

Physician Non-Compete and Non-Solicitation Clauses

Illinois Updates and National Trends

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An Enforceable Restrictive Covenant must be:

- Ancillary to valid contract
- Reasonable in time and scope
- Necessary to protect a legitimate business interest
- Supported by adequate consideration

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Illinois – *Fifield* decision 2 year consideration rule

Fifield v. Premier Dealer 2013 IL App. (1st) 120327

- Rare instance of a court giving a single bright line answer
- **Two (2) years** of employment is the **minimum** to constitute consideration
- Does not matter if the employee is fired or resigns
- Reasoning: at-will employment is illusory. Can be taken away
- Consideration can ALSO be satisfied by other benefits

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Prairie Rheumatology further defines consideration

- *Prairie Rheumatology Associates, S.C. v. Francis*, 2014 IL App (3d) 140338 (Dec. 11, 2014)
- Physician-employee resigned after 19 months. Court held 19 months was insufficient consideration under *Fifield* "2 year rule"
- Court also considered – but rejected - employer's claim that alternate additional consideration was given by:
 - assistance with obtaining hospital credentials
 - access to referral sources
 - expedited partnership opportunities

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Non-Competes Must Also Be Reasonable

Four basic components to the reasonableness inquiry:

- (1) the restrictive covenant must protect a **legitimate business interest** of the employer
- (2) the restrictive covenant **cannot impose undue hardships** on the employee
- (3) the restrictive covenant cannot be **injurious to the public**, and
- (4) **time and territory** limits must be reasonable

Cumulus Radio Corp. v. Olson, 2015 U.S. Dist. Lexis 18354 (C.D. Ill. Feb. 13, 2015).

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Legitimate Business Interest

Non-Competes and Non-Solicit agreements can only protect a **legitimate business interest** of the employer. Illinois protects two types of interests:

- (1) threatened use of trade secrets / confidential information
- (2) a "near permanent customer relationship"

"Confidential" truly means confidential

Did the employer take reasonable steps to protect the information?

"Near Permanent Relationship" is the most common reason to protect patient and referral sources by employers of physicians

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Near-Permanent Relationship (con't)

- Courts once viewed patients/customers as belonging to employer
- "Totality of the circumstances" is now used in Illinois
- Fluid test. Factors include whether it was the doctor or employer that:
 - developed patients/referral sources
 - managed billing
 - marketed the physician's practice
 - received referrals
- If patients followed physician to the employer, it is fair for them to follow the employer from the practice. *Gastroenterology Consultants v. Meiselman*, 2013 IL App (1st) 123672

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National Trend: Through the Looking Glass

- Non-Competes are so common that courts now look through the language (consideration) stated in the contract to the actual consideration given and merits of the claim
- "Blue pencil" being replaced with refusal to enforce at all
- MA recently attempted legislative reform (others refuse - CA)
- Courts often note that any "secrets" requiring protection are best governed by Uniform Trade Secrets Act or other laws
- Looking into evidence of actual consideration can also benefit employer rather than employee. *See, Assurance Data v. Malyevak* 747 S.E.2d 804 (VA 2013) (dismissal of non-compete case reversed to allow employer to present evidence of consideration)

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Tips for Employers: How to Bind Employees

1. Illinois – Guarantee 2 years of Employment
2. Give Something Extra (and *actually* give it)
 - Bonus. Raise. Patients. Access to Referrals. Incentives.
3. Recite Exactly What Consideration is Given
 - Be Specific. Be honest. Be realistic.
4. Recite Exactly What "Secrets" Are Being Shared
 - No generic claim of "confidential information"
5. Pick a Friendly Venue and Choice of Law
 - State laws differ drastically. If employer conducts business in multiple states, choose the law best suited to your needs

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Tips for Employees: How to Escape

1. Don't Agree in the First Place
 - You might be surprised
 - Courts hate "take it or leave it" adhesion contracts
2. Amend your existing agreement (in Illinois)
3. Document any breach(es) of agreement by employer
4. Consult with a lawyer

Law is evolving and every state is different

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Thank You.



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