

## Non-Compete Clauses and Massachusetts Physicians

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By Massachusetts statute, G.L. c. 112, § 12X, a covenant not to compete after termination of employment is unenforceable against a physician. Accordingly, physicians should not be required to refrain from practicing within a certain area for a certain amount of time following termination. Massachusetts courts have applied this statute very broadly, consistently favoring patients' right of access to physician services over the medical practice's right to protect a business interest. Courts have considered a number of contractual provisions that, while not strictly geographic restrictive covenants, were linked to the terminating physician's post-termination practice activities.

In *Falmouth OB-Gyn Associates, Inc. v Abisla*, 417 Mass. 176 (1994), the Supreme Judicial Court struck down a provision requiring the physician to pay liquidated damages to the practice.

In *MetroWest Medical Group, Inc. v. Mount Auburn Hospital*, 1994 WL 90285 (1994), the superior court refused to uphold a contractual provision requiring physicians to repay debt incurred by the group in recruiting the physicians.

In *Parikh v. Franklin Medical Center*, 940 F. Supp. 395 (D. Mass. 1996), the U.S. District Court struck down clauses in a partnership agreement requiring forfeiture of a portion of a partner's interest and termination of staff privileges.

In an unpublished superior court opinion, the court refused to uphold a provision prohibiting the physician from soliciting patients or suggesting the transfer of their medical records to the physician's new practice. (*Ell Pond Med. Assocs. v. Lipski*, Super. Ct. Civ. No. 97-3805 (Jan. 29, 1998).)

In states that recognize covenants not to compete for physicians, a covenant will be enforced only insofar as enforcement is necessary to afford reasonable protection to an employer's legitimate interests—usually trade secrets, confidential information, or goodwill. A covenant must be reasonable in time and in geographic area.

Note that agreements restricting competition during employment or provisions that prohibit the physician from recruiting staff members of the practice have not been tested under G.L. c. 112, § 12X.

Some commentators have argued that a covenant not to compete in an asset acquisition agreement may be enforceable against a selling physician in Massachusetts if an acquisition agreement is viewed as not establishing a "form of professional relationship with a physician" within the meaning of G.L. c. 112, § 12X. One justification for such an interpretation might be that generally, non-competition covenants arising out of the sale of businesses are enforced more liberally than covenants arising out of the employer-employee relationship. *Alexander & Alexander, Inc. v. Danahy*, 21 Mass.App. Ct. 488, 496 (1986). Because covenants not to compete are generally not enforceable against physicians *after* the termination of their employment in Massachusetts, buyers often use other methods to prevent departing members from competing. These methods include deferred compensation or equity buyout arrangements in which the departing member forfeits or has reduced payments in the event of competition with the former employer. Other common mechanisms include the following:

- nonsolicitation provisions with respect to the seller's former patients and employees;
- nondisclosure of confidential information by the seller;

- the establishment of deferred compensation, retirement, or other benefit plans with benefits that vest over time in increments and with forfeiture of unvested benefits upon early termination of employment;
- longevity bonuses for retained employees;
- increasing vacations or other benefits with longevity; and
- payment of claims-made tail coverage only if the physician or other provider is employed for a specified length of time, otherwise, the responsibility for payment of tail coverage may rest with the physician or other provider.