More doctors become hospital employees, facing noncompetes

Meg Bryant

As fewer physicians strike out on their own, they're hitting one potential disadvantage to hospital employment: the noncompete agreement.

Hospitals call them necessary for building a patient base and legal experts say they are common and usually enforceable. But physicians, and in some cases the courts, are pushing back.

Last month, 92 doctors of Mecklenburg Medical Group sued Atrium Health seeking release from restrictive work covenants and the right to form a standalone practice. The complaint, filed in Mecklenburg County Superior Court, alleges the health system engaged in anticompetitive practices including noncompete agreements and compelling doctors to refer patients to Atrium facilities if they needed additional care.

“It has become common practice for hospitals to require physicians to sign noncompete agreements,” says Aaron Hall, attorney and CEO of Jux Law Firm in Plymouth, Minnesota. “Hospitals invest significant resources in building their base of patients, so they want to avoid the risk of losing patients when a physician goes to a competing facility.”

The lawsuit claims Atrium has a “bloated management bureaucracy” and “is acting as the exact opposite of the nonprofit healthcare provider that it claims to be.”

As large health systems look for ways to solidify market share, many are betting on physician practices to expand specialty offerings and bring in new patients. In a 12-month period from 2015 to 2016, hospitals acquired 5,000 physician practices and employed 14,000 physicians, according to an Avalere

analysis conducted for the Physician Advocacy Institute. The findings indicate a 100% rise in hospital-owned physician practices and 63% jump in hospital-employed doctors since 2012.

The trend reflects physicians' struggle to survive in a healthcare environment that increasingly favors integrated health systems.

Protecting investments

But ownership often comes with a price. Doctors and other healthcare workers are often asked to sign noncompete agreements promising not to see patients within a geographic range and time period after they leave an employer. Hospitals and health systems see noncompetes as a means to protect valuable investments in physician practices and top-ranked specialists, but critics say they are anticompetitive and not in the best interest of patients.

"When [MMG] joined us they were much smaller, and now we've invested a lot of resources," Atrium spokesman Chris Berger tells Healthcare Dive. The decision to withdraw from the health system "took us back a little bit," he adds.

The dispute stems from a contract that introduced a new payment model in January. Of the roughly 1,900 physicians employed by Atrium, 92% signed up again, Berger says. The MMG doctors who rejected the contract interpreted it as termination from employment without cause, since the old contracts were no longer in effect — in essence, nullifying the noncompete agreements, according to MMG attorney Noah Huffstetler III of Nelson Mullins Riley & Scarborough.

Atrium has agreed to release the physicians from the noncompete and

informed them that their last day will be Aug. 31. MMG attorneys are reviewing the agreement and how it affects the pending lawsuit.

Noncompete agreements are enforceable in every state but California. However, some states bar their use in certain industries, such as medicine and law. For example, Connecticut and Rhode Island passed laws in 2016 prohibiting noncompetes between employers and physicians. And earlier this year, the Colorado legislature amended its law on noncompete clauses to allow doctors to continue treating patients with rare diseases after they part with an employer. Gov. John Hickenlooper signed the bill into law on April 2.

The MMG case notwithstanding, Huffstetler believes there can be a legitimate role for covenants in the medical area. “When a health system purchases a practice, part of the value which it gets for the purchase price is the physicians' continued involvement in the practice.”

But others disagree. The American Medical Association’s Code of Medical Ethics recommends physicians avoid restrictive covenants when possible. Among its concerns are that they can limit access to care and disrupt care continuity. They also discourage competition, which can boost quality and conveniences while lowering fees.

Specifically, the AMA guidance says doctors “should not enter into covenants that: (a) 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 (b) Do not make reasonable accommodation for patients’ choice of physician.”

Mixed record in court

Legal challenges to noncompete agreements have a mixed record. While they are generally enforceable, courts can limit the extent to which they are enforced, Hall says. It’s a balancing act between the hospital’s right to protect its interests, the employee’s right to work in their professional field and what

is in the public interest.

While rural areas regularly struggle with access to care, noncompete agreements can impact urban areas as well. Huffstetler points to a North Carolina case where the appellate court refused to enforce a noncompete involving a pediatric endocrinologist because there were no other such specialists within a fairly large urban area. In another case where there were only two physicians in a subspecialty, the court declined to enforce the covenant on grounds it would deprive patients of having a choice of providers.

“Under North Carolina law, our first obligation is to the patient, to make sure there is no interruption in care or disadvantage to patients,” Huffstetler says. He added that MMG’s doctors want to continue to work with Atrium in the Charlotte community. They just want to revert to being independent practitioners, rather than employees.