



Are Physician Restrictive Covenants in Emergency Medicine Enforceable in WI?

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Contracts between emergency practice physicians and their employers which limit the doctor's right to compete after her employment ends are common and subject to close scrutiny when challenged. Post-employment "non-competes" limiting physician practice in certain areas, non-solicitation provisions respecting former patients and colleagues, and confidentiality/ non-disclosure provisions are types of restrictive covenant agreements.

In Wisconsin, such contracts between individuals and entities – e.g., employees-employers, independent contractors-principals, partners-partnerships – usually are subject to a Wisconsin statute which applies a more critical standard than those applied in most states. Adopted more than sixty years ago to legislatively overrule a contrary Wisconsin Supreme Court decision, Section 103.465 of the Wisconsin Statutes deprived courts of the power to rewrite flawed, indivisible restrictive covenants.

To be enforceable Wisconsin requires that restrictive covenants be reasonable under the totality of the circumstances. Such contracts are "viewed with suspicion" by the courts, and when challenged, the employer/ principal has the burden of proving that it has a protectable interest justifying the restriction imposed on the employee, that the restriction has a reasonable time and territorial limit, and that the restriction is not harsh or oppressive to the employee or contrary to public policy.

Although restrictive covenants have been enforced against a wide range of physicians, there is no published Wisconsin precedent addressing non-competes or restrictions against soliciting or serving patients in emergency medicine. Unlike many physicians, emergency room specialists likely do not establish prolonged personal/ business relationships with patients or secure patients through referral sources. Nor do patients customarily seek out a particular emergency room physician when faced with a medical emergency.

Wisconsin courts have long observed that such restrictive covenants are ordinarily unenforceable except to prevent the use of trade secrets, customer lists or services which "are of a unique character." Wisconsin courts are loathe to announce *per se* rules in assessing restrictive covenants, but they may well prove reluctant to enforce non-competes or restrictions against soliciting or serving patients in the emergency medicine context given the unique nature of that specialty.

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