

Not-So-Friendly Competition

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Non-compete agreements are becoming standard provisions in employment agreements by and between sleep labs, DME companies, sleep technologists, and physicians. A healthcare lawyer explains what's generally included and what it means to you.

Non-compete agreements, also known as restrictive covenants, are becoming more commonplace in sleep medicine. Most state courts, except for those in California, recognize and enforce non-competes when such agreements are determined to be reasonable in scope, duration, and geographic area. (The California Business and Professions Code, Section 16600, provides that contracts containing restrictive covenants will not be enforced.)

Due to increasing competition, many businesses have begun having employees and independent contractors sign non-compete agreements to protect sleep labs and durable medical equipment (DME) companies from future competition.

The agreements generally require that for a certain period of time after a sleep technologist or

physician leaves a sleep lab or DME company, the former employee or contractor will not practice and provide professional services within a designated geographic distance. In addition, restrictive covenants prohibit former employees from soliciting patients, employees, referral sources, and vendors of their former employer. Many also prohibit the taking of confidential information, including patient lists and referral contact information.

Employment agreements may include several different types of non-compete agreements including non-solicitation of patients, employees, referral sources, and vendors; geographic restrictions on practicing within a specified zip code, mileage radius, or county in relation to the sleep lab or DME company; a specified length of time



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for such restricted activities; and an enforcement provision. Many also include survival of termination or expiration and attorney's fees provisions that are triggered in the event the employment agreement is terminated or expires and there has been a breach of the non-compete agreements by the former employee. Historically, the attorney's fee provision related to non-compete agreements states if the sleep technologist or physician breaches any of the agreements, the breaching party is responsible for any associated

continued from page 1

attorney's fees and court costs for the enforcement of the restrictive covenant(s) by the sleep lab or DME company.

If You're Asked to Sign a Non-Compete

Prior to signing any non-compete agreement, a sleep technologist or a physician should determine which future activities would

who have breached the signed non-compete agreements by seeking a court order, including a temporary restraining order, to enjoin or stop a sleep technologist or physician for providing professional services within the restricted geographic area identified in the non-compete agreement or to stop the sleep professional from contacting and soliciting patients, employees, or

representing the sleep lab or DME company. A "cease-and-desist" letter may be sent by the sleep lab or DME company's attorney, and it will direct the former employee to stop breaching the agreements and return any confidential information or proprietary property. If the sleep lab or DME company is not satisfied that such measures will protect its business interests, it may also file a subsequent lawsuit to enforce the agreements. It is important to know case precedent for the enforcement of non-compete agreements in your state. Certain state courts will use a "blue pencil" (meaning a court finds a certain portion of a contract void but other parts to be enforceable) when reviewing non-compete agreements to determine if the restrictive covenants are reasonable in scope, duration, and length of time. The court may modify the provisions so they are deemed to be reasonable and enforceable by the court, sleep lab, or DME company.

Prior to signing any non-compete agreement, a sleep technologist or a physician should determine which future activities would be restricted and/or prohibited upon termination or expiration of the employment agreement.

be restricted and/or prohibited upon termination or expiration of the employment agreement. It is imperative you completely understand the parameters of the proposed agreements and how they may impact your future ability to work in a certain area. Once the agreements are signed, that is not the time to question their reasonableness or enforceability. Sleep labs and DME companies have enforced non-compete agreements against sleep technologists and physicians

referral sources. You may be reluctant to sign a non-compete based upon past negative experiences, so before you put your signature on the bottom line, make sure the agreement is reasonable and balanced for both parties.

What Happens When an Agreement is Breached

If a sleep technologist or physician breaches a non-compete agreement, the breaching party should anticipate being contacted by the attorney

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