



Emergency Medicine Residents' Association

EMRA Restrictive Covenants and Non-Competes Policy Brief

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BACKGROUND

Restrictive covenants, more commonly known as noncompete clauses, are part of many emergency physician contracts. These typically prevent physicians from working in a specific geographical location for a certain amount of time after termination of the contract. Prominent medical associations have expressed their viewpoints regarding this important issue. It is essential for emergency physicians to examine these perspectives, as this common practice can significantly affect emergency physicians. This issue has been referred to the EMRA Board through a 2020 Spring Representative Council resolution.

EMRA opposes employment contracts that contain non-compete clauses and restrictive covenants that limit the right to practice medicine as an emergency physician after termination of employment or contract

This policy brief, prepared at the request of the EMRA Board, will:

- I. Summarize existing statements by other medical societies
- II. Summarize existing perspectives on this issue on a state level
- III. Provide the employee versus employer perspective
- IV. Provide the EMRA Board with recommendations

I. POSITION STATEMENTS FROM OTHER MEDICAL SOCIETIES

AAEM:

The American Academy of Emergency Medicine (AAEM) **condemns restrictive covenants**¹. While restrictive covenants are meant to prevent competition, Past President of AAEM Dr. Larry Weiss states that these concerns do not apply to emergency medicine. When an emergency physician begins a new job, they do not transfer patients to their new workplace, and there are no trade-secrets that must be kept from competing groups.

AMA:

The American Medical Association (AMA) has released a statement through their Code of Medical Ethics, stating that **restrictive covenants may “restrict competition, can disrupt continuity of care, and may limit access to care”**. They affirmed that **restrictive covenants should not be used as conditions of entry into training programs**².

In early 2020, the Federal Trade Commission (FTC) considered the issue of restrictive covenants. The AMA submitted a letter discussing concerns and benefits of non-competes. Benefits included incentivization of businesses committing resources to employees, while concerns included forcing physicians to move, severance of developed patient-physician relationships, and reduction of available physicians within a region. Ultimately, the AMA urged the FTC against changing restrictive covenant laws, arguing that this issue is more appropriately legislated at a state level³.

ACEP:

The American College of Emergency Physicians (ACEP) states that **emergency physicians should not be required to sign “unreasonable” restrictive covenants because they are not in the best interest of the public**⁴.

While “reasonableness” can be up to interpretation, both ACEP and AAEM have supported physicians in their legal battles against restrictive covenants⁵.

II. WHAT STATES SAY

The State in which a physician is employed can determine whether or not – and how strictly – they must follow a non-compete agreement^{6,7}.

DOES widely allow Non-Compete Agreements: New York

A non-compete clause is allowed in a physician’s contract so long that it is:

- “(1) is necessary to protect the employer’s legitimate interests,**
- (2) does not impose an undue hardship on the employee,**
- (3) does not harm the public, and**
- (4) is reasonable in time period and geographic scope”.**⁸

Court rulings as to what would count as a “reasonable” time period and geographic scope are determined on a case-by-case basis⁸.

Does NOT allow Non-Compete Agreements: California

California widely voids non-compete agreements in contracts⁹. Other examples that have specific laws against physician non-compete agreements include Rhode Island¹⁰ and Massachusetts¹¹. These states argue that non-compete agreements may lead to a shortage of physicians within a geographical area¹².

Allows Non-Compete Agreements, With an Exception: Tennessee

In Tennessee, non-compete agreements in physician contracts are allowed, but must be reasonable. Physicians may be restricted for up to two years to a maximum 10-mile radius from the site of current employment. Uniquely, “this section shall not apply to physicians who specialize in the practice of emergency medicine”.¹³

III. EMPLOYEE VS. EMPLOYER PERSPECTIVE

WHAT EMPLOYEES SAY:

Physicians signing an employment contract generally seek to limit restrictions on their ability to earn a living practicing medicine. A physician barred from practicing within, say, 50 miles of her employer's hospital for a year after that contract ends will find it difficult to leave that hospital, even if they would rather work with a competitor. Young physicians in particular may feel they have little standing to negotiate an employment contract, but they must balance this reticence through an understanding of the restrictions being placed on them. If a non-compete clause is restrictive enough, and the employer refuses to budge, physicians may be better off walking away entirely.

Emergency medicine presents an unusual set of circumstances that make non-compete clauses both less advantageous to employers and more harmful to physicians. The primary purpose of a non-compete clause is to prevent an employee from immediately cannibalizing a business by taking away customers cultivated there or using trade secrets acquired there. Such reasoning could even make these clauses appear beneficial for employees. These considerations do not apply to emergency medicine. Patients rarely follow an emergency medicine doctor to a different practice site, and trade secrets are simply less of a concern in emergency medicine.

Emergency physicians should understand the traditional rationale behind non-compete clauses, as well as the reasons these may be misapplied in the emergency medicine context. Not all employers will agree to change this part of the contract. Some may even refuse to negotiate it. But considering the outsized impact such a clause can have on a physician's career and livelihood, emergency physicians should at the very least carefully weigh the pros and cons of these provisions before signing on the dotted line.

WHAT EMPLOYERS SAY:

Restrictive covenants are an important, useful, and most of all fair way to protect legitimate business interests, promoting a stable environment and encouraging employers to hire ever more employees. After all, employers provide career mentoring, a place of employment, the prestige of their name brand, additional training, marketing of the patient, and a pool of patients to build a well-trusted and honorable practice upon. Additionally, physicians that are in leadership positions may be privy to proprietary information, which could be unfairly used against the employer if there is not adequate prevention. This information could be used to establish competing practices or used by an existing competitor as an unfair advantage. Considering the wide and significant scope of these legitimate business interests, it is only fair that there are some protections in place.

For example, a standard portion of a restrictive covenant is a non-solicitation agreement, which ensures that former employees cannot attempt to recruit our current employees¹⁴. If left uncurbed, this practice could result in outright pilfering of the very best and brightest, potentially leaving existing systems bereft. To further enforce the reasonable expectations of the employer, the time period of the “non-compete” and the non-solicitation agreement tend to be identical, and typically never extend longer than 2 years¹⁴. Additionally, the zone of effect is carefully thought out based on the applicable metrics of the situation, such as population density and location of potential competition. This agreement can impose some difficulties to physicians, who may need to relocate their place of practice. However, it is also important to consider the expenses associated with verifying, hiring, on-boarding, and elevating the physicians who choose to join our system. It is also worth noting that without these reasonable restrictions, there is significantly less incentive to dedicate valuable resources towards multi-faceted physician promotion. Both employers and employees benefit from reasonable restrictive covenants.

IV. SUMMARY AND RECOMMENDATIONS

While restrictive covenants have legitimate uses in a number of industries, their traditional rationale finds little place in the realm of emergency medicine. Emergency physicians occupy a unique sphere within medicine, without any ability to transfer patients over to their new workplace. In some cases, emergency physicians may obtain proprietary information, especially when serving in leadership positions, but such concerns about trade secrets are more appropriately dealt with through non-disclosure or non-solicitation agreements.

Courts have held that a chief limitation on the enforceability of restrictive covenants is the potential for these agreements to harm to the general public. At a time of physician shortages, and especially amid an ongoing pandemic, legislators and jurists must look carefully at any provisions which deprive the public of access to care. In the case of emergency medicine, where the postulated benefit is so limited, it becomes even harder to justify these barriers.

It is an unfortunate reality that as of 2018, 27.1% of counties in the United States have no emergency medicine clinicians, and 41.4% of counties have no emergency physicians reimbursed by Medicare fee-for-service Part B¹⁵. This is a tragedy, as emergency physicians have been shown to reduce mortality, particularly for those with the highest illness severity, even as admission rates have gone down¹⁶. It is incumbent upon emergency medicine organizations to do our part in alleviating this issue. A possible solution may be to **oppose restrictive covenants upon emergency physicians which prevent them from working clinically at any location or facility for any period of time, regardless of geographical or temporal proximity to a prior place of employment, while supporting reasonable non-disclosure and non-solicitation agreements**. This compromise should allay concerns for both employees, who are allowed to clinically work anywhere and anytime, and employers, who are able to protect their practices from unfair disclosure and solicitation.

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