

So, you're a health care provider with a non-compete. Tips for physicians, dentists and other health care professionals for dealing with covenants not to compete.

By John F. Reha

DISCLAIMER/NOTE: The author is not giving any legal advice to the reader of this article. The reader is advised to seek advice from counsel competent in the areas of competition restrictions before taking any action. No attorney-client relationship exists between the author and the reader unless and until the reader formally retains the author as counsel.

It is increasingly common for hospitals, group practices and other health organizations to require that physicians, dentists and other health care providers execute non-compete agreements. This article provides tips for the health care professional who has executed such an agreement.

1. MD and DO “physicians.” Colorado’s Non-Compete Statute creates a rule applicable only to “physicians” who are “practicing medicine,” i.e. MD’s and DO’s, both of whom are deemed to practice medicine under Colorado licensing statutes. Such rule has these provisions:

a. Physicians may practice medicine where they wish. The Non-Compete Statute prohibits restrictions on a physicians’ right to practice wherever they deem fit.

b. Competitive damages provisions are permitted. Although non-competes are unenforceable as to physicians, an agreement with a physician may provide for “the payment of damages in an amount that is reasonably related to the injury suffered by reason of” the exiting physician’s post-termination competition.

c. Competitive damages are nonetheless limited to net profits. It is common that physician non-competes set out arbitrary dollar amounts, portions of compensation or percentages of revenue as the “competitive damages” provision permitted under the Non-Compete Statute. Provisions seeking the competitive damages described above are impermissible under an opinion of the Colorado Court of Appeals which limits attainable damages to lost net profits. Net profit is the result of the following three-step calculation: (1) revenue, (2) less direct expense (such as physician and support staff salaries and benefits)---these first two steps result in gross profit, (3) less a proportionate share of the employer’s overall general and administrative expense apportioned to the revenue that the physician would have generated had the physician remained employed. This third step creates net profit. Net profit is often a small percentage of revenue and sometimes may be a negative amount.

d. The result. The Non-Compete Statute creates significant hurdles for enforcement of physician non-competes. Many of them can be successfully challenged.

2. Rules Applicable to Non-Physician Healthcare Professionals. Other parts of the Non-Compete Statute govern non-competes outside of the special physician rule. In summary, those portions of the statute render all non-competes void, except those in the following three areas as applied to health care professionals: (1) the sale or purchase of a practice, (2) non-compete

agreements with “professional staff to management,” and (3) non-competes which protect trade secrets.

a. The sale of business exception does not typically apply to healthcare professionals. If the covenant not to compete arises out of the sale of a practice it will be enforced, *at least as to those persons who are involved in the sale itself as stockholders, practice owners, etc.* This is not the case for employees who have no meaningful ownership position in the practice.

b. “Professional staff.” The Colorado Court of Appeals has limited the professional staff exception only to those persons who are both (1) employed as “professionals,” and (2) engage in their profession as part of the employer’s key management team. The practice of dentistry, podiatry, etc. is inherently not part of management.

c. Trade Secrecy allows only limited enforcement. The only remaining exception is trade secrecy. Non-competes are enforced under such exception, but only to the extent they protect legitimate trade secrets. In healthcare, the trade secrecy focus is typically patient identity. If identity of patients can be established as a trade secret, a non-compete will be enforced, but only to the extent necessary to prohibit the exiting healthcare professional from treating those patients. The trade secrecy exception will not support a general, across the board prohibition against a healthcare provider engaging in his or her profession.

3. What to do. If you are contemplating leaving a medical, dental or other healthcare practice, if you are otherwise a physician burdened by a non-compete, or if you are a healthcare organization interested in drafting non-competes which feature increased enforceability, you should confer with counsel having expertise with covenants not to compete affecting healthcare professionals. Doing this will increase the chances of a favorable resolution.

John F. Reha is an attorney practicing in Littleton, Colorado. His practice focuses heavily on non-compete, trade secrecy, non-disclosure and other competition issues, including non-competes involving physicians, dentists and other healthcare providers. He has been repeatedly recognized as an expert in these areas and has repeatedly been named to lists of outstanding attorneys practicing in Colorado.