 N.E.2d 723 (Ind. 2008).</p> <p>Regarding the enforceability of non-competition agreements between physicians, the issue is essentially a balancing of policy considerations best left to the legislature. Countervailing reasons exist that would militate against any deviation from the long-standing practice of finding reasonable restrictive covenants in medical employment contracts enforceable. For this reason, prohibiting restrictive covenants in medical practice contracts is a decision better left to the legislature, where the competing interests can be fully aired. Any decision to ban physician non-competition agreements altogether should be left to the legislature. <i>Id.</i></p> <p>Non-competition covenants in employment contracts are in restraint of trade and disfavored by the law. Courts construe these covenants strictly against the employer and will not enforce an unreasonable restriction. Agreements by physicians should be given particularly careful scrutiny. To be enforceable, a non-competition agreement must be reasonable; unlike reasonableness in many other contexts, the reasonableness of a noncompetition agreement is a question of law. In arguing the reasonableness of a non-competition agreement, the employer must first show that it has a legitimate interest to be protected by the agreement. The employer also bears the burden of establishing that the agreement is reasonable in scope as to the time, activity, and geographic area restricted. <i>Id.</i></p>
Iowa	<p>Restrictive covenants regarding physicians have been recognized as valid and enforceable in Iowa. Non-compete agreements, otherwise known as covenants not to compete, are not generally favored, however, because they are viewed as restraints of trade that limit an employee’s freedom of movement among employment opportunities. A restrictive covenant is strictly construed against the party seeking injunctive relief. <i>Board of Regents v. Warren</i>, 2008 Iowa App. LEXIS 1192 (Iowa Ct. App. Nov. 26, 2008).</p> <p>To determine whether a restrictive covenant in an employment contract is enforceable, a court considers: (1) whether the restriction is reasonably necessary for the protection of the employer’s business; (2) whether it is</p>

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	<p>unreasonably restrictive of the employee’s rights; and (3) whether it is prejudicial to the public interest. The restriction must be no greater than that necessary to protect the employer. Essentially, these rules require a court to apply a reasonableness standard in maintaining a proper balance between the interests of the employer and the employee. The facts and circumstances of each individual case must be carefully considered to determine whether a restrictive covenant is reasonable. The validity of the contract in each case must be determined on its own facts and a reasonable balance must be maintained between the interests of the employer and employee. <i>Id.</i></p>
<p><b>Kansas</b></p>	<p>Covenants not to compete restrict competition, disrupt continuity of care, and potentially deprive the public of medical services. Any agreement that restricts the right of a physician to practice medicine for a specified period of time or in a specified area upon termination of an employment, partnership, or corporate agreement is discouraged. Restrictive covenants are unethical if they are excessive in geographic scope and duration in the circumstances presented, or if they fail to make reasonable accommodation of patients’ choice of physician. The American Medical Association’s standards, however, do not make restrictive covenants <i>per se</i> unethical but adopt a reasonableness standard similar to that applied by courts. <i>Idbeis v. Wichita Surgical Specialists</i>, 112 P.3d 81 (Kan. 2005).</p> <p>Any restrictive covenant agreed to by a physician is going to make some limitation on patient choice. The American Medical Association’s ethics guidelines condemn only those covenants that fail to make reasonable accommodation for patient choice. In each case, the varying circumstances must be considered in the effort to evaluate that impact. One valid consideration in this case is the nature of the typical relationship between a patient and a cardiovascular surgeon: it is usually short-term, lasting long enough to accommodate the surgical care and follow-up. <i>Id.</i></p>
<p><b>Kentucky</b></p>	<p>The clinic sought an injunction to prevent defendant physician from violating a restrictive covenant in his employment contract. Plaintiff patients sought an injunction to prohibit enforcement of the restrictive covenant. The trial court found the patients were third-party beneficiaries to the restrictive covenant entitled to notice of termination, which they did not receive. It enjoined enforcement of the restrictive covenant. The court reversed and held that defendant was terminated within the meaning of the restrictive covenant when his contract was not renewed upon expiration. The court also held no inequity would result from enforcing the restrictive covenant. The patients were not third-party beneficiaries to the restrictive covenant; rather, two distinct contracts</p>

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	<p>existed. The first contract was between the clinic and the patients, which required the clinic to provide medical care meeting the standard of care required of all physicians, but it did not require the clinic to provide a particular doctor or to give notice of personnel changes. The second contract was the employment contract, involving professional service to which the patients were only incidental beneficiaries. <i>Daniel Boone Clinic, P.S.C. v. Dahhan</i> 734 S.W.2d 488 (Ky. Ct. App. 1987).</p> <p>Restrictive covenants are valid and not against public policy unless the particular circumstances of the case would cause serious inequities to result. <i>Id.</i></p>
<p><b>Maine</b></p>	<p>The Supreme Judicial Court of Maine has recognized “existing patients and business good will as legitimate interests that may be protected through a restrictive covenant.” <i>Sisters of Charity Health Sys., Inc.</i>, 21 A.3d 110 (Me. 2011) (citing <i>Brignull v. Albert</i>, 666 A.2d 82, 84 (Me. 1995)).</p> <p>Liquidated damages clauses in physician non-compete contracts are enforceable in Maine. <i>Id.</i> (enforcing \$100,000 liquidated damages clause against physicians for breach of two-year, 25-mile restrictive covenant).</p> <p><i>See also Moshe Myerowitz, D.C., P.A. v. Howard</i>, 507 A.2d 578 (Me. 1986) (evaluating whether a chiropractic practice was entitled to a preliminary injunction to enforce a restrictive covenant); <i>Roy v. Bolduc</i>, 140 Me. 103, 34 A.2d 479 (1943) (holding that protectable confidential information may include trade or business secrets).</p>
<p><b>Maryland</b></p>	<p><i>Lofton v. TLC Laser Eye Ctrs., Inc.</i>, 2001 U.S. Dist. LEXIS 1476, 143 Lab. Cas. (CCH) P59231 (D. Md. Feb. 8, 2001) (evaluating non-compete restrictions with respect to an ophthalmic technician); <i>Wakefield v. Booth</i>, 33 Md. 63 (1870).</p>
<p><b>Mississippi</b></p>	<p><i>Field v. Lamar</i>, 822 So.2d 893 (Miss. 2002) (dismissing, on procedural grounds, action seeking to enforce non-compete against physician); <i>Wilson v. Gamble</i>, 180 Miss. 499, 177 So. 363 (1937) (holding that a restriction must cover only such territory and such time as to be reasonably necessary for the protection of the employer or principal, without imposing undue hardship on the employee).</p>
<p><b>New Jersey</b></p>	<p>In New Jersey, restrictive covenants between physicians are not <i>per se</i> unreasonable and unenforceable. Instead a three-part test called the</p>

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	<p>Solari/Whitmyertest exists: (1) whether the covenant in question protects the legitimate interests of the employer, (2) imposes no undue hardship on the employee, and (3) is not injurious to the public. A non-exhaustive list of relevant factors to consider exists when determining the enforceability of restrictive covenants among physicians. Those factors include the time the employer-physician needs to rebuild the practice following the employee-physician's departure, the reasonableness of the geographic scope, whether the activities the departing physician is prohibited from engaging in are the same as those performed by the employer physician, the hardship on the employee and the reason for the departure, the likelihood that another physician in the area can provide the medical services left vacant by the departing physician, and the effect that enforcement of the covenant would have on the public interest. <i>Community Hosp. Group, Inc. v. More</i>, 869 A.2d 884, 894 (N.J. 2005).</p> <p>Except for attorneys and psychologists, New Jersey courts have consistently utilized a reasonableness test to determine the enforceability of restrictive covenants. There is no logical justification to treat a hospital-employer differently from a physician-employer. If either the hospital-employer or the physician-employer cannot establish that it has a legitimate business interest and, most important, that enforcement of the restriction will not be injurious to patient care, then enforcement of the restriction should be denied. <i>Id.</i></p> <p>A restrictive covenant between a physician and a hospital, although not favored, is not <i>per se</i> unreasonable and unenforceable. Rather, the trial court must determine whether the restrictive covenant protects the legitimate interests of the employer, imposes no undue hardship on the employee, and is not adverse to the public interest. <i>Pierson v. Med. Health Ctrs.</i>, 183 N.J. 65, 69-70 (N.J. 2005).</p>
<p><b>New Mexico</b></p>	<p>All of the physician and surgeon cases either expressly hold or clearly indicate that the rights and duties created by the contract of employment or association are enforceable, if the restrictions thus imposed on the employee or the associate are reasonable. The question of reasonableness is not related to or dependent on the existence of a legally enforceable right or duty independent of the rights and duties created by the contract of employment or association. <i>Taylor v. Lovelace Clinic</i>, 78 N.M. 460, 463 (N.M. 1967).</p>
<p><b>New York</b></p>	<p>Under New York law, negative covenants restricting competition are enforceable only to the extent that they satisfy the overriding requirement of reasonableness. An employee agreement not to compete will be enforced only if it is reasonable in time and area, necessary to protect the employer's</p>

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	<p>legitimate interests, not harmful to the general public, and not unreasonably burdensome to the employee. This general limitation of reasonableness applies equally to a covenant given by an employee where he quits his employ. <i>Oak Orchard Cmty. Health Ctr. v. Blasco</i>, 2005 NY Slip Op. 25221, 3 (N.Y. Sup. Ct. 2005).</p> <p>Although the rule of reasonableness in cases involving professionals gives greater weight to the interests of the employer in restricting competition within a confined geographical area because professionals are deemed to provide unique or extraordinary services, the New York Court of Appeals nevertheless requires strict scrutiny of the particular facts and circumstances giving context to the agreement in the learned profession cases. Accordingly, even though an agreement is reasonable as to time and area, there is no <i>per se</i> rule of reasonableness arising just because it is a physician's unique or extraordinary services that is involved; a court must still scrutinize whether the covenant, on the facts presented, is being legitimately employed to protect a plaintiff's legitimate interests, would not be harmful to the public, and would not be unduly burdensome to the defendant. New York case precedents do not obviate the need for independent scrutiny of the anti-competitive provisions of an employment agreement under the tripartite common-law standard. <i>Id.</i></p>
<p><b>Pennsylvania</b></p>	<p>Pennsylvania's courts have taken the traditional path in evaluating the enforceability of non-competition agreements involving physicians. Two Pennsylvania cases, <i>New Castle Orthopedic Assocs. v. Burns</i>, 392 A.2d 1383 (Pa. 1978), and <i>West Penn Specialty MSO, Inc. v. Nolan</i>, 737 A.2d 295 (Pa. Super. Ct. 1999), set the bounds for the traditional view. In Pennsylvania, a plaintiff seeking to enforce such a covenant must show: (1) the covenant relates to the contract for employment; (2) the covenant is supported by adequate consideration; and (3) the covenant is reasonably limited in both duration of time and geographical distance. A plaintiff seeking enforcement must also demonstrate that the court's protection will not detrimentally impact the availability of healthcare services in the restricted area. The <i>Burns</i> court emphasized that it attached great weight to this additional public policy prong.</p> <p>Once a legitimate interest is established, a court balances the employer's business interest against the employee's interest in earning a living and also the interests of both the employer and employee against the public interest. In doing so, a court must also determine whether the restrictive covenant is temporally and geographically reasonable in light of the fact that the public interest is of paramount importance in determining whether to enforce a restrictive covenant against a healthcare provider. <i>A&amp;T Med. Inc. v.</i></p>

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	<p><i>Mercadante</i>, 2011 Pa. Dist. &amp; Cnty. Dec. LEXIS 200 (Pa. Common Pleas Ct. Feb. 28, 2011) (finding a two-year and five-mile radius restriction in chiropractor non-compete agreement reasonable). [R]etaining patients is a compelling interest as is their interest in preventing existing and former employees from establishing a competing medical practice using their current patients. <i>Id.</i></p> <p>See also <i>Wound Care Ctrs., Inc. v. Catalane</i>, 2011 U.S. Dist. LEXIS 88136 (W.D. Pa. Aug. 9, 2011) (denying injunction where plaintiffs sought to enjoin for a period of one year within 20 miles several physicians and a hospital from entering into the business of or employing a physician-defendant for the purpose of treating chronic non-healing wounds); <i>Eckert v. Lehigh Valley Women’s Med. Specialties, P.C.</i>, 2012 Pa. Dist. &amp; Cnty. Dec. LEXIS 226 (Pa. Common Pleas Ct. Feb. 29, 2012) (finding physician’s junior position with the practice and relatively brief duration of employment weighed against enforcement, but enforcing non-compete against physician who was officer and shareholder).</p>
<p><b>Rhode Island</b></p>	<p><i>Dial Media v. Shiff</i>, 612 F. Supp. 1483 (D. R.I. 1985) (holding that the employer’s good will, special training, and trade secrets are protectable interests); see also <i>Abbey Med./Abbey Rents, Inc. v. Mignacca</i>, 471 A.2d 189 (R.I. 1984); <i>Tillinghast v. Boothby</i>, 20 R.I. 59, 37 A. 344 (1897); <i>French v. Parker</i>, 16 R.I. 219, 14 A. 870 (1888).</p>
<p><b>South Carolina</b></p>	<p><i>McElveen v. McElveen</i>, 332 S.C. 583, 506 S.E.2d 1 (S.C. Ct. App. 1998) (enforcing non-compete covenant against former manager of a surgical center); <i>Stringer v. Herron</i>, 309 S.C. 529, 424 S.E.2d 547 (S.C. Ct. App. 1992) (refusing to enforce, as overbroad, a restriction preventing a departing veterinarian from competing within a 15-mile radius of his former employer’s three practice locations); see also <i>Hyer v. McRee</i>, 306 S.C. 210, 410 S.E.2d 604 (1991).</p>
<p><b>Utah</b></p>	<p><i>Robbins v. Finlay</i>, 645 P.2d 623 (Utah 1982) (holding that covenants not to compete are enforceable only to the extent necessary to protect the legitimate interest of the employer; noting that the scope and duration of the restriction will be compared with the nature of the interest the employer seeks to protect); <i>Microbiological Research Corp. v. Muna</i>, 625 P.2d 690 (Utah 1981) (holding that employer’s customer list was not protectable because customer identities publicly available); see also <i>Allen v. Rose Park Pharmacy</i>, 120 Utah 608, 237 P.2d 823 (1951); <i>Melrose v. Low</i>, 80 Utah 356, 15 P.2d 319 (1932).</p>

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<p><b>Vermont</b></p>	<p><i>Roy’s Orthopedic v. Lavigne</i>, 142 Vt. 347, 454 A.2d 1242 (1982), and 145 Vt. 324, 487 A.2d 173 (1985) (declining to enforce a restriction prohibiting former employee from competing for three years in any “territories presently served by [the] corporation and those additional territories to which the [employee] knows the corporation intends to extend and carry on business by expansion of its present activities”); <i>see also Butler v. Burleson</i>, 16 Vt. 176 (1844).</p>
<p><b>West Virginia</b></p>	<p>An employee covenant not to compete is unreasonable on its face if its time or area limitations are excessively broad, or where the covenant appears designed to intimidate employees rather than to protect the employer’s business, and a court should hold any such covenant void and unenforceable, and not undertake even a partial enforcement of it, bearing in mind, however, that a standard of “unreasonable on its face” is to be distinguished from the standard of “reasonableness” used in inquiries adopted by other authorities to address the minor instances of over breadth to which restrictive covenants are naturally prone. <i>Huntington Eye Assocs. v. LoCascio</i>, 553 S.E.2d 773, 780 (W. Va. 2001).</p> <p>In <i>Gant v. Hygeia Facilities Found.</i>, 384 S.E.2d 842 (W. Va. 1989), appellant doctor sought review of a decision that denied his motion for declaratory judgment to void a restrictive covenant in his employment contract prohibiting him from practicing within a 30-air-mile radius of any facility owned and operated by appellee nonprofit organization for three years. The court held that the restrictive covenant was reasonable on its face because it was included in the contract for a valid business purpose and was not designed to intimidate appellant. The court held that the restrictive covenant was presumptively enforceable because appellee met its burden of proving it had legitimate interests that its covenant was designed to protect. <i>Id.</i></p>
<p><b>Wyoming</b></p>	<p><i>Hopper v. All Pet Animal Clinic, Inc.</i>, 861 P.2d 531 (Wyo. 1993) (upholding restriction preventing a veterinarian from practicing small-animal medicine within a five-mile radius but reducing such restriction from three years to one year); <i>see also Tench v. Weaver</i>, 374 P.2d 27 (Wyo. 1962).</p>

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