Failed restrictive covenant case signals a warning to practices

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Practice management

Recently a New Jersey practice lost a suit to enforce a restrictive covenant against a physician they had released. Experts say the case reveals pitfalls that practices should take care to avoid when they write and enforce their noncompetes and other covenants, and ways to get around them if they still come up.

According to presiding Chancery Court Judge Darren T. DiBiasi's decision, Timothy Vogel, M.D., was a well-regarded pediatric neurosurgeon when he was recruited from Cincinnati Children's Hospital Medical Center to New Jersey Brain and Spine (NJBS) in 2016. NJBS was eager to establish a pediatric neurosurgery practice, mainly to head off New York's Columbia University, which had an apparent interest in supplying those services to Hackensack University Medical Center (HUMC), with which the practice is associated for other specialties.

Vogel signed up, moved his family to New Jersey, and for seven years performed at a high level, winning renown in his profession and cementing NJBS' pediatric neurosurgery practice at HUMC. But NJBS was losing money on him, owing to the vagaries of the subspecialty including a high number of Medicaid patients, as well as Vogel's high salary. In 2022, NJBS informed Dr. Vogel that it was "moving in a different direction" and he was terminated without cause or advance notice.

Vogel continued to work at Hackensack under other employment agreements, notwithstanding the hospital was within the region circumscribed by his employment agreement with NJBS. He didn't have much choice; capabilities for Vogel's subspecialty, explains Steven I. Adler, a partner with Mandelbaum Barrett P.C. and one of the lawyers who represented Vogel at trial, are offered by "virtually none of the other hospitals in New Jersey." Also, having been dismissed, Vogel had no reason to consider the covenant binding.

NJBS disagreed, sought an injunction, and sued for breach of contract, among other charges, seeking to recover $4.3 million from Vogel. NJBS also, in the course of litigation, charged that Vogel had actually been dismissed for cause and supplied witnesses who testified to that. Ultimately, the judge dismissed the testimony as "inconsistent with the evidence," pointing to the lack of any disciplinary paper trail.

Is the burden undue?

No case in which the judge suggests one's witnesses are not on the level can be said to have much chance of success. The practice's switcheroo on firing Vogel without cause might have been made in hopes of strengthening a weak case against him.

"The practice had the right under his contract to let him go without cause," Adler says. "But if the court found they really did let him go without cause, then they would be more likely to find in the employee's favor, because he didn't actually screw up as an employee and thus bring this restrictive covenant upon himself."

It's also unusual for a practice to seek to enforce a restrictive covenant when the employee in question is released without cause, rather than leaving on his own.

Still, it could have gone the other way. Salvatore G. Gangemi, a partner with the Harris Beach Murtha firm in Stamford, Conn., thinks NJBS would have had a better chance if Vogel had violated other aspects of the covenant — for example, "if he'd taken with him some confidential information, like patient lists, and started calling those people."

The court might also have found for NJBS if the judge accepted that the practice's harm from Vogel's continued presence outweighed Vogel's harm from the restrictions of the covenant. But his lawyers successfully argued that freezing Vogel out of his field in his home territory with the covenant's time and regional restrictions placed, in legal terms, an undue burden on him.

All restrictive covenants put some burden on the contracted employee, Adler explains. But if, for example, "an employer is trying to bar a former employee from working in a particular industry, but that industry is the only industry in which the employee ever worked, courts usually will not enforce the restrictive covenant, since it would impose an undue hardship [and] make the former employee unemployable. Courts do not want to preclude an employee from earning a living and supporting his or her family."

Consider options other than noncompetes

Noncompete clauses are finding new challenges in state legislatures, and may lose salience as ways of keeping departing doctors out of your backyard.

Last year saw the courts strike down the Federal Trade Commission's proposed national noncompete regulation (*PBN 9/9/24*). But the states are moving ahead: The Economic Innovation Group's state noncompete law tracker shows that while only four states have banned noncompetes outright, most states have some restrictions on them, including limits on contracts that can contain them based on salary level.

Given the environment, says Tamika Hardy, a partner with Rivkin Radler in Uniondale, N.Y., "employers need to move away from restricting how and where people work; they need to focus instead on their business interests — patient lists, referral lists and vendor lists. They should focus more on non-solicitation of the things that make your business unique and profitable."

Hardy also suggests you look at other ways, certainly other than litigation, to get what your practice needs in the employment and post-employment.

"I try to get my clients to ask themselves, what is the *legitimate* business interest that you are trying to protect [with this covenant]?" Hardy says. "Everything you put in this agreement should be geared toward protecting that."

"If you can't clearly articulate the interest you are trying to protect [with your noncompete], then your noncompete is overbroad," Gangemi says.

Also remember that, if it comes to cases, just as courts consider some employee burdens undue and some not, they might consider some business interests legitimate and some not, and merely preferring less competition may not cut it.

"Again, noncompetes are not there to prevent competition," Gangemi says. "Noncompetes exist to prevent *unfair* competition. In the United States, fair competition is fair game."

3 more tips

Talk to patients, not the court. "While a patient has the right to be treated by the doctor of their choice, [under normal agreements] they can't be solicited [by their former doctor]," Hardy says. That gives you the floor to convince them to stay. "If the goal is not to lose patients, give yourself the space and time to develop relationships with the patients who were being treated by this departing physician."

Add takeback terms. In negotiating the agreement, put in reimbursement terms for yourself, Hardy says: "For example, you might include a provision that says that if the doctor leaves you have to be paid back for what you invested in their marketing and education."

Come to terms. Even if you're the one making the call to terminate an employment agreement, try to bring the employee to the table and negotiate terms, using the current language as a starting rather than a stopping point. "Perhaps instead of saying all of these hospitals that are in this vicinity [are off limits]," Hardy says, "maybe you can say, '90% of our patients are at these four hospitals so we're going to let you work at the other ones.'" If it goes well, there'll be less chance of a challenge afterward.

Resource

- Economic Innovation Group state noncompete law tracker: https://eig.org/state-noncompete-map/

Public interest: Another noncompete hurdle

Along with other relevant legal issues, courts may also rule on whether blocking a physician's employment is harmful to the public interest.

In the Vogel case, that argument was prepared because the pediatric neurosurgeon "would not be able to perform his complicated cases elsewhere, since other hospitals were not equipped to do those surgeries," says Steven I. Adler, Vogel's attorney. But it was not needed, as the defense's other arguments carried the day.

If all else failed, though, Vogel's niche subspecialty, and the vulnerable and underserved population he treated, could have succeeded. Henry Norwood, of counsel with Kaufman Dolowich in San Francisco, notes that "enforcing this noncompete would potentially result in less access to care for children," and that "weighed on the court's decision."

Norwood suggests you keep that in mind especially when drafting a noncompete involving a specialist physician such as Vogel, and preempt objections with "lesser restrictions on the geographic and temporal terms of the noncompete." -- *RE*

BACK TO TOP