INDEPENDENT Physicians & Providers OF ILLINOIS

March 15, 2023
MEETING NOTES

Thanks to those who attended our March 15 meeting!

- NEW BENEFIT ALERT: Give your employees health insurance at a discounted rate via this link!
  - Available Plans: medical, dental, vision, Teladoc, and life insurance.
  - Members may also utilize the 401(k) Retirement Solution.

- Save the date for our next member dinner: Wed., June 21, 2023 @ 6:30pm @ Pinstripes-Oak Brook.
- Here are pictures from the event
- Here is the slideshow from the program
- Below are the takeaways provided by David Becker (312-377-7881 or DBecker@dickinsonwright.com) of Dickinson Wright PLLC regarding non-competes and protecting your intellectual property.

Presentation Notes:

Types of restrictive covenants typically present in employment agreements:
- Non-competition
- Non-solicit
- Non-disclosure of confidential information
- Assignment of IP rights

Non-Competes

In-term vs. Post-term

- In-term is generally not even discussed as a restrictive covenant because it can often be covered as a condition of your employment and linked to confidentiality obligations. Additionally, the more significant the role, the more likely that employee is covered by certain duties, whether a duty of loyalty or a fiduciary duty, not to directly work adverse to their employer's interests. Most employees simply accept these norms. So, it is only with the most aggressive employees that we see these duties come up in litigation. But beware, it makes sense to have these obligations spelled out because it is only the worst actors who will start competing with you while their still employed by you.
- Post-term is generally the key thing we're looking at- a typical post term restrictive covenant limits an employee's ability to work in a competitive role for a period of time after their current employment is terminated.
  - These can apply when the "termination" of employment occurs for any reason, whether the employer terminates or the employee does.
    - § Must protect a legitimate business interest
    - § Must be reasonably limited in time - 2 years maximum in Illinois
    - § Must be limited geographically in a way that matches the company's legitimate business interests
    - § Must be supported by adequate consideration - Can be supported at hiring or a promotion provided that the employment or time after the promotion in which the employee remains employed in that capacity (or something better) continues for at least 2 years after the agreement is entered. This can also be money provided at the time of execution.

- What does an enforceable non-competition agreement look like (so these are things that, if done correctly will make this more defensible so, conversely, if these things are not properly addressed in an agreement, it will more and more indicate that the term is not enforceable):
  - In general: It's going to define the business of the company with enough detail to establish that the business relies on some confidential /proprietary methods or systems that are worthy of protection. This can be a trade secret manner of doing what you do or it could be the manner in which the company develops and services customers. Folks often rely on customer lists and how they are developed.
  - For medical practices, IL courts have found that developing a client base is a legitimate business purpose but the scope of the restriction needs to be drawn narrowly to match that purpose.
  - Once you've defined that legitimate business interest that needs to be protected, the agreement needs to be written to reflect that scope and timing has some relation to that protection.
  - Make it less than 2 years and, if it's shorter, it will be more defensible
  - Define the geography in relation to where your business actually operates. Don't go overboard as the scope must be narrowly tailored to meet your business's needs.
  - Define the "competition" as narrowly as you can to accomplish your goals.
  - Needs to be signed at the time of hiring or at some other major promotion or positive change in employment status.
  - If not signed at hiring, you're going to need to consider the consideration to provide.

Unique Illinois issues:

ILLINOIS FREEDOM TO WORK ACT 1/1/22

- Can't have non-compete agreements with employees earning under $75,000 moves up over time to $90,000 in 2037
- Can't have non-solicit agreement with salaries under $45,000 moving to $52,500 in 2037
- Prohibited in construction industry and for unionized workers
- Employees must now be given 14 days to sign and advice to check with counsel
- Caselaw regarding consideration has now been codified "adequate consideration" is now "(1) two years of employment after the employee signs the non-compete or non-solicit; or (2) other "consideration adequate to support an agreement to not compete or not solicit, which consideration can consist of a period of employment plus additional profession or financial benefits or merely professional or financial benefits adequate by themselves." Think raise, bonus, equity award, promotion, specialized training, or educational benefit.
- Codifies need for "legitimate business interests," but this will be considered in a "totality of the circumstances" manner and takes into account the employee's access to and acquisition of confidential information.
- Also codifies requirements that were previously set forth in judicial decisions, the Amendment provides that non-compete and non-solicit agreements are illegal and void unless: (1) the employee receives adequate consideration, (2) the covenant is ancillary to a valid employment relationship, (3) the covenant is no greater than is required for the protection of a legitimate business interest of the employer (discussed below), (4) the covenant does not impose undue hardship on the employee, and (5) the covenant is not injurious to the public.
- Confidentiality agreements are okay
- Agreements not to disclose trade secrets too
- Invention assignments work
- Garden leave clauses (pay someone to sit) are okay
- Restrictive covenants as part of the sale of a business work too
- You can also enforce an agreement where an employee agrees not to reapply for employment to the same employer after termination
- Fee shifting to allow employees to recover fees if they prevail in a claim filed in Illinois
- As of July 2022, the law forbids non-competes for Certified Nursing Aides and nurses working with nursing agencies.

What does an enforceable non-solicit agreement look like:

- Very similar, but courts generally are willing to permit non-solicits where a non-compete otherwise won't work. This is because you're really just protecting against customers you have. And it is even more workable where you define some direct link between the departing employee and the specific customer—*i.e.* can't solicit customers they've worked with in the last 12, 18, 24 months, but

as you get further out, it's going to be less enforceable. You probably want to stick to 12 months and customers they worked with for the last 12 or 18.

What is a typical non-disclosure/confidentiality agreement?

- These agreement are very enforceable and, when you think about, justifiable and necessary. When you have an employee working for you, you want them to do their job to the best of their ability and you don't want to have to worry that when they leave, they will take your best technology, methods, or ideas with them.
- Enforcing these is much more linked to the protectable nature of the underlying ideas or technology. Trade secrets and financial information are very protectable.
  - Trade secrets discussion and need to protect those ideas
  - Customer lists are unique
  - Courts have generally determined that, in a medical practice, client relationships are protectable for the practice. But the overlay of HIPPA and other privacy concerns makes this a thorny issue.

What is a typical assignment of IP rights?

- Not typical necessary for a medical practice, but could be for a medical services company
- As you might imagine a lot of you and your colleagues are coming up with new ideas all the time that have nothing to do with the "work" you are doing for the practice. Let's face it, I don't think a Dr. believes that anything they do in the operating room or exam room, unless it uses someone else's machine, should be someone else's property. And that's a unique perspective for this industry.
- If you are using some kind of innovative technique or device that could be covered by a patent or protected as a trade secret, you should think about actually using these

Recent developments in the FTC and potential impact on employment relationships/agreements

- July 9, 2021- Biden encouraged the FTC to engage in rulemaking to curtail the use of non-competes
- January 5, 2023 - FTC proposed a rule to ban non-compete clause stating that such clauses "hurt workers and harm competition."
- The proposed ban would:
  - Supersede all state laws
  - Define "non-compete clauses" broadly enough to affect other contractual provisions that have the effect of prohibiting workers from seeking or accepting employment or operating a business after the conclusion of the current employment
  - Could impact non-disclosure-of-confidential-information restrictions and requirements that an exiting employee re-pay training costs or pay for the training of their replacement.
  - Require affirmative action by employers to rescind the non-compete agreements and, therefore, "touch" every agreement that includes a non-competition (or related) restriction in it.
- Comment period has been open since and hearings have been held:
  - American Hospital Assn opposed the rule:

The weight of existing research indicates that non-compete agreement for certain categories of employees are beneficial… Any final rule must take full account of both the existing economic literature and the real-world experience of hospitals and health systems, which has been that non-compete agreements for physicians and senior executives incentivize recruitment, retention, training, investments in career-building (e.g., marketing and building individual physician practices) and the sharing of a broad range of proprietary information

  - US Chamber of Commerce stated FTC doesn't have the necessary authority
  - Many have voiced concern that there is a lack of evidence from the FTC that a total ban is necessary.
  - Some think the rule will be too broad in scope
  - There are issues relating to business owners-FTC limits applicability of the proposed rule to owners of more than 25% of a business when they sell. Many think that's too high and that any owner should be able to be precluded.
  - Some (like Nat'l Assn of Truck Stop Owners and Society of Indep. Gasoline Marketers) want it to be prospective rather than retroactive to leave executive non-competes they currently have
  - Concerns re: diminished interest in investing in employees and employee education

- Senators and Reps. Have introduced bills in both houses following the FTC's lead and they are both have bipartisan co-sponsorship.

Thanks,
Jill McCall, IPPI Executive Director
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