The Importance and Validity of Nondisclosure and Nonsolicitation Clauses for Urgent Care Center Owners

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Urgent message: Nondisclosure and nonsolicitation clauses are necessary to protect an urgent care center from providers and staff utilizing information gained in their employment in ways that may be damaging to the business. To be effective, however, their restrictions and limitations must be understood.

Businesses frequently rely upon important and confidential information for the success of the company. This information, often referred to as *trade secrets*, can include a sales strategy, client lists, or some form of intellectual property.

An employer must guard against former employees taking this valuable and secret information learned while on the job and using it when they join a competitor.[1] Former employees' actions can be very damaging to morale if they use their former position and corporate knowledge to hurt the standing of the remaining employees.

This article will examine the different types of contractual tools that employers such as urgent care center owners can leverage to reduce or eliminate the potential risk of losing valuable and confidential corporate information.[2]

Nondisclosure and Confidentiality Agreements

Use of nondisclosure agreements (NDAs) or confidentiality agreements is an ideal method for an employer to prevent the loss of confidential information. An NDA is a contract in which the employee pledges to protect the confidentiality of secret information that's disclosed during their tenure with the organization. The NDA also sets out the company's legal remedies against an employee if they divulge this information.[3]

There are several essential components to a nondisclosure agreement:

- A definition of what constitutes "confidential information" for purposes of the NDA
- Any exclusions from that confidential information
- The employee's obligations and duties as to the confidential information
- The time in which the NDA is valid and enforceable
- Any other miscellaneous provisions[3]

In effect, an NDA is protection for permitting employees access to confidential and proprietary information of the employer's business during the course of their job.[4]

Exclusions

An NDA will also contain specific exclusions from the obligations of the employee to address circumstances where it would be unfair or overly burdensome for an individual to keep the information confidential. Common exclusions include information that is:

- Already known to the employee
- Already public knowledge (provided the employee didn't wrongfully release it to the public)
- Independently developed by the employee without reference to or without use of the employer's confidential information
- Disclosed to the employee by some other source that has

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no duty of confidentiality to the employer[4]

While these clauses can be an effective tool to control what former employees say about the company and what they can do with confidential information, there are some restrictions on the scope of these contract clauses.

NDAs that contain a catch-all clause rather than limiting the contract to only necessary confidentiality information may be found to be overbroad. Likewise, an agreement that is overly restrictive is frowned upon by the courts.[5] For example, Virginia courts will enforce a clause restricting postemployment activities only if the contract: 1) is narrowly drawn to protect the employer's legitimate business interest; 2) is not unduly harsh and oppressive in curtailing the employee's ability to earn a living; and 3) is not against sound public policy.[6]

Courts require any confidentiality agreement to be "reasonable." To determine the reasonableness of a confidentiality agreement, courts will usually balance several factors, including:

- The employer's legitimate business interests in keeping the information private
- The duration of the obligation (1 or 2 years is typically acceptable)
- The burden on the employee
- The interests of the public[7]

Nonsolicitation Clauses

A nonsolicitation agreement is a contract in which an employee agrees to refrain from soliciting a company's clients or customers—for their own benefit or for the benefit of a competitor—after leaving the company.[8] Typically, these types of agreements are found in service or sales businesses, especially when the potential list of customer prospects is limited.[8] Another common scenario is when a long-time employee starts their own business and attempts to take clients and key personnel with them.

An enforceable agreement must satisfy the following requirements:

- As mentioned above, the employer must have a valid or legitimate business reason, such as protecting a valuable customer list, protecting trade secrets, or protecting the company from the mass exodus of valuable employees with specialized skills, knowledge, and access to trade secrets.
- The customer list must be worth protecting, as such the employer must show that it has spent time, energy, and money establishing its client database, and that the list must contain data that's not readily available to the general public.
- An agreement can't prevent a client, customer, or employee from moving to a competitor voluntarily, but the departing employee can't pressure clients or use their former employer's information to solicit their business (like pricing to outbid their former employer).[9]

In 2018, in *Manitowoc Co. v Lanning*,[9] the Wisconsin Supreme Court held that, although a provision of an employment agreement that prohibited soliciting employees didn't use the words *covenant not to compete* and didn't restrict the employee from working for a competing company, it was found to be a restraint of trade under state law because it restricted access to the labor pool by a competitor that hired the employee. As a result, the provision was unenforceable because it was overbroad for lack of a specified territory or class of employees to which it applied. The clause failed to meet the statutory requirement that a restriction be "reasonably necessary" for the protection of the employer.[10]

Employer Limitations

Generally, to be enforceable, these agreements must have reasonable limits in terms of time, area, and types of work. An agreement cannot be considered a restraint of trade found to unreasonably restrict an individual from doing business.

However, the complexion of these limitations can be changed when the employee signs a *severance agreement* or *separation package* at termination. This is a contract between an employer and an employee who's about to leave the company.[11] In a typical severance agreement, the employer will consent to provide the employee with additional compensation (severance pay) in exchange for the soon-to-be former employee's agreement not to sue the employer for any employment-related claims such as wrongful termination or back wages.[11]

It is important to note that in order to be valid, these agreements require consideration or something of value. The requirements for consideration will often depend on whether the agreement was signed at *the time of hire* or *during employment*. If the contract was signed when the employee was hired, the job offer itself can constitute consideration. However, if the nonsolicitation agreement or confidentiality agreement was signed during employment, the company must offer the employee something to serve as consideration—typically, some amount of money, as is seen in a severance agreement.[12]

Issues with HIPAA information

In addition to NDAs, some organizations have their employees sign a HIPAA employee confidentiality agreement. In this document, the employee acknowledges that the use and disclosure of patient information is governed by the rules and regulations

established under HIPAA and that the employees agree to handle such information in a confidential manner at all times during and after employment.

These clauses can stipulate that an employee may not disclose or communicate any information that is proprietary to the healthcare organization, or information that may be considered private to the consumer—including information protected by HIPAA regulations.[13,14]

In one Maryland case, a HIPAA agreement barred an employee from disclosing or removing confidential information, which it defined as including, but not limited to, "[protected health information], financial information, business data or information, customer information, reports, pricing information, projections, employee lists and personnel information, records, notes, analyses, studies[,] or other information related in any manner to the operations of the Company."[15,16]

The federal HIPAA law will supersede any contractual terms that are in conflict with an NDA.

Employer Remedies

An employer who has a nondisclosure agreement signed by an individual who then later uses the company's confidential information without authorization can petition a court for injunctive relief—requesting that a judge order that person to stop violating the nondisclosure agreement. Employers can also bring suit for any damages the company has suffered because of the breach of confidentiality.[17]

Application to the Urgent Care Setting

Nondisclosure and nonsolicitation agreements may vary slightly when applied to licensed professionals like physicians, compared with nonlicensed employees or managers.

Courts have recognized that reasonable physician restrictive covenants are legally enforceable in most states. These agreements typically restrict a physician from soliciting employees of the practice to join them at the physician's new practice.

Courts make a distinction between agreements that prevent a physician from *soliciting* former patients—which typically are enforceable—and those that keep a physician from *treating* former patients—which typically are unenforceable.[18]

The term "solicitation" is arguably an ambiguous term. As a result, it would be wise to define it in an employment agreement. One way to define the term is to state what it *doesn't* mean. For example, an employee will not be considered to have solicited a patient or employee of the urgent care center, provided:

1. the patient initiates the contact with the former physician;
2. the patient was known to the former physician prior to his or her employment by the urgent care center; or
3. the patient responds to a notice that the former physician publishes that is available to the general public.[19]

In Pennsylvania, for example, a nonsolicitation agreement must have been signed near the time the physician signed their employment agreement, or received some sort of improvement in the terms or conditions of work. Again, consideration is essential in enforcing the nonsolicitation agreement.[20]

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Summary

Urgent care center owners should be certain that they create clear and unambiguous terms that will support the enforceability of these clauses and provide adequate consideration to ensure that the agreement will be found legally enforceable. Consult with an employment law attorney for specific rules in your state. ■

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