Frequently Asked Questions: Non-compete clauses

What is a non-compete?

A non-compete is a kind of restrictive covenant, often found in employment contracts, which limits the locations or kinds of jobs an employee can legally accept after he/she quits or is fired. By signing the contract, the employee is agreeing to the limitations in the non-compete, which may include geographical and temporal restrictions. A non-compete may be utilized in just about any position. It is often encountered in the technological and medical fields.

Are non-competes legal?

It depends on what state you live in, but they are legal in Washington. Washington courts will enforce "reasonable" non-compete agreements, after considering a number of factors, including the duration, geographic area, and scope of the restrictions. Further, starting in 2020, Washington imposed further regulations on non-compete agreements by passing a new law.

What is reasonable?

When a court has to determine if a particular non-compete agreement is reasonable, it will utilize a three part test and ask the following questions:

1. Is the restraint on the employee necessary for the protection of a legitimate business interest or the goodwill of the employer?
2. Is the restraint imposed upon the employee greater than reasonably necessary to secure the employer's business interest or goodwill?
3. Will enforcing the non-compete unjustifiably deny the public the service and skill of the employee? Or, put another way, how much harm will the public suffer if the noncompete is enforced, and does that harm outweigh other considerations?

In addition to these inquiries, a court will ask if the employee benefitted from the contract he signed with the employer. This benefit is sometimes called *consideration* in legal terms.

What is consideration?

Consideration is a word used by the courts to describe what each party is willing to give up to benefit the other party as part of the contract. If the non-compete is part of the original employment

contract, the employer's promise to employ the physician – a promise to pay money to the employee in exchange for the employee's work for an agreed upon time period - would suffice as consideration.

Before it will enforce a non-compete, a court will require the employer to demonstrate consideration to support the agreement. A court would require additional consideration (like a pay raise, for example) for a non-compete signed separately, after the initial employment contract was signed. [1]

What changed when Washington passed its law regulating non-compete agreements starting on January 1, 2020?

In short, the new law provides that:

- If a court "reforms, rewrites, modifies, or only partially enforces any noncompetition covenant," the employer must pay the employee's damages (with a minimum damage amount of $5,000) plus attorney fees, costs, and expenses. For example, courts often modify geographic or other restrictions (such as reducing a geographic radius from 30 miles to 20 miles), which would now result in an award for the employee;
- If an employee's noncompetition covenant lasts longer than 18 months, it is unenforceable unless the employer can prove otherwise through "clear and convincing" evidence;
- Noncompetition covenants are prohibited for workers unless their earnings exceed a certain threshold (about $100,000 for employees and $250,000 for independent contractors), which amounts are adjusted annually;
- In the event of a "layoff" (an undefined term), an employee's noncompetition covenant is unenforceable unless the employer continues to pay the employee's base salary during the period of enforcement (offset by compensation the employee makes from subsequent employment);
- Employers must disclose the terms of the noncompete restrictions to employees in writing no later than the time the person accepts an offer of employment;
- The new law does not regulate: (a) a nonsolicitation agreement (defined narrowly by the statute); (b) a confidentiality agreement; (c) a covenant prohibiting use or disclosure of trade secrets or inventions; (d) a covenant entered into by a person purchasing or selling the goodwill of a business or otherwise acquiring or disposing of an ownership interest; or (e) certain covenants entered into by franchisees.

[1] Labriola v. Pollard Group, Inc. 152 Wn.2d 828, 100 P.3d 791 (2004).

The new law applies to new and agreements that existed prior to January 1, 2020, although generally an employee only has remedies against an employer for such a preexisting agreement if the employer is seeking to enforce the covenants against the employee.

What ultimately will a Washington court enforce?

It is very difficult to predict if a court will decide to enforce a particular non-compete or not. The questions the court asks when conducting the three-part test are all very fact dependent and individual judges may come to different conclusions.

The Washington Supreme Court has acknowledged that non-competes benefit public policy. For example, a business has the right to protect its intellectual property, business secrets, and its investment in its employees. It wouldn't be fair to allow an employee to immediately open his/her own practice next door, right after an employer spent time and money to train that employee. A court must weigh the rights of the individual to sign contracts, the business's right to protect its resources, and the public's need for access to skilled and available services. Each case will be different, and it is extremely difficult to predict how the court may rule.

What is a non-solicitation clause?

A non-solicitation clause is a provision, typically found in an employment contract or contract for sale of a practice, in which an employee or seller of a practice agrees not to solicit business from patients, following the termination of the employment relationship or the sale of the practice.

Are non-solicitation clauses enforceable?

Generally, yes. Non-solicitation clauses are a type of covenant not to compete, and are therefore generally enforceable as long as they are reasonable.

What are the risks of agreeing to non-competes?

Depending on the non-compete, if you quit or are terminated from your job, you may find yourself unable to continue to practice where you live – sometimes, for several years. Some employers are located in densely populated areas, like downtown Seattle, and prohibit their employees from working within many miles of the employer's clinic location(s).

What should a physician keep in mind when considering a non-compete?

A physician *signing* a contract should carefully review it before signing, and make sure that the duration, geographic area, and scope of the non-compete are acceptable.

You may wish to speak with an attorney before signing a contract with a non-compete clause. Tell your lawyer your concerns, and consider how the specifics in the contract might affect you depending on where you plan to live and for how long. Contact the WSMA for more information on attorney referrals.

A business *drafting* a non-compete for its employees to sign must use reasonable terms in the contract. And remember that in order to be enforceable, a non-compete signed after the initial contract as an addendum needs to have additional consideration as part of the deal (such as a pay raise for the employee). We also recommend consulting an attorney before drafting a non-compete clause.

For further information, email us at wsma@wsma.org.