LEGAL HOT TOPIC:
Pirates in the home health agency: How to stop competitors from raiding your employees and patients
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This issue’s legal hot topic focuses on non-compete and anti-piracy agreements. The home health, hospice, and private duty marketplaces are very competitive. Agencies compete not only for patients, but also for staff. Competition for staff can be a result of personnel shortages or personnel turnover in a particular area. Competition for staff or staff departures can be an attempt by an employee or a competitor to obtain your clients.

Agencies have often felt this kind of piracy was simply a cost of doing business in these industries, but it does not have to be this way. Agencies can restrict their employees’ post employment conduct through the use of non-competition agreements and/or anti-piracy agreements. These types of agreements give an employer a tool to use to stop former employees who are stealing away patients. As with any preventive medicine, the time to implement non-competition agreements is before your employees walk off with your clients, not after.
Pirates in the home health agency: How to stop competitors from raiding your employees and patients

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This type of activity can appear in a number of ways – an employee may leave your agency and then shortly thereafter some of your patients follow the employee to the new agency; a manager or supervisor may leave your agency and then begin recruiting your employees; or an employee may simply go to work directly for a patient. All of these scenarios have a common theme – a competitor or employee using your agency’s goodwill to their advantage.

Agencies have often felt this kind of piracy was simply a cost of doing business in these industries, but it does not have to be this way. Agencies can restrict their employees’ post employment conduct through the use of non-competition agreements and/or anti-piracy agreements. These types of agreements give an employer a tool to use to stop former employees who are stealing away patients. As with any preventive medicine, the time to implement non-competition agreements is before your employees walk off with your clients, not after.

What is a Non-Competition Agreement?

A non-competition agreement is a form of restrictive covenant. A restrictive
A covenant is a contract in which one party is prohibited from engaging in certain conduct. The restriction in a non-competition agreement is a limitation on the employee’s ability to work in a particular field and a particular region. Because this type of restriction acts to “restrain trade,” Indiana courts disfavor them. This leads Indiana courts to construe non-competition agreements against the employer and read them very narrowly.

That does not mean non-competition agreements are unenforceable. It simply means that a non-competition agreement must be carefully drafted to meet all of the requirements of an enforceable non-competition agreement as outlined by Indiana courts.

Indiana courts will enforce what are called “reasonable” non-competition agreements. A reasonable non-competition agreement must meet three requirements: 1) the employer must have a protectable interest; 2) the covenant must be reasonable as to the length of time the employee is restricted after separation from the employer and 3) the restriction must be reasonable as to the extent of the geographic limitation imposed on the employee during the course of the restriction.

**First Element – Employer’s Protectable Interest**

An employer cannot simply restrict an employee from working for another employer after that employee stops working for the current employer. The employer must have a protectable interest. There are a number of categories of employer interests that Indiana courts recognize. For home health agency non-competition agreements there are three commonly relied upon interests: 1) trade secrets; 2) confidential information; and, 3) representative contact.

**Trade Secrets**

Trade secrets are defined by statute and are beyond the scope of this article, because whether or not a piece of information is a “trade secret” is very fact sensitive. If a piece of information is a trade secret, not only will it qualify as a protectable interest for a non-competition agreement, but it will also be protected under Indiana’s trade secrets law without a valid non-competition agreement. Because of the very specific requirements to meet the definition of trade secret, you should not assume information is trade secret information without first consulting with an attorney.

**Confidential Information**

Information that does not meet the definition of a trade secret may still be protected by a non-competition agreement. This type of information is known as confidential or proprietary information. Proprietary or confidential information includes the names, addresses and requirements of a customer. This information is considered protectable, because it is a component of an employer’s goodwill which the employer invested time and effort to develop and is not “readily available elsewhere”. Information that is readily available that the
employer did not invest time and effort to develop will likely not be considered confidential.

Home health, hospice, and private duty providers put forth similar efforts to develop patient/client lists. Although the names and addresses of patients are likely available through a phone book or directory, agencies have much more information about patients which would be considered confidential. Agency patient/client information is even more likely to be considered confidential information, because it is subject to the privacy requirements of HIPAA. Because it is subject to state and federal privacy laws, information about a customer’s medical needs, reimbursement source, etc., is very likely to be protected by the court, because it is not “readily available elsewhere.”

**Customer Representative Contact**

Employee representative contact with the employer’s clients is the primary employer interest protected in most non-competition agreement cases. This is especially true in industries like home health, hospice, and private duty. Providers’ employees serve patients on behalf of their employer. The providers’ employees go into the patients’ homes each day and provide care.

As they care for the patients, the employees become familiar with the patients’ needs, likes, dislikes, and develop a close relationship with them. In most cases, this relationship results in your patients developing a positive feeling towards your employee and your agency. In the words of one Indiana court, the employee “is the agency” in the eyes of your clients. This relationship between your clients and your employees is what makes it possible for your employees to steal your patients.

This relationship is another aspect of your “corporate goodwill.” This goodwill is the property of your agency and is a recognized business interest.

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**Reasonable Restriction**

Once you have identified a protectable interest, your non-competition agreement must be reasonably drawn to protect your interests without burdening the employee. Courts look at two factors: the area in which the employee is restricted and the length of time for which the employee is restricted.

**Geographic limitations**

The restriction in a non-competition agreement must be limited to a reasonable geographic area. Failure to include a geographic limitation in a non-competition agreement is fatal to enforcing the agreement, with one exception discussed below. Including an unreasonable geographic limitation is fatal to enforcing the non-competition agreement.

Indiana courts have held that the reasonableness of a geographic restriction depends upon the area served by the provider, the area served by the
employee, and the area restricted by the agreement. This means that the geographic limitation must be related to the area in which the agency serves patients. Outside of this area, the employer does not have a protectable interest. If you only provide care in northeastern Indiana, a court will most likely find a statewide restriction unreasonable.

Home health, hospice, and private duty agencies provide services within an area specifically defined in their application. This area is generally described in terms of counties the agency serves. This service area provides a convenient and reasonable geographic limitation.

One reason why courts allow employees to compete outside a reasonable geographic area is that when a former employee goes to work for a competitor outside of your service area, the employee will usually be unable to take advantage of the customer goodwill she helped to generate while serving your patients. A similar issue can arise if the employee goes to work within your service area, but in a county or counties in which she has never provided services before. Again, because there was no contact with clients in the area where she now works, she likely does not have any confidential information or representative client contact to use unfairly. This makes it hard to argue the employer has a protectable interest.

**Reasonable time restriction**

A non-competition agreement cannot restrict an employee’s activity forever; it must be limited to a reasonable length of time. A reasonable length of time, like a geographic restriction, must be reasonably limited to the interest you seek to protect by using a non-competition agreement.

What is a reasonable length of time can vary, depending upon a number of factors. Indiana courts have routinely held that a two-year restriction is presumptively reasonable. This means that if the temporal restriction is two years or less, the burden will be on the employee to prove it is unreasonable. Restrictions lasting longer than two years are enforced, but only with special circumstances, which the employer will need to demonstrate to the court.

Most providers will be trying to prevent employees from stealing customers. This will mean the interest for which protection is sought is customer goodwill, either in the form of confidential information or customer contact. Because your goal is to protect the customer goodwill, the time restriction should relate to the goal of protecting goodwill. Determining an appropriate length of time for a restriction should involve consciously considering how long it will take your patients to develop a relationship with the new employee(s) you assign to the patient.

The time that the former employee is restrained should be long enough that the patient can develop a good relationship with her new caregiver while the

The primary alternative to non-competition agreements is what is known as a non-solicitation or anti-piracy agreement. An anti-piracy agreement focuses on restricting whom the employee contacts or provides services to post employment, rather than the area in which they provide services.
relationship with the former caregiver fades. Once the new relationship is developed, the patient will be less inclined to leave your agency to follow the former caregiver.

**Anti-Piracy Agreements**

Many employers and employees are uncomfortable with a non-competition agreement that simply forbids the employee from working in a particular service area for a set period of time. Employers may hesitate to use them because they want to let employees work for competitors so the employees can get sufficient hours. They may also hesitate to use them because of their employees’ objections to signing them. Employees object to non-competition agreements for many reasons, including that they do not want to have to look for work outside of the stated geographic area if they leave their employer. These concerns have led many employers to consider alternative approaches to the non-competition agreement.

The primary alternative is what is known as a non-solicitation or anti-piracy agreement. An anti-piracy agreement focuses on restricting whom the employee contacts or provides services to post employment, rather than the area in which they provide services. In other words, a customer specific restriction replaces the geographic restriction. A customer specific restriction prohibits the former employee from providing services to a specific group of clients, wherever those clients may be located.

The specific group of clients is usually described as clients served by the employee or current clients of the employer. Many employers also want to prohibit contact with “prospective clients.” These prospective clients may be individuals who contacted the agency regarding services during the employee’s employment terms or to whom the agency marketed services. Although courts in Indiana will enforce a customer specific restriction, the courts have not recognized a protectable interest in prospective clients. Courts will not extend the customer specific restriction to prospective clients because there is no goodwill or established relationship between the employer and the “prospective” client.

In addition to restrictions regarding to whom the employee can provide services, an anti-piracy agreement will include a prohibition on contacting or soliciting any of the agency’s clients. As with a customer specific restriction, a non-solicitation restriction cannot prevent the employee from contacting or soliciting “prospective clients.” Because the anti-piracy agreement focuses on the employer’s customers, an anti-piracy agreement allows the employee to continue to work in the industry and in the same region after separation from the employer. For example, the employee would be prohibited from providing home health services to any of the agen-
cy’s patients for a period of time. A more narrowly drafted agreement would restrict the employee to such activities in relation to the specific patients the employee served while working for your agency. Anti-piracy agreements are generally considered less restrictive than traditional non-competition agreements, which means they are easier to enforce than traditional non-competition agreements.

Pre and Post Hire Non-Compete Agreements
A non-competition agreement must be supported by “consideration” in order to be enforceable. Indiana courts recognize hiring an employee as sufficient consideration to support a non-compete agreement executed at the beginning of an employment term. Indiana courts also recognize continued employment as sufficient consideration for a non-competition or anti-piracy agreement. This means that if you do not have non-competition agreements in place with your current employees, you can implement them without having to provide some additional value to the employee. It is enough that the employees’ continued employment is conditioned upon the employee signing the agreement and that the employee’s employment continues after signing the agreement.

Other Contractual Considerations
Although it is important to understand what makes a non-competition agreement enforceable and to have agreements in place that meet these requirements, there are other considerations to a non-competition agreement besides just the restrictions. When implementing non-competition agreements, providers should consider the following additional issues:

Liquidated Damages
Parties to a contract can agree in advance that a party who breaches the agreement will owe the other party a specific amount of money. This agreed amount of money is called liquidated damages. Liquidated damages serve two important purposes in non-competition agreements. First, they serve as a deterrent. Most employees will reconsider breaching a non-competition agreement, when faced with the prospect of paying a large amount of damages.

Second, they eliminate the need to prove the damages the employer suffered from the employee’s misconduct. The amount of damages an employer suffers when an employee steals a patient(s) is measured in terms of lost profits. In home health care, proving lost profits requires producing information regarding rates, costs to serve the patient, etc. If the contract has a liquidated damages clause, your burden to prove damages is eliminated. Once the court finds a breach of the contract, it can simply award the agreed upon damages. This can greatly reduce your litigation costs.
**Damages v. Penalty**

If you decide to include a liquidated damages clause in your agreement, you should carefully consider the amount of damages. If the damages are not reasonable, the court will rule that the amount is a penalty and not award them. A reasonable liquidated damages amount will relate to your potential actual damages. In a non-competition violation, the employer’s damages are measured in terms of lost profits. Because profits can vary depending upon the client, the liquidated damages will not reflect an exact amount. The key to avoiding the damages being labeled a penalty is to have it relate to your actual damages. In most cases, this is an average or an approximation.

The damages amount you calculate will be large enough that most of your employees will not be able pay it, at least not in a short time frame. Although you may have to collect this amount through wage garnishments for many years, this fact should not deter you from including a liquidated damages provision. If the employee breaks the agreement, your damages will be the same, regardless of the employee’s ability to pay.

**Injunctive Relief**

Non-competition litigation usually begins with the former employer seeking an injunction against the former employee. An injunction is a court order instructing a person to do or not do something particular. In a non-competition violation, the court would order the employee to stop working in the restricted area or, if it is an anti-piracy agreement, stop serving the former employer’s patients.

Indiana courts require an employer to show irreparable harm as a prerequisite to obtaining an injunction. Because a liquidated damages clause is an agreed amount of damages to be awarded in the event of a breach, some courts have held a liquidated damages clause means the harm for the breach can never be irreparable. If the court simply awards the liquidated damages and no injunction, the employer’s harm is repaired.

Indiana courts have recognized that an employer should be able to pursue liquidated damages and still obtain an injunction. It is important that a non-competition agreement state specifically that the employer is able to obtain both forms of relief.

**Other Terms**

Because a non-competition/anti-piracy agreement is a contract, there are other practical terms you should consider including. For example, the agreement can require the employee to pay your attorneys’ fees and court costs. In the American court system, the default rule is that each party pays its own attorneys’ fees and costs. This rule can be altered by the agreement of the parties or by statute. If your non-competition agreement states that the employee is
responsible for paying your attorneys’ fees and costs associated with enforcing the agreement, the court can add this amount to any judgment against the employee. This allows you to shift the costs of enforcing the non-competition agreement onto the employee who breached the agreement.

Another way to reduce the costs of enforcing the agreement is to require any litigation relating to the agreement occur in a court that is convenient for the employer. The non-competition agreement can require any action relating to the agreement be filed in the county court nearest to your main office. Depending upon the scope of the area you serve, this can make litigation much cheaper, because it eliminates the potential need to travel to a court in another county to litigate the matter.

You can also agree that you will not need to post a bond in order to pursue an injunction. When pursuing injunctive relief, the party seeking the injunction is required to post a bond. Agreeing to forego this requirement can greatly reduce the cost of enforcing a non-competition agreement.

All of the foregoing considerations are important, because the cost of enforcing a non-competition agreement is often the biggest deterrent to an employer. The ability to eliminate these costs, or shift them to the employee makes the decision to pursue the employee a little easier.

In addition to these cost related terms, the agreement can state that the court may extend the length of any injunction by the length of time the employee was in violation of the agreement. This allows the court to order the injunction to last past the “anniversary” date on which the employee’s non-compete would expire. For example, the employee quits on September 1, 2010. The employee is subject to a non-compete agreement that has a two-year term. The employer discovers the employee is violating the agreement and obtains an injunction against the employee six months after the employee quit. This means the employee was able to violate the agreement for six months. Without an extension of the injunction, the agreed upon two year injunction becomes an eighteen month injunction. However, this provision allows the court to issue an injunction that extends six months past the September 1, 2012 injunction to March 1, 2013. This extension ensures the employee is bound for two years, as he agreed to when he executed the non-competition agreement.

Enforcement Considerations
If you have non-competition or anti-piracy agreements, you need to enforce them. If your employees conclude that you are unwilling to enforce the agreement, which is not uncommon in home care, they will ignore it. If you pick and choose against whom you enforce the agreements, another common occurrence, you may open yourself up to a claim of selective enforcement.
agreement, which is not uncommon in home care, they will ignore it. If you pick and choose against whom you enforce the agreements, another common occurrence, you may open yourself up to a claim of selective enforcement.

When you enforce a non-competition agreement you should expect that some employees would be willing to go to court. In most instances, you can expect the employee, or her attorney, to respond to a cease and desist letter with a request for a copy of their personnel file and payroll records. The employee’s attorney will be looking at raising potential wage and hour claims, discrimination claims, or other counterclaims to try to deter you from pursuing enforcement.

Employees will often raise public policy/patient choice as a defense. If a non-compete agreement violates public policy, the courts will not enforce it. Indiana courts have made it clear those non-competition agreements between health care providers and employees are not void per se as violating public policy. Indiana courts recognize that while the client has a right to choose a healthcare provider, the provider has a right to contract. Because the provider’s right to contract is as much a matter of public policy as the client’s right to choose, the courts do not find non-competes in the health care setting to be void as a matter of public policy.

**Patient Restrictions**

Another common theme in home health non-compete cases is patients/clients hiring away your caregiving staff. This can be the result of an employee soliciting the patient or it can be the result of solicitation by the patient. You can restrict your clients from hiring your employees in the same manner you restrict your employees.

You can include a term in your client agreement that prohibits the patient/client from hiring an assigned caregiver directly. If the patient violates this agreement, the patient agrees to pay a finder’s fee to the agency. The finder’s fee is designed to reimburse the agency for the costs of finding, screening, hiring, and training the employee. It may also include lost profits.

You might also consider explaining to clients that when they hire a caregiver directly they become the caregiver’s employer. If they do, they are obligated to do everything any other employer is obligated to do. This means paying payroll, withholding payroll taxes, issuing W-2s, etc.
Conclusion

Home health, private duty, and hospice agencies have long suffered from former employees and even current employees recruiting their patients to other providers. Providers do not need to continue to suffer this way because there is something providers can do to stop this conduct. Providers can put non-competition or anti-piracy agreements into place to prevent their employees from unfairly competing against them. A properly drafted non-compete is an effective way to stop former employees from misusing your company’s goodwill to take your patients to another provider.
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