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In this time of healthcare consolidation, many if not most employment or contractor agreements with healthcare professionals contain clauses that prevent the professional from competing with or soliciting patients from the employer for a certain period of time after termination. The status of such non-competition or non-solicitation clauses ("restrictive covenants") is somewhat ill-defined in Idaho.

Unlike some states, restrictive covenants involving physicians and other healthcare professionals are not per se illegal in Idaho, but they must satisfy the requirements for a valid non-competition clause. *Intermountain Eye & Laser Centers, P.L.L.C. v. Miller*, 142 Idaho 218, 127 P.3d 121 (2005). Traditionally,

- Covenants not to compete ... are 'disfavored' and 'strictly construed' against the employer. Non-competition provisions must be reasonable, which is to say they must not be more restrictive than necessary to protect a legitimate business interest, must not be unduly harsh and oppressive to the employee, and must not be injurious to the public.

Id. 142 Idaho at 224, 127 P.3d at 127. Non-competition clauses may not be enforced if doing so would unduly restrict access to needed health care. *Dick v. Geist*, 107 Idaho 931, 693 P.2d 1133 (Ct. App. 1985).

In 2008, Idaho enacted a statute intended to define the parameters of enforceable restrictive covenants. Under the statute:

- A key employee or key independent contractor¹ may enter into a written agreement or covenant that protects the employer's legitimate business interests and prohibits the key employee or key independent contractor from engaging in employment or a line of business that is in direct competition with the employer's business after termination of employment, and the same shall be enforceable, if the agreement or covenant is reasonable as to its duration, geographical area, type of employment or line of business, and does not impose a greater restraint than is reasonably necessary to protect the employer's legitimate business interests.

I.C. § 44-2701. "Legitimate business interests" include, but are not limited to:

- an employer's goodwill, technologies, intellectual property, business plans, business processes and methods of operation, customers, customer lists, customer contacts and referral sources, vendors and vendor contacts, financial and marketing information, and trade secrets...

Id. at § 44-2702(2). Section 44-2704 creates a rebuttable presumption that a non-competition or non-solicitation agreement is reasonable and enforceable if (1) it only restricts competition in the line of business conducted by the key employee while working for the employer, (2) it has a term of eighteen months or less, and (3) it is restricted to the geographic areas in which the key employee provided services or had a significant presence or influence. *Id.* at § 44-2704(2)-(5). Terms in excess of 18 months require additional compensation. See *id.* at § 44-2701.

Although the statute sets forth general parameters, it does not definitively resolve the validity of any particular restrictive covenant. By its express terms, compliance with the statutory standards only creates a presumption of validity. Theoretically, a party could rebut the presumption by establishing that a particular restrictive covenant is unreasonable as to duration, geography or scope, or that it otherwise "impose[s] a greater restraint than is reasonably necessary to protect the employer's legitimate business interests." *Id.* at § 44-2701. Conversely, the status of non-compliant covenants is unclear. Since compliance with the statutory standard creates a statutory presumption of validity, does non-compliance create a presumption that the restrictive covenant is unenforceable? Although that would seem to be the logical result, it is not clear how courts would apply the standard.

Traditionally, Idaho courts have been remarkably hesitant to modify (i.e., "blue pencil") an unreasonable restrictive covenant to make it enforceable, opting instead to forego enforcing unreasonable covenants. See, e.g., *Insurance Ctr., Inc. v. Taylor*, 94 Idaho 896, 899, 499 P.2d 1252, 1255 (1972); *Pinnacle Performance, Inc. v. Hessing*, 135 Idaho 364, 370, 17 P.3d 308, 315 (App. 2001). However, § 44-2703 now expressly authorizes courts to "blue pencil" unreasonable agreements. It is not clear whether the newly confirmed authority contained in § 44-2703 will motivate courts to modify overly-broad restrictive covenants so as to make them enforceable.

Finally, § 44-2701 applies to employment or contractor agreements. It is not clear to what extent a court might apply it to restrictive covenants in other types of arrangements, e.g., purchase agreements for practices. In the past, courts have been more willing to enforce broader restrictive covenants in purchase agreements given the nature of the transaction.

Until we receive further clarification from a court, employers who wish to maximize the chances that the restrictive covenant will be enforced should structure their restrictive covenants in services contracts to comply with the § 44-2704 standards.

Endnotes

¹Per the statute,

- "Key employees" and "key independent contractors" shall include those employees or independent contractors who, by reason of the employer's investment of time, money, trust, exposure to the public, or exposure to technologies, intellectual property, business plans,

business processes and methods of operation, customers, vendors or other business relationships during the course of employment, have gained a high level of inside knowledge, influence, credibility, notoriety, fame, reputation or public persona as a representative or spokesperson of the employer, and as a result, have the ability to harm or threaten an employer's legitimate business interests.

I.C. § 44-2702(1).

For questions regarding this update, please contact

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