

HEALTH LAW UPDATE

NEWS FOR THE CLIENTS AND FRIENDS OF BASS, BERRY & SIMS PLC

Putting Physician Non-Competes On The Same Page (Sort Of)

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Last month, Tennessee Governor Bill Haslam signed into law Public Chapter No. 218 (“P.C. 218”) and Public Chapter No. 271 (“P.C. 271”), which together broaden the enforceability of physician non-compete covenants in Tennessee. In addition, the legislation attempts to correct previous inconsistencies among the three Tennessee statutes that address physician non-compete covenants¹, but ultimately fails to align these statutes completely.

Background

Originally enacted in 2007, Tenn. Code Ann. § 63-1-148 (the “General Non-Compete Provision”) establishes a limited ability to enforce reasonable non-competes against healthcare providers, including physicians (except emergency medicine specialists), chiropractors, podiatrists, dentists, optometrists and psychologists. Under the General Non-Compete Provision, a non-compete agreement with a healthcare provider is presumed enforceable if (1) the agreement is in writing, (2) the restriction lasts for no longer than two years after the termination of employment (or other contractual relationship), and (3) the restriction is limited in geographic scope to certain prescribed areas (typically the greater of either a 10-mile radius from the provider’s primary practice site or the county in which the primary practice site is located). These and other general provisions remain unchanged.

The ability of hospitals and their affiliates to enforce non-competes has been historically addressed in two additional Tennessee statutes: Tenn. Code Ann. § 63-6-204(f); and § 68-11-205(b), which will be collectively referred to in this alert as the “Hospital Non-Compete Provisions.” As mentioned in our prior *Health Law Updates* on this topic,² the restrictions on physician non-compete covenants in the Hospital Non-Compete Provisions have generally been considered more stringent, i.e., more employer-unfriendly, than the restrictions in the General Non-Compete Provision.

Expansion of Enforceability of Non-Competes

P.C. 218, enacted on May 20, 2011, amends the General Non-Compete Provision, effective January 1, 2012, to remove limitations on the enforceability of non-compete covenants against

¹ See Tenn. Code Ann. §§ 63-1-148, 63-6-204, and 68-11-205.

² See [“Physician Non-Competes - New Flexibility, But Can Hospital Employers Benefit?”](#) (June 4, 2010), and [“Tennessee General Assembly Breathes New Life Into Physician Covenants Not To Compete”](#) (June 15, 2007).

physicians who have been employed for longer than six years. Previously, a non-compete covenant could not extend beyond six years without the parties agreeing to renew it in writing based on additional negotiations and fresh consideration (and even then for no longer than an additional six-year period, which could again be renewed by the same process). Pursuant to P.C. 218, there will no longer be any length-of-employment limitations within the statute; thus, the only length-of-employment (or length-of-contract) limitations that may come into play are those that the physician and employer negotiate and agree to incorporate into the contract. In addition, P.C. 218 expands applicability of § 63-1-148 to osteopathic physicians.

Partial Reconciliation Of Hospital Non-Compete Provisions With General Non-Compete Provision

P.C. 271 attempts to fix the non-alignment between the General Non-Compete Provision and the Hospital Non-Compete Provisions by amending Tenn. Code Ann. § 63-6-204(f), which defines “the practice of medicine” and establishes limitations on hospital (and hospital affiliate) employment of physicians. Prior to the enactment of P.C. 271, the extent of the restrictive covenants under this Hospital Non-Compete Provision that a hospital could place on physicians who became employees other than as a result of a bona fide practice purchase centered on whether the physician had been employed for more or fewer than five years. P.C. 271 removes these more-than and fewer-than five year provisions and replaces them with a simple statement that all restrictive covenants for physicians whose employment does not stem from a bona fide practice purchase must comply with the General Non-Compete Provision (Tenn. Code Ann. § 63-1-148).

However, P.C. 271 does not address the other Hospital Non-Compete Provision (Tenn. Code Ann. § 68-11-205(b)), and therefore that provision, which contains the more-than and fewer-than five year standards, remains intact. As a result, although P.C. 271 strives to create some clarity and consistency among non-compete provisions, it ultimately fails to do so completely by ignoring or overlooking § 68-11-205. Now the law surrounding hospitals’ and hospital affiliates’ ability to enforce physician non-competes is in some ways potentially more confusing because two statutes that specifically address hospital restrictive covenants say different things.

If you have any questions regarding this *Health Law Update*, please contact any of the attorneys in our Healthcare Practice Group listed below.

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