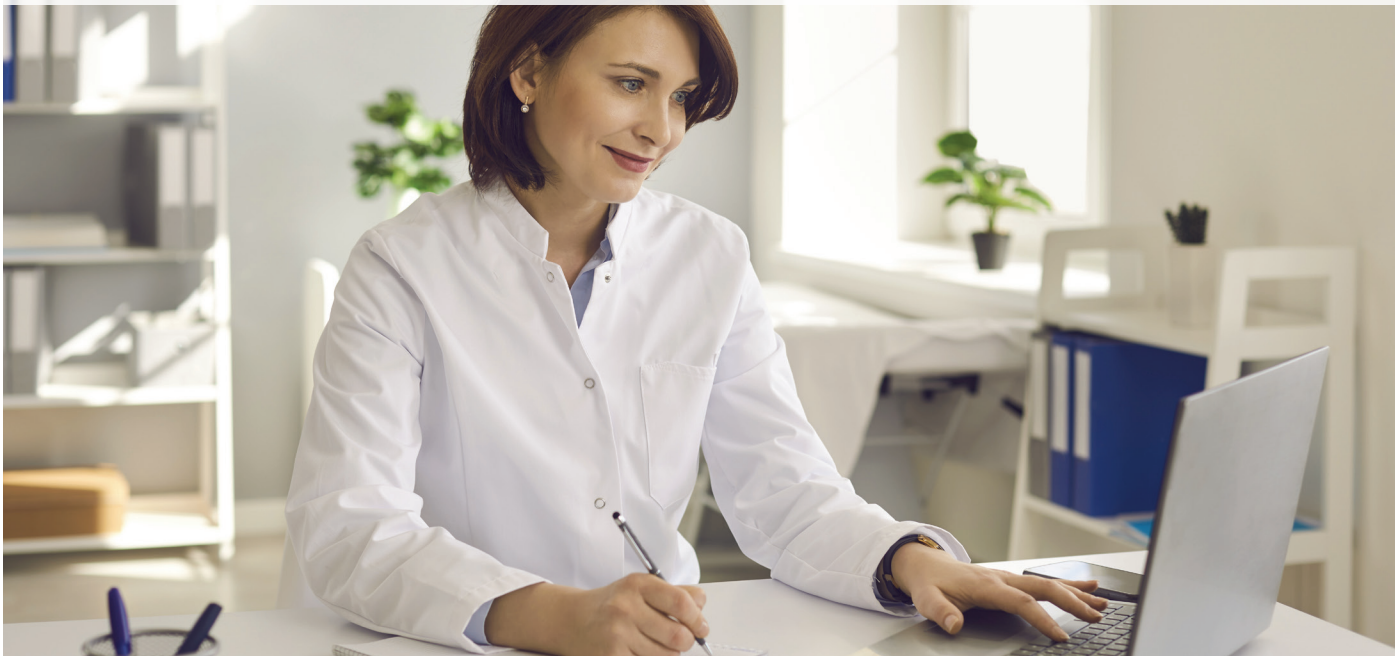
LAWYER LOOKOUT



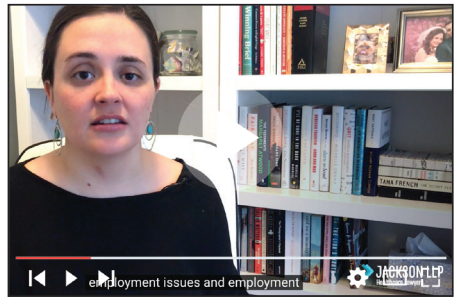
Non-Competition Clauses and the Rise of Telehealth

For years, healthcare employers have commonly used non-competition clauses — informally known as "non-competes." However, the COVID-19 pandemic has changed the way practices deliver healthcare services. There has been a massive rise in telemedicine, with clinicians using technology to see non-emergent patients safely.

But if a healthcare professional is working under the scope of a non-competition clause that limits where he or she can practice, how does telehealth factor in? Can a physician see patients virtually inside the non-competition clause's radius? Can the physician work from home within the radius but see patients outside the range?

While we might not yet have answers to all these questions, it's important to consider the future of physician non-competition clauses and telehealth in light of modern-day circumstances.

What is a non-competition clause?
Non-competition clauses typically limit an employee's right to join a competing business within a specific geographic radius and time period. For example, imagine that a physician works at one hospital (Hospital A) and then quits. Another hospital (Hospital B) is located 15 miles away and wants to hire the physician immediately. Suppose the physician's contract with hospital A contained a non-competition clause preventing the physician from working for a competitor within a 20-mile radius and two years after quitting. In that case, the physician cannot work for Hospital B without being in breach of that contract.



A simple non-compete clause in an employment contract might look something like this:

- Employee agrees that during the Term of this Agreement and, if the employee resigns or voluntarily terminates employment with the Company, for a post-termination period of two (2) years ("Restricted Period"), and within a two (2) mile radius of the company, Employee will not directly or indirectly engage or participate, as an employee, consultant, contractor, manager, member, owner, or for remuneration in any other capacity, to provide the same or similar services as those provided by Employee to Company, in any business that directly or indirectly competes with Company and provides private practice medical services.

What is Reasonable?
The idea behind this limitation is to protect businesses by preventing trained employees from taking their talents, patients and inside information to a competitor. A non-competition clause's geographic radius and duration vary based on what is *reasonable* for a particular area. A radius of 20 miles, for example, might be too big of a limitation in a densely populated urban area. Yet, that same 20-mile radius might be quite practical for an employee in a rural area.

Are non-competition clauses enforceable?
Non-competition clauses are usually deemed enforceable, though this is dependent on state law. California, for example, takes a rigid stance on non-compete clauses, mostly considering them unenforceable with few exceptions.

If an employer thinks a former employee has violated a non-competition clause, the employer may bring a breach of contract claim to the court. As a result, courts often determine whether a non-competition clause is reasonable and within the boundaries of state law.

Generally, when courts evaluate whether a specific non-competition clause is enforceable, they make a few considerations. Does the employer have a valid interest that needs protection? Is this clause putting too much of a burden on the employee? Will the enforcement of this clause hurt the public in some way? If the court sees a non-competition clause's limitations as "reasonable" in light of these interests, the court will likely enforce it.

What about the enforcement of non-competes in telehealth situations?
Courts have taken different approaches to the enforceability of non-competition clauses in telework cases. Even so, the response to the issue of non-competition clauses and telehealth has been slow. Courts have largely not caught up on the issue of whether non-compete clauses should be enforceable in the face of the pandemic.

The public has a strong interest in receiving accessible care from a physician of their choice. For this very reason, a handful of state governments have already enacted rules prohibiting non-competition clause provisions that restrict a physician's right to practice, even in normal circumstances.

Now, in the midst of the pandemic, if a patient's access to care becomes jeopardized by restrictions on providers' ability to offer telehealth services, a non-competition clause might be seen as overly burdensome or contrary to public policy. Thus, this public policy consideration may be the key to finding a future balance between the goals of non-competition clauses and telehealth availability.

Connor D. Jackson, JD

Connor D. Jackson, JD, is the Principal Partner at Jackson LLP, a healthcare law firm based in Chicago. Connor focuses on helping independent medical practices with regulatory compliance, business startup, employment and telehealth in CA, IL, MI, NY, TX, WI, VT and DC. Visit his firm's website at ***JacksonLLP.com***. *This article is made for educational purposes and is not intended to be specific legal advice to any particular person. It does not create an attorney-client relationship between our firm and the reader. It should not be used as a substitute for competent legal advice from a licensed attorney in your jurisdiction.*

What if you are concerned about a non-competition clause and telehealth *right now*?
Providers who have questions about the enforceability of their own non-competition clauses should know that courts still enforce these clauses. However, a court's analysis may be highly contextual. Further, the common perceptions of non-competition clauses and telehealth are shifting in light of the pandemic. An experienced attorney can help practices craft employment contracts to protect their interests and review contracts for physicians making career moves.