FREEING DOCTORS
FROM RESTRICTIONS

PAMED POLICY, PHYSICIAN OPPOSITION HAS SPARKED BILL TO UNWIND RESTRICTIVE COVENANTS

BY ED FINKEL

To varying degrees depending upon their geographic location and specialty or subspecialty, Pennsylvania physicians have been facing a growing specter of non-compete restrictive covenants written into their contracts.

These provisions limit where they can practice after leaving their current employer, typically stating that they cannot take a new position within a certain distance for a certain period of time. Some include a radius from any facility owned by the current employer, a growing limitation as hospital groups enter into mergers and acquisitions.

PAMED has had a policy on the books for about a decade opposing restrictive covenants and has supported a state legislative bill that would prohibit their use. Doctors who haven't faced them and attorneys who represent those who do say the legislation is needed, and they note that those under restrictive covenants are unlikely to speak out.

PAMED Policies and Pending Legislation

Policy #140.993 — Restrictive Covenants in Physician Contracts states PAMED's opposition to non-compete physician contracts as well as the use of restrictive covenants as a condition for physicians entering into training programs.

"The Society shall, as a high-priority item, seek legislation prohibiting non-compete restrictive covenants in employment contracts," the policy reads. "Said prohibition would not preclude a contract provision permitting an employer to recoup reasonable expenses incurred in recruiting the physicians and establishing the physician's patient base."

PAMED also has promulgated Policy #140.997 on Non-Compete Clauses in Physician Contracts, which states, "The Society opposes non-compete restrictive covenant provisions in physician contracts and seeks state legislation banning those contract clauses."

Finally, the society has a broader Policy #140.998 on Restrictive Covenants in Medicine that says, in part, "The Society opposes the use of restrictive covenants as a condition for physicians entering training programs."

The pending legislation, HB 346, currently awaiting action in the General Assembly's House Health Committee, would prohibit employers from prohibiting physicians from joining a competitor, while leaving open the possibility of a buyout clause as described in PAMED's policy. PAMED has strongly advocated for this bill and continues to monitor and track its progress.

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The plain English, two-page bill says that aside from contracts already in place at the time of its passage, "a contract of agreement that creates or establishes the terms of an employment relationship with a health care practitioner that includes a restriction of the right of the health care practitioner to practice in a geographic area for a period of time after the termination of the employment relationship or prohibits a health care practitioner from treating a prior patient shall be void and unenforceable regarding the restriction."

The bill defines a "prior patient" as a patient who has been seen within three years of the termination of employment. It also allows for a buyout clause for liquidated damages to the employer, unless "(1) the clause contains a term fixing unreasonably large liquidated damages; or (2) the employer terminated the employment relationship actually or constructively."

Physician Experiences

Douglas Clough, MD, an internist in McCandless, says restrictive covenants haven't affected him because he's in private practice — but as a past president of the Allegheny County Medical Society (ACMS) he's been hearing about them for at least 20 years. He says larger systems in particular have been "using restrictive covenants as part of their competition, to prevent one entity from going after their limited resources and prevent them from raiding one another."

As hospital systems have grown and the radius around restrictive covenants has been expanded to include all facilities owned by a hospital group, these agreements have effectively prevented some physicians from practicing anywhere in the region, Clough says. "If they don't like the health system they're working for, they have to leave the area," he says. "We're losing good physicians. … They can take a doctor who's out and established, and has a reputation, and they don't have to worry about them competing."

The dynamic is especially difficult when it comes to internists, Clough says. "It's detrimental to the community," he says. "There's a limited number of primary care doctors. There aren't enough around. … They're leaving town, leaving the area, going out of state." Not practicing for a year or two isn't generally an option, he adds, and if a doctor goes that route, patients temporarily lose their doctor.

Physicians who talk to Clough in his ACMS capacity are afraid to talk to anybody about it. "These doctors are typically in their 50s, the ones who are most impacted," he says. "They have families, they don't want to move, and the health insurance companies know it. … I'm old enough that they can't really hurt me, but if you're 50, you really have to be concerned about it."

Clough believes the PAMED-backed legislation is needed, and he adds that requiring a reasonable buyout on the part of physicians that want to leave a system sounds reasonable to him. "If a doctor wants to come in, build up a practice and leave, paying the employer something is not unreasonable because he's taking business with him," Clough says. "It would level the playing field. Doctors would be treated with more respect."

Bryan Negrini, MD, MPH, president of the Prometheus Group of Companies, says he has been employed by "pretty much every" major medical system in Western Pennsylvania, and he's needed to sign a contract every time. "I have always looked at contracts and signed things mindfully," he says. "Sometimes I didn't sign because of the restrictive covenant, and that meant I didn't get that job."

Negrini doesn't believe restrictive covenants have changed much in the past two decades, usually lasting two years and covering a radius between 10 and 20 miles, although the concentration of hospital systems has changed the dynamic. "Some organizations have tried to enforce distance from any of their sites, which is a lot different," he says. "Then you have to negotiate down. The distance is always the biggest issue."

Negotiating is always tricky when it comes to larger systems because they tend to want uniformity, Negrini says, but it's worth a try based on the distance, time, and type of practice. "As long as they know those are the important pieces, and they're comparing and contrasting with their colleagues, trying to find out what's reasonable before they sign the contract is appropriate," he says. "Once they sign, they will be held accountable."

Negrini thinks the PAMED policy and pending legislation would be especially helpful for internists and their patients, who tend to establish more of a long-term relationship. "When a physician establishes a patient practice, are those patients truly the physician's, or do they belong to the entity?" he asks. "Or are the patients free to go wherever they will?"

Attorneys' Advice

Deborah Robinson, of counsel attorney with the Pittsburgh firm of Houston Harbaugh, primarily represents physicians and physician practices, and she notes that most of them are employed by corporate organizations and in contracts of up to five years. She suggests that they examine contracts in part to determine the ramifications with regard to their next career step.

"If my employer decides not to continue my contract, or I want to leave, what

Douglas Clough, MD

options do I have?" she asks. "You have to measure this on a radius basis. … Over time [employers] have become more restrictive in terms of not the years, but in terms of geographic breadth."

Taking a year off is usually not practical, not only financially but in terms of keeping skills updated, especially for surgeons, Robinson says. "If you're a younger doctor, and you're disgruntled, and you're not happy where you are, what are your options?" she asks. "They have you. They know if you have a family, if you have kids you won't want to relocate. People who aren't settled yet and don't have kids in school, they can move."

Robinson sees the legislation as helpful if it can overcome opposition. "It's the shortest bill I may have ever seen, but it's pretty straightforward, too," she says. "From a physician's standpoint, absolutely, it's unequivocal."

William Maruca, partner at Fox Rothschild LLP, has seen restrictive covenants mostly covering two years, although sometimes one, and with a fair amount of variation in radius, sometimes due to natural geography like a river or tunnel that patients don't tend to cross to see a doctor.

"For [restrictive covenants] to be enforceable, they have to relate to the territory in which you draw patients," he says. "You might have a 20-mile radius but only draw patients from the left side of it. That can be an issue when we're negotiating these, and hypothetically when you're disputing them. You might have to produce a scatter-chart in court of where patients are coming from," although he adds that courts don't always want to get that far into the weeds.

Few such cases end up in court, Maruca says, which means restrictive covenants tend to be deterrents more than anything else. "When they do [reach court] it's very much about the attitude of the judge, whether they are enforceable," he says. "Most get settled. People back down, or they move away. Sometimes we negotiate carve-outs — the employer is worried about a particular competitor, and they say, 'You can go somewhere else.'"