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CONNECTICUT LIMITS PHYSICIAN NON-COMPETITION AGREEMENTS: JUST ONE PIECE OF SB 351

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On May 3, 2016, the Connecticut Senate sent SB 351 to Governor Malloy for signature. Among other things, the legislation limits the use of physician non-competition agreements. The Governor is expected to sign the bill into law in the coming weeks and, once he does, it will become effective on July 1, 2016. We will address the other sections of the legislation in a follow-up bulletin.

This portion of the legislation will apply to physician non-competes entered into, amended, extended or renewed on or after July 1, 2016 but does not otherwise affect existing agreements. Nonetheless, in enforcement actions involving existing agreements, Judges may well be inclined to apply the new standards.

The legislation limits physician non-competes to:

- One year.
- Fifteen miles from the primary site where the physician practices.
  - "Primary site" is where a majority of the revenue derived from that physician's practice is generated, or another location where the physician practices and that is identified in the agreement as the primary office, facility or location for that physician.
- Instances of "for cause" terminations if the employer terminates the employment contract or employment relationship.

Furthermore, the legislation prohibits the use of non-competes in situations (excluding partnership or ownership agreements, or agreements made in contemplation of partnership or ownership agreements) where the contract or agreement expires or is not renewed, unless, prior to expiration, the employer makes a bona fide offer to renew the contract on the same or similar terms. This means that in situations where a physician employment agreement simply expires, without an offer to renew on similar terms from the employer, the employer cannot impose a non-compete.

The legislation has an express "carve-out" for "partnership or ownership" agreements but the extent of the carve-out is not clear, and will likely require interpretation in the courts. One possible interpretation of the legislative intent is that, unlike employee agreements, a non-compete can be enforced against a former owner or partner if the ownership or partnership interest is terminated "without cause." Until the meaning of this part of the legislation is clarified, we recommend proceeding with caution.

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The legislation will make it difficult to obtain injunctive relief in any situation where the employer acts to terminate the employment relationship because evidence of "cause" will have to be presented at the hearing to justify the enforcement of the non-compete. Where the employer fails to renew an employment agreement (absent a bona fide offer to renew), the non-compete simply is not enforceable. The greatly-circumscribed "zone of validity" effectively limits enforcement to situations where i) the physician leaves voluntarily (and does not claim "constructive discharge") and ii) fairly clear cases of "cause" terminations. Even in those circumstances, at best, enforcement will be only for one year and within fifteen miles.

The legislation expressly includes "reasonableness" standards that Judges already apply in non-compete cases but under the limited circumstances under which these covenants will be enforced at all, one year and fifteen miles will be presumptively "reasonable."

In all events, no non-compete entered into on or after July 1, 2016 will be enforceable beyond the one-year, fifteen mile limits. The legislation also requires that the non-compete restrictions be separately and individually signed by the physician in order to be enforceable.

Finally, there is an issue as to whether non-competes entered in connection with the purchase of a physician practice are affected by this legislation. The legislation defines "covenant not to compete" as "any provision of any employment or other contract or agreement that creates or establishes a professional relationship with a physician and restricts the right of a physician to practice medicine in any geographic area of the state for any period of time after the termination or cessation of such partnership, employment or other professional relationship." It might be argued that the purchase of a physician practice does not fit this definition. However, at least where the physician is to be retained for professional services as part of the transaction, this legislation presumably would apply.

TAKE-AWAYS:

1. Review your current agreements now and anticipate the changes that will need to be made if renewed or amended on or after July 1, 2016. Consider acting immediately with respect to these agreements.
2. Create a template for new agreements that will be entered into, renewed or amended, on or after July 1, 2016. This template should include a separate physician signature for the non-compete provision.
3. Carefully consider how you assign physicians to offices, locations and facilities and be careful about deployment to more than one location. Consider whether to specifically identify a location as the physician's "primary site."
4. Carefully consider the implications of these non-compete restrictions in the context of potential physician practice acquisitions – the acquiring entity's ability to impose a formerly typical non-compete on the new physician(s) is likely greatly diminished.
5. Review the interplay between any physician practice governance documents and practice employment agreements with regard to non-compete restrictions.
6. Consider other ways to protect your business interests in the event of physician departure.

If you have any questions regarding physician non-competition agreements or any other health law topic, please contact:

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