

## Legal Primer on Noncompetition Agreements

Margrit Lent Parker, JD, Kennedy Childs P.C.

Does your employment agreement limit when and where you practice veterinary medicine if you leave the practice? Does your partnership agreement protect against competition among the partners if the partnership dissolves or terminates? Do you know whether these restrictions against competition are legally valid and enforceable?

Generally, a noncompetition agreement (also known as a covenant not to compete) is added to a contract to protect the veterinary practice's "goodwill," (i.e. its client relationships and its ability to attract and retain clients). However, the agreement also results in limiting another person's ability to earn a living. Because of this restriction on the right to work, the law presumes noncompetition agreements to be invalid and unenforceable, except in narrow circumstances.

Section 8-2-113 of the Colorado Revised Statutes (available at [www.michie.com/colorado](http://www.michie.com/colorado)) provides four limited instances in which a noncompetition agreement may be valid: (1) a contract for the purchase or sale of a business; (2) a contract for the protection of trade secrets; (3) a contract provision allowing the employer to recover the cost of training an employee who leaves after less than two years; and (4) employment contracts with executive and management personnel, or with the professional staff serving executive and management personnel.

Which employment contracts are permitted to have noncompetition agreements is not always clear. For example, the exception permitting noncompetition agreements for "professional staff" creates some confusion about exactly who can be subjected to a noncompetition agreement. Unfortunately, there is little Colorado case law interpreting the statute, let alone interpreting the statute as it applies to veterinarians. But, courts have concluded that physicians constitute professional staff subject to noncompetition agreements. And, highly skilled or trained (not necessarily through graduate work) staff may be professional staff. Recently, however, the Colorado Court of Appeals re-emphasized the literal application of the statute, requiring not only that a person be "professional staff" but also that the person qualify as a key member of the executive's or manager's staff in carrying out managerial or executive functions. This may seem extremely restrictive and preclude noncompetition agreements for non-ownership/executive level veterinarians or technicians. On the other hand, one could argue that, regardless of ownership, a veterinarian or senior skilled technician has significant supervisory and management authority over other staff, and could be subject to a noncompetition agreement.

Equally as important as the question of who can be subject to a noncompetition agreement is the question of whether the terms of the agreement are appropriate. A court will not enforce an agreement if it is unreasonable in (1) the length of time of the restriction; (2) the scope of the activities restricted; and (3) the size of the restricted geographic area. In fact, a court will not enforce the agreement at all if it does not include at least time and geographic limitations. On the other hand, where a clearly defined agreement

exists but is overly broad in time, scope, or distance, courts can narrow or eliminate the problematic provisions so that the agreement can be legally enforced.

It is impossible to predict with certainty how a court might apply the law to a given agreement, especially where the law itself is not clear. Moreover, every agreement will have different underlying facts and circumstances. Furthermore, it is not uncommon for two courts to reach opposite conclusions regarding identical noncompetition agreements.

What you can do to protect your agreements from scrutiny is to carefully consider the statutory exceptions, and build your agreements accordingly. In an employment contract with a professional employee, you might more clearly explain the managerial functions you expect him or her to perform, demonstrating that this person is not only professional staff but also assists in performing management or executive functions.

As for the actual terms of the agreement, the bottom line is reasonableness. Consider how to strike the balance between protecting the practice's goodwill and allowing the veterinarian or other professional to practice his or her trade. For example, in the sale of a practice, a near-indefinite time period restricting competition might be considered appropriate, but almost certainly would not be appropriate in an employment contract. If the practice has a single specialty, then restrictions on practice outside of that specialty may not be reasonable. And, geographically, the restriction of practice should consider the type of practice and clientele served. Compare, for example, the geographic radius covered by a large animal practice versus a small animal practice; an ambulatory practice versus a hospital practice; or an urban practice versus a practice in a less populated area.

In sum, noncompetition agreements are allowed in Colorado only in limited circumstances, and they must be reasonable in their restrictions before a court will enforce it. By carefully considering these issues when you are writing and negotiating them, you can avoid (or at least minimize) surprise and costly disputes down the road. ■

*Margrit Lent Parker is an attorney with Kennedy Childs P.C., a firm that assists licensed professionals with all of their legal needs, from business decisions and employment matters to licensing matters and litigation. She will be moderating a panel of attorneys who will discuss "Hot Legal Topics" at CVMA Convention 2012.*

**Like this article?** Be sure to attend the Legal Hot Topics session moderated by the author on Saturday, October 6 during CVMA Convention 2012 in Loveland. The panel will discuss legal issues relevant to Colorado veterinarians, including malpractice litigation and Board matters, non-DVM ownership of practices, buying and selling trends, nuances of non-competes, and much, much more. Join Margrit and three of her colleagues for this informative two-hour session!