

Restrictive Covenants on Physicians: Boundaries and Tipping Points

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What is a Non-Compete?

A non-compete is a restriction on an employee from competing against his/her employer both during employment and a period after employment ends

FTC proposed definition: “contractual term between an employer and worker that prevents the worker from seeking or accepting employment with a person, or operating a business, after the conclusion of the worker’s employment with the employer.”

Three “scales” in non-compete clauses:

Time – weeks/months/year(s)

Activity – “practice of medicine” “orthopedics” “competition with X”

Geography – zip code, mile radius, county

What isn't a Non-Compete?

Non-disclosure/Confidentiality agreements & clauses*

Prevent ex-employee from disclosing old employer's trade secrets, client/patient lists, technology, etc.

Non-solicitation/Non-Diversion agreements & clauses (patient or employee)*

Prevent ex-employee from recruiting patients/employees away from ex-employer

*Could still be referred to as “Restrictive Covenants”

Statistics

FTC estimated in 2023 that 30 million workers are subject to non-competes and that elimination of them would increase overall earnings \$250 to \$296 billion per year

Common in low-skill jobs as well as professional and executive

Only 10% of employees negotiate them

One-third of employees were presented with non-competes after accepting job

Sources: FTC

Starr, Prescott & Bishara, "Non-compete Agreements in the U.S. Labor Force" (U.S. Mich. Law School Repository, 2021)

Physician Recruiting Costs – up to \$2.8 Million Per Physician

Direct Costs:

Search Firm Fees or In-House Staff Cost: \$18,000 - \$35,000

Sourcing and Marketing Costs: \$6,000 - \$12,000

Candidate Site Visit/Interview Expenses: \$9,000 - \$15,000 (for 3 candidates)

Optional Recruitment Incentives:

Residency/Fellowship Stipends: \$12,000 - \$36,000+

Sign-on Bonuses: \$20,000 - \$100,000+

Education Loan Repayment Assistance: \$25,000 - \$100,000+

Housing Assistance: \$50,000 - \$100,000+

Retention Bonuses (per year): \$10,000 - \$50,000

Source:

Many Other Non-Direct Costs & Effort of Recruiting Physicians Incurred by Employers Include:

Office and Hospital Staff

Space Buildout

Equipment Purchases

Ancillary Recruitment of Providers & Staff Necessary to Build Programs

Downstream Academic Medicine Infrastructure (Research Protocols, Resident/Student Recruitment & Training)

Business Plans Often Require Many Years of Ramp Up Before Break-Even

Do Physicians Need Protection?

Physicians as a whole are a highly educated and highly compensated class of employee

Physicians have more bargaining power than most employee types

Physicians are more likely than other groups to negotiate employment offers/employ counsel to negotiate

Countervailing arguments: Access, patient freedom of choice, hardship to relocate

Non-Compete Clauses: the General Rule in Ohio

Non-competition agreements with physicians are not favored but are enforceable if they are ancillary to a contract and reasonable in time, geography, and scope of activity.

Reasonableness also takes in account:

The interests of the entity imposing the restriction that are being protected,
The hardship imposed on the restricted party, and
The interest of the public.

See *Raimonde v. Van Vlerah*, 42 Ohio St. 2d 21, 325 N.E. 2d 544 (1975)

Factors Discussed in *Raimonde*:

Reasonableness of limitations

Extent of employee contact with customers/exclusivity

Access to confidential info, trade secrets

Would competition be genuinely unfair?

Weighing of benefit to employer vs. burden to employee

Whether covenant prohibits use of special skills or earning a living

Employee's bargaining power/consideration received

“Blue Penciling”

Court will amend or reform a restriction in a non-compete clause if the restrictions as written are overly broad or burdensome

In *Metro Health System v. Khandelwal*, 183 N.E.3rd 590 (2022), Metro Health sought preliminary injunction against physician who left to join Akron Children’s Burn Unit. The Court affirmed the trial court’s revision of the physician’s restrictive covenants, allowing him to continue practicing at Akron Childrens, reducing enforcement of the non-compete for administrative jobs from two years to one year, and reducing the patient non-solicitation clauses from two years to one.

Is “Blue Penciling Required?”

In the 2024 case of *Kross Acquisition Co., LLC v. Groundworks Ohio, LLC*, 2024-Ohio-592, the First District Court of Appeals (Hamilton County) held that blue-penciling was discretionary and declined to modify or enforce a non-compete that it found was overbroad in time and geographic scope. The parties could not agree on modifications that would protect the employer and the Court found there were too many variables to revise to modify the covenant.

Proposed Ohio Senate Bill 301 (Sen. Johnson, R-McDermott)

Limits non-competes to six months and 15 miles

Would apply to physicians, PAs, APRNs working at *non-profit hospitals*

Employee cannot agree to waive protection

Employee can sue, recover damages, fees, and costs

Earlier version, SB11, passed Senate in 2025 but only covered physicians

In Senate committee as of 4/21/26.

Does a Successor Employer Get the Benefit of a Non-compete?

In *Acordia of Ohio LLC v. Fishel*, 133 Ohio St. 3d 356, 978 N.E. 2d 823 (2012), the Ohio Supreme Court initially ruled that a successor company did not acquire the right of a predecessor to enforce a non-compete against acquired employees. (The contract in question did not have assignment language). On reconsideration, the Court reversed its decision and held that a successor does step into the shoes of its predecessor.

Language protecting the current employer and successors and assigns is still a good idea.

OHA Comments on Previous Proposal (March 2025)

Non-compete clauses are necessary to protect hospital investments needed to assure quality, accessible care

Investments include recruiting costs, medical equipment, clinical and support staff

Particular concern in small and rural communities

Disadvantage to hospitals near borders of states that do not restrict

This will reduce access to care

Many States Are Restricting Healthcare Non-competes

California has a policy of open competition since 1872 but narrowly-tailored covenants regarding trade secrets may be enforced

New Colorado law (effective August 2025) bans restrictions on physicians, APRNs, midwives, dentists

New Maryland law bans non-competes for workers earning less than \$350,000, and limits others to one year and 10-mile radius

Nevada bill banning non-competes for “patient-facing” providers of health care” was vetoed in 2025

Many States Are Restricting Healthcare Non-competes (con't.)

Minnesota recently passed law banning new employment non-competes

Many states prohibit non-competes for low-wage workers with income levels up to \$150,000 per year (Illinois, Maine, Massachusetts, New Hampshire, Nevada, Oregon, Rhode Island, Virginia, Washington, Washington, D.C.)

Kansas and Florida have recently passed laws favorable to non-competes

Choice of law clauses in employment contracts matter !

New Indiana Law

Effective July 1, 2025, SEA 475 provides that employers may not prohibit physicians from practicing medicine with a new employer, impose financial penalties, require employer consent, or impose indirect restrictions that limit or deter practices with a new employer

Agreements entered after effective date are void and unenforceable

Renewed or amended agreements existing previously not affected or amended

Sale of more than 50% of practice excluded

Kentucky Generally Enforces Non-Competes

Enforced if reasonable as to scope, duration, geography

Courts will blue-pencil

“There is no basic public policy against such covenants, particularly when they involve professional services. In fact, the policy of this state is to enforce them unless very serious inequities would result.” *Lareau v. O’Nan*, 355 S.W.2d 679 (Ky. 1962) (Injunction granted to enforce five-year prohibition on practice in Henderson County in employment contract).

One statute limits for nurse staffing companies

ULC's "Uniform Restrictive Employment Agreement Act" (2021)

ULC reveals important trends although OH has not adopted

Defines "Restrictive Employment Agreements" as:

§ 7 Non-Compete Agreements

§ 8 Confidentiality Agreements (NDAs, trade secrets, but not general or public knowledge)

§ 9 No-Business Agreements (w/clients/customers for 6 mos. only)

§ 10 Nonsolicitation Agreements (w/clients/customers for 1 yr. only)

§ 11 No-Recruit Agreements (w/co-workers for 6 mos. only)

§ 12 Payment-for-Competition Agreements (financial conseq. no > competitive harm & ltd. To 1 yr.)

§ 13 Training-Repayment Agreements (limited to prorated "special training" costs & 2 yrs.)

§ 4 – Provides procedural "Notice Requirements"

§ 6 – Requires overriding "reasonableness" (like the common law)

AMA's Code of Medical Ethics Opinion 11.2.3.1

Competition among physicians is ethically justifiable when it is based on such factors as quality of services, skill, experience, conveniences offered to patients, payments, fees, or credit terms.

Covenants not to compete restrict competition, can disrupt continuity of care, and may limit access to care.

Physicians should not enter into covenants that:

- Unreasonably restrict the right of a physician to practice medicine for a specified period of time or in a specified geographic area on termination of a contractual relationship; and

- Do not make reasonable accommodation for patients' choice of physician

Physicians in training should not be asked to sign covenants not to compete as a condition of entry into any residency or fellowship program

STARK Law Effect on Non-Competes – Recruitment Through Practice Group Exception

The regulatory exception provides that “the physician practice may not impose on the recruited physician restrictions that unreasonably restrict the recruited physician’s ability to practice medicine in the geographic area served by the hospital.” 42 CFR 411.357(e)(4)(iv). This was less restrictive than complete prohibition of non-competes discussed in Phase II preamble.

In CMS AO-2011-11, CMS approved a one-year, 25-mile non-competition provision in a recruiting agreement for a pediatric orthopedic surgeon, as there was another hospital just outside the 25 miles, and three others 35 to 60 miles away, where the physician could practice on termination of his employment from the group.

Federal Government Recent History

Biden Executive Order on competition, specifically directed FTC to “curtail the unfair use of non-competes clauses.”

FTC Proposed Rules

FTC Proposed Rule Issued January 2023

Relied on FTC Act, prohibiting “unfair methods of competition in or affecting commerce.”

26,813 comments

21% mentioned physicians (compared to 65% of US labor market)

Industry Response to Proposed Rule

Health Care Industry Response: As Expected

87% physicians support ending NCs

AMA was surprisingly opposed to proposed rule as written

Support more regulation around NCs, but not outright ban

Physician comments deeply personal

AHA resoundingly opposed – 18 page comment

The Final Rule

Sweeping final rule issued April 2024

Multiple court challenges followed

Enjoined by Northern District of Texas due to exceeding statutory authority

Biden administration's appeal was abandoned by Trump FTC in September 2025

Does FTC Act Even Apply to Non-Profits?

Section 5 of the FTC Act states that the FTC has authority to prevent unfair or deceptive trade practices for “persons, partnerships, or corporations...”

“Corporations” are defined in the FTC Act as any company “organized to carry on business for its own profit or that of its members...”

FTC does not concede that all 501(c) organizations are excluded

Nationwide 58% of hospitals non-profit, 24% for-profit, 19% government
78.8% for-profit hospitals in a region w/non-profit competitors

Current Status of Federal Law

Appears to be “rule of reason” in most cases
Court weights pro-competitive and anti-competitive effects

Horizontal conspiracy or argument could lead to “per se” restraint of trade analysis

FTC Warning Letters, September 2025

Issued to several large healthcare employers and staffing firms

Concerns regarding overly broad non-competes for nurses, doctors and others that limit employment options and restrict patient “choice”

Reduction in patient choice, especially rural areas

Current FTC Commissioner Mark Meador's Comments

Non-competes may protect legitimate interests

Factors to evaluate legality include:

- likelihood of free riding

- availability of less restrictive alternatives

- scope and duration, employee's ability to pursue work

- market power

- evidence of economic effects

FTC Comments, January 2026 Workshop

Chairman Andrew Ferguson says Biden administration went too far in banning most non-competes by agency action

Emphasized case-by case approach, focus on oppressive non-competes that do not protect legitimate interests such as:

- Sole purpose to protect financial interests
- Industries that generally lack business need
- Required for low-wage employees

Suggestions that healthcare industry will be scrutinized

Related Provisions: Non-Solicitation of Patients

Usually includes prohibitions on direct and indirect solicitation

May also prohibit the departing physician from disrupting the relationship between patient and the health care entity

Termination clauses sometimes dictate what a departing physician may say to patients; cooperation with ORC 4731.228 notice requirements

The departing physician may be required to cooperate with the health care entity in transferring patient records and information to the physician designated to take over care

Related Provisions: Exception for Private Practice

Some non-compete clauses provide an exception if the departing physician is going into private practice

The private practice exception may require

The physician to practice as a solo practitioner

Ownership entirely by licensed physicians, not managed by a separate entity

Related Provisions: Non-Disclosure of Information-How do these apply to:

Patient lists

Vendor Contacts & Contracts

Referral Source Contacts

IP Under Development

Clinical & Other Research In Process

Other Know How and Trade Craft

Procedural Issues in Non-Compete Cases

Covenants are typically tested by motion for temporary injunction

Temporary injunction is extraordinary remedy governed by CR 65.04; Court must find:

Movant has raised substantial questions on the merits

Irreparable injury if relief not awarded

Balance of equities (weighing possible detriment to public interest, harm to defendant and preservation of status quo)

Results are heavily dependent on trial judge's assessment of reasonableness, harm.

Although interlocutory, temporary injunction ruling commonly ends the dispute

Other Legal Theories Relating to Breach

Breach of Fiduciary Duties (depending on practitioner's role in the practice)

Tortious Interference with Contract (knowledge of contract; action with intent and effect of inducing breach; absence of privilege or justification)

Drafting Considerations

Ensure non-competes promote legitimate business interests

Develop or beef up alternatives (confidentiality; trade secrets; non-solicitation)

Keep scope, time and geography of non-competes reasonable based on need

Include assignment and successor clauses

Monitor legislation, FTC and DOL guidance

Other Strategies to Make Departure Harder

Focus on “Stickiness”

There are a lot of levers a hospital can pull to make exiting employment more difficult. But: it’s a double-edged sword however; employment agreements are recruiting tools

Every tool you use may make it less likely physician will sign

Uniform Terms, Consistent Application, Maintaining Reputaiton for Reaasonable Enforcement & Willingness to Enteratain Reasonable Exceptions Can Ameliorate Negotiation Anxiety

Other Strategies

“Tail Insurance”

Do you offer to pay “Tail” upon physician exit? Other penalty for occurrence-based policies?

Requiring physician to cover tail may discourage physician exit

Tail can be expensive for many specialties – usually 2x – 3x the annual premium

Agreeing to pick up tail for entering physicians may be key recruitment tool

Other Strategies (cont'd)

Medical Staff Privileges

Do the physician's medical staff privileges automatically term with employment agreement?

Do you have open/closed medical staff departments?

Closed to community providers? (Your mileage may vary)

Won't be as effective for primary care

Surgical/procedure-based, and hospital-based specialties

Academic/Professional Appointments

Is physician required to resign academic/professional roles upon termination?

Are academic, professional society, or medical staff roles "ex officio" or tied to employment status?

Other Strategies (cont'd)

Sign On Bonus Repayment

Have a larger sign on bonus that is repayable upon termination by physician

Physician may be less inclined to leave if subject to repayment obligations

Keep in mind Stark, AKS and tax parameters

Program-Related Contracts Tied to Institution vs. Individual (e.g., transferrable to replacement)

Do Institutional IP Rights Survive Termination?