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Utilizing Employment Contracts to Protect a Practice's Investment in Its Employees

By Paul J. Welk, PT, JD

Owners of physical therapy private practices invest significant time, money, and effort in establishing and building a successful private practice. In one sense, the value of a practice is determined through a financial analysis based on information such as accounts receivable and expenses. Just as important, however, is the value of the investment the practice puts into employee development. Every practice depends on its employees to build its goodwill and reputation in the surrounding community among both patients and referral sources. As with any other asset, the practice owner should consider ways the practice can protect its investment in its employees. This can be accomplished through an employment agreement containing a restrictive covenant, often referred to as a "non-compete."

A non-compete is a type of restrictive covenant essentially preventing an employee from providing competing services within particular parameters.[1] Restrictive covenants are governed by state law. For this reason, it is important to understand how restrictive covenants are treated by the legal system in the state in which the agreement is to be enforced. For example, some jurisdictions analyze restrictive covenants by statute,[2] while other states analyze them through court-made case law as set forth in judicial opinions.[3] Additionally, states may elect to apply restrictive covenant laws differently to different professions and business arrangements or may disfavor the enforcement of restrictive covenants at all. Given the broad variability in legal analysis of restrictive covenants, it is important to consult an attorney familiar with this area of law to ensure that the practice's interests are adequately protected.

Despite the differences between states, there are a number of issues to consider when exploring restrictive covenant alternatives. Initially, it is important to understand the rationale behind the provision. An employer is justified in requiring that an employee agree to a reasonable restrictive covenant when the employer has a legitimate interest in limiting the employee's ability to take advantage of valuable relationships and information about the practice which the employee develops and learns during his or her employment.[4] This information may include patient lists, marketing plans, established goodwill, current practice employees, or other confidential information. From the practice's perspective, the practice does not receive the full benefit of the employment relationship if, upon termination of employment, the employee capitalizes on the relationships or information gained during the employment period to benefit a competing physical therapy provider or the departing employee.

Whether analyzed through statutes or case law, a court decision on enforcing a restrictive covenant will often look at whether the employer has given consideration to the employee and whether the restraint is at an appropriate level to protect an employer's legitimate interests.[5] For a restrictive covenant to be valid, courts generally require that the employee receive something of value from the employer in exchange for the agreement not to compete. This value is commonly referred to as consideration. For this reason, non-competition provisions are often included in employment contracts because this allows the offer of employment to serve as consideration for the employee's agreement not to compete. Courts are often reluctant to enforce a non-competition provision where there is no consideration; for example, if an employee signs a non-compete agreement during the term of employment and no additional consideration, such as additional compensation or benefits or a change in employment status, is offered.

In assessing the reasonableness of a restrictive covenant, courts will often examine the scope of the limitations placed upon the employee in relation to the activity being restricted—typically, the geographic area of the restriction and the time period for which such activity is being restricted. For example, a court may be more willing to enforce a restraint prohibiting a former employee from working in a private practice but not otherwise restricting that person from providing physical therapy services in other practice settings, such as an inpatient hospital. Likewise, a court is generally more likely to enforce a restriction covering a smaller geographic area. As to the length of a restrictive covenant, the limitation must generally last no longer than the time period necessary to

protect the employer's interest. Restrictive covenants spanning from six to 18 months following the termination of employment are relatively common.

While a physical therapy private practice makes significant investments in its patients and business relationships, it cannot forget about its employees. Through a well-drafted employment contract with appropriate restrictive covenants, a practice may minimize the loss of its investment in a departing employee. When considering the use of a restrictive covenant, it is important to consider the nature and scope of the interest that can be reasonably protected in the context of applicable laws, and to consult with an attorney as necessary. ■

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[1] Other types of restrictive covenants may include restrictions on a former employee's ability to solicit the practice's patients or employees to seek physical therapy services or employment with another entity.

[2] See for example Tenn. Code Ann. §63-1-148; Cal Bus & Prof Code §166000 et seq.; 6 Del. C. §2707; Fla. Stat. §542.33.

[3] Case law states include Pennsylvania, Virginia, Maryland, and New York.

[4] See American Physical Therapy Association HOD G06-92-14-28, Guidelines: Student and Employer Contracts.

[5] Restatement 2nd Contracts §188.