Podcast

Is There a Doctor in the House? Unfair Competition Enforcement Actions in Healthcare

By Maurice G. Jenkins & Mary A. Smith

February 17, 2022

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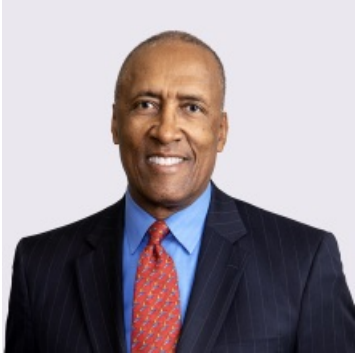

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Non-solicitation clauses in physician shareholder and employment agreements are under increased scrutiny, and enforcement actions concerning non-solicitation covenants are on the rise.

Jackson Lewis P.C. · Is There a Doctor in the House? Unfair Competition Enforcement Actions in Healthcare

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Transcript

Alitia (00:06):

Welcome to Jackson Lewis' podcast, We get work™, focused solely on workplace issues everywhere and under any circumstances. It is our job to help employers develop proactive strategies, strong policies, and business oriented solutions to cultivate a workforce that is engaged, stable, and diverse. Our podcast identifies the issues dominating the workplace and its continuing evolution and helps answer the question on every employer's mind, how will my business be impacted? Non-solicitation clauses and physician shareholder and employment agreements are under increased scrutiny and enforcement actions concerning non-solicitation covenants are on the rise.

On this episode of We get work™, we discuss how employment agreements and enforcement actions make it difficult for healthcare employers to recruit physician talent while protecting their competitive posture in the market. Our host today are Maurice Jenkins and Mary Smith, principals in the Detroit and White Plains offices of Jackson Lewis, respectively and members of the restrictive covenants, trade secrets and unfair competition group. Maurice and Mary each have more than 30 years-experience assisting clients with drafting and reviewing employment agreements, confidentiality agreements and non-competition agreements. Maurice and Mary, the question on everyone's mind today is, how do healthcare

organizations protect their competitive posture in the market while facing these and other emerging trends, and how does that impact my business?

Mary Smith (01:42):

Thank you, Alicia. We have noticed a real focus in the last year or so by both the Department of Justice and the Fair Trade Commission on non-solicitation provisions. And they've been focused in the healthcare industry, right, Maurice? Not necessarily in physicians, but certainly within the healthcare industry. Are you seeing the same thing?

Maurice Jenkins (02:01):

Oh, no question. And it's important for those who are listening in on the podcast to understand that these DOJ and plaintiffs lawyers that are out there, they're taking aim at the non-solicitation agreements that limit generally the mobility of labor. And when you look at that in the context of healthcare, one needs to look at the focus of antitrust versus employee mobility, if you will, or competitiveness for talent in the labor market. Antitrust theory generally has been focused on the effect of contracts that limit competition and has the effect of increasing consumer prices. Whereas when we talk about healthcare providers protecting their investment in the talent, and those who actually deliver those healthcare services in a very strained market, the focus then becomes on mobility or contracts that would limit that mobility with the effect being to lower the wage. So now instead of the focus on consumer prices in the antitrust context, what we're talking about is dampening the impact of these restrictive covenants on the cost of labor. Healthcare providers would argue it actually benefits the end consumer, if you will, because healthcare costs would go down.

But the Department of Labor and particularly the Department of Justice under the current administration, has revisited, I think, those pronouncements from back in 2016. I don't know if you agree, Mary, that at the time back in July of 2016, there was quite an uproar, if you will, when the DOJ came out at the so-called HR guidelines pertaining to restrictive non-solicits or anti-poaching kinds of agreements. But fundamentally we're talking about cost control as it would affect the movement of talent and labor in the market and at the same time, not focused on the end consumer price. But what's your take on those 2016 pronouncements as they've rolled forward to today?

Mary Smith (04:31):

I think you're exactly right. We saw the trend start and the focus start, I think in 2016, and the focus was really by the Department of Justice and the Fair Trade Commission on mergers, acquisitions and wage fixing, right? That seems to be the real focus of non-solicitation provisions. Is it really an attempt to fix the wages of those individuals, to keep them from, as you said, having mobility between jobs. But then we saw in September of 2021, the chairman, the new chairman of the FTC came out again and said in all mergers and acquisitions, they're going to be focusing on non-solicitation provisions and their impact on wages and mobility of employees. So it's interesting, they're not as focused on the consumer and the impact within an industry on a merger or acquisition, but looking at how that

impacts employees within that industry. So I think there is a rather significant difference.

What I find interesting is how many cases involving healthcare have been brought by the Department of Justice in just in 2021 and going into 2022. So I took a look and we've had cases by the Department of Justice, challenging non-solicitation provisions with healthcare companies, not necessarily hospitals or doctor groups or physician directed, but healthcare companies and companies that provide care in that industry in January, March, June, November, January of 2022 and as recently as this week, all seeking criminal indictments and all directed at just non-solicitation provisions that might have been occurring between healthcare agencies when it came to staffing.

What I've noticed is that in most of those cases, the defendants have tried to argue that the challenge here is that it's a pandemic. There was a severe and significance staffing shortage in all of those industries and most of these agreements were for the benefit of providing patient care. And so is for an equitable and good reason that the companies entered into the agreements. It's not for the bad reason, wage fixing. Doesn't seem that the government is all that interested in that. But I have noticed that that has been the defense and all of the cases are at a very early stage, so it's hard to say how that might play out in an actual litigation.

Taking COVID into account, I do think that healthcare organizations have to approach non-solicitation provisions and staffing shortages with some creativity and be aware of the equitable arguments that they need to make in order for those non-solicitation provisions to be enforceable. So with respect to physicians, I have not seen any cases involving non-solicitation provisions of physicians, but I do expect that we will start to see a trend by the Department of Justice or even the FTC in that regard. Are you thinking the same thing?

Maurice Jenkins (07:24):

Yeah. I mean, the points you make, Mary, are very germane to our overall discussion, and that is, what is the Department of Justice or FTC really going after and looking at these, what they would describe as anti-competitive agreements that affect mobility and in a way, undervalue the talents that coincidentally, because of COVID, many employers are facing a shortage in the kind of talent they need with respect to their organizations. And so in a healthcare context text, I have seen with respect to, and again, this is a moving picture here, as hospitals have or healthcare systems have merged and have taken different tax, if you will, to somehow withstand the effects of the pandemic and still deliver healthcare services to the communities in which they're located. The design and the affiliations of various physician groups who are taking over departments within a hospital, it then becomes one of competition among those who are horizontally competing to get into that space.

So if you're a physician practice that has succeeded in essentially assuming, say a radiology department of a hospital, then for those individuals in that practice, that particular practice has an interest, the protectable interest and not having those physicians flip over to another practice and then take over that radiology department. So we're going to see more of that. I've been involved in litigation

where the principals and the practice brought actions against departing physicians, and they've had non-compete and other restraints, if you will, but there's consideration for it. In the end the argument turns to, well, what is the primary competitive benefit, if you will, of whatever arrangement that is in place? I'm reminded of a case in the Ninth Circuit last year, looked at a case where you had two staffing agencies who provided nursing on a short term basis, and they competed in that space, but then they contracted to collectively provide that nursing support to hospitals.

And the Ninth Circuit affirmed with the district court when, well, what happened really, was one of the partners to that collaborative agreement decided to start recruiting nurses from their partner. And at that point, the agreement was terminated and that offended the terminated party and they filed suit under sections one and two of the Sherman Antitrust Act and under California's anti-competitive and antitrust laws. There, the Ninth Circuit said, unlike the Biden administration seems to be ahead it, they said, well, you should bring the same kind of analysis as you would to any other antitrust issue. And that is what was the primary benefit? Is the benefit or the restraint merely ancillary to something that is pro-competitive? And in that case, the Ninth Circuit affirmed the dismissal of that complaint, because the plaintiff wanted to have that non poaching agreement deemed to be a naked restraint and therefore, per se, illegal.

And the Ninth Circuit said, no, it was merely ancillary to that larger beneficial relationship, if you will, where they were providing nurses on a more permanent basis, as opposed to that transient temporary home healthcare or extended health environment.

So I think, and there are other cases where through whispers and text messages, horizontal competitors who are fighting to recruit nurses in particular, were found even here in the Eastern district of Michigan, there were several class actions and DOJ actions claiming wage fixing because of the subtle hints and other efforts to invite horizontal competitors, in this case, hospital systems to essentially control the wages for nurses.

And so I, I think to answer your question, yes, there are things emerging in healthcare that's much more complicated. But I think regardless of the industry you're looking at, the Biden administration is saying, well, a restraint will scrutinize it, regardless of whether someone is going to a competitor, we view those non-solicitation restraints as having an overall destructive impact on the mobility and therefore the market value of talent. So I'm just wondering what have you advised clients when they're reviewing their non-solicitation and non-competes, given this new focus on general mobility and not so much in determining what's a reasonable restraint, but just that broader concept of rejecting those restrictions?

Mary Smith (13:03):

Well, it's interesting because I agree with you. Almost all of the recent cases that I looked at are cases where the Department of Justice has said, this is really horizontal, per se, illegal non-solicitation provisions and we challenged whether or not there was a better or positive competitive outlook for what you, the companies, were doing. So in looking at drafting the non-solicitation provisions, and I have had

a couple of clients have noticed the trends and asked for some advice on the non-solicitations. What we've said to them is they have to be based on a protectable interest that should be articulated in whatever agreement you're including the non-solicitation provision, right? You have to have something to protect. So with respect to physicians, it might be client relations, it might be particular research and programs. With respect to nurses, it may not be as clear that you have a protectable interest.

So you really have to think about what is our protectable interest, and if it's not the patients, but it's the care, then I think we have to start being a little more creative on what we define as a protectable interest for a healthcare agency or a staffing agency when it comes to non-solicitation provisions. I think maybe we have to be a little bit more traditional in our staffing agencies and say, it's actually the person, right? We need to protect the person that we are sending out for our clients. Otherwise we can't provide the healthcare to our clients. So, I do think we have to be a little more creative in the drafting. I also think that healthcare organizations need to be a little smarter when they're describing and articulating both for people they're asking to sign the agreements and when they're drafting them as to why they need them. They need to be a little more upfront about it.

I mean, I thought the most interesting case that I've read about in the last two weeks was that case in Wisconsin. I don't know if you saw it, but it was a hospital organization that went to court and asked for an injunction to keep seven employees. And they were all within a particular, I think it was a radiology department, from leaving that hospital, going to a competitive hospital nearby. What was interesting out the cases that there were no non-solicitation provisions. There were no non-compete provisions. The hospital just went into court and basically said, if they leave, we can't provide care to our existing patients, right? This is really going to impact patient care. I mean, ultimately the hospital was not successful in gaining the injunction, but I thought it was a very creative approach to a really difficult issue.

I think the challenge hospitals have, and what I saw in that case, was the opposition to their request was, well, you really only care about this group because radiology brings a tremendous amount of revenue to the hospital. You wouldn't care if it was a lower revenue producing group. So I think the healthcare industry has to really embrace why it needs non-solicitation, what is the real protectable interest and be honest. If it's really care, they have to be upfront to back care. But with that brings the whole host of issues. I understand they don't want to admit that if they don't have enough staff, they can't provide good care. Right? There's a lot of reasons why you have be careful in what you articulate. But I do think that the equitable argument is one that will probably be litigated in the healthcare industry, more than in some other industries where it's more profit driven than it is necessarily equitably driven.

Maurice Jenkins (16:28):

Yeah. It's interesting, Mary, because most states, even those that are very, let's say, covenant friendly, restrictive covenant friendly, when you get to healthcare and community health, then the whole framework for analyzing what is a reasonable

restraint becomes something more complex than merely geographic radiuses. Okay? Because 50 miles may be, for example, very reasonable to suggest that a physician should not be able to apply their specialty and really focused on specialization here, because when you look at coverage in the community and available medical care, that's going to be an issue. So if I'm a doctor who is subject to what would otherwise be a reasonable covenant of non-competition or solicitation of patients or other physicians in the practice that that physician is departing from, if they're moving to an area that is underserved, even though it's well within that a hundred or 50 mile radius, it's going to be a much more complex analysis.

You can't rely on the traditional, well, it's only for six months or a year, or it's only 50 miles or 25 miles. So as you say, being more specific in describing what that protectable interest is, and the effect of imposing that kind of restriction on a physician becomes the key point. And another interesting statistic that the Department of Justice in this administration has cited to, and a number of senators who are on a bipartisan basis, believe it or not, actually in favor of limiting the use of non-solicitations and non-competes. 30 to 40%, according to a study, 30 to 40% of employees who are subject to non-compete agreements are not presented with those agreements until they've already started on the job.

Mary Smith (16:28):

Really?

Maurice Jenkins (18:49):

And so, when you talk about equitable circumstances and the essence of an injunction, it's an equitable remedy,, as we've learned in law school equity is as equity does, it suggests to me and what I'm advising clients is that don't take a shotgun approach. Really be, no pun intended, surgical in your approach to first defining and identifying who should be subject to these restrictive covenants, and then what they should look like depending on the specialties and the areas of service that are involved. So, I think having a savings clause that says, these geographic limits will not apply, however, if it's determined that the area in which the departing physician is practicing is underserved in that particular practice.

Mary Smith (19:49):

I think that's a great idea. We also, in New York, we've had a couple really, we've had a couple of cases involving junior physicians, right? Not necessarily physician shareholders, but residents who've graduated, finished their residency program and just starting out, who've been asked to sign relatively restrictive non-compete, non-solicitation agreements. And then they challenge them in court and the courts have been less willing to enforce them and also less willing to rewrite them in New York. We've had a couple of cases where the courts have just said, no, we're not interested in enforcing it. And we think it's over broad and it's just not enforceable. So I think there's some value in really spending the time to think about for certain classes of employee who are coming on board, especially physicians, what does this physician bring to us? What do we need to restrict? What's the protectable interest?

And obviously someone who's starting out, if they're with you five years and you help

them to develop in their specialty and develop a particular type of group of patients. Yes, you certainly have a protectable interest in goodwill, but being very specific on presenting that agreement, making sure everybody understands it, making sure the physician understands it. And then I do think there's some value in advising physicians and employees in advance that you're going to ask them to signed an agreement and then limiting and narrowing it in the drafting and not expecting a court will necessarily jump in and save you when you end up in litigation. Because we have seen a real shift, at least in New York, in the courts being willing to do that. And New York is still a very good state for physician business agreements where there's a sale of a business. It's very good. We see enforcement of those non-competes and those non-solicitation agreements on a regular basis.

I also think that physician groups, as well as healthcare organizations, need to be mindful when they're entering into mergers and acquisitions, that there will be some heightened scrutiny of the types of agreements that they have both in place that they want the new employees, right, the merged employees, to sign after the merger or acquisition. I do think there is a trend and I think the FTC is leading that trend in taking a very outspoken position that we are going to scrutinize this particular area when it comes to mergers and acquisitions.

And as you noted, and I think it's true, the healthcare and industry has really shrunk, right? It's partially because of the pandemic. It has had no choice. But as a result of that, there's a lot more mergers and acquisitions. And I don't think that the corporate part of that process necessarily reviews and takes into account what those existing agreements might mean before the acquisition or maybe, before they actually start the acquisition. I know that we sometimes work on the agreements after the acquisition or merger, but I think there might be some value in having employment council look at that in that due diligence phase and really understand whether there are some concerns here about what's in existence before we jump in.

Maurice Jenkins (22:47):

Well, that's again, an excellent point because we know that with respect to health system mergers, that's a trend that's going to continue. And so there is a separate process if you will, before those mergers are approved, just like in any commercial setting where you have to basically give a proforma, if you're the merging companies you have to, or that divesting company, you're divesting a part of your business or your healthcare portfolio to another competitor, a horizontal competitor, there is supposed to be a finding if you will, that the overall benefit of this merger will inure to the patient community.

Mary Smith (23:34):

Right.

Maurice Jenkins (23:35):

And so, if as a result of that finding, if you've got that in place, then those ancillary non-solicit agreements, if I hearken back to the Ninth Circuit case, if it's ancillary to the larger merger that is viewed as positive, that will essentially reduce the costs of healthcare, then the subsidiary or ancillary in impact on physicians affected by those

non-solicits become less important.

Mary Smith (24:11):

Right. But I do think, and I think you're right, the Ninth Circuit, that was a good decision. I'm not so sure that the FTC would analyze it exactly the same, especially not based on some of the more recent statements and memoranda that have come out of the FTC. So, it will be interesting to see. There will be one opportunity for everybody to watch. We've certainly had a chance to see what the Department of Justice's take on this is. And I think they've been aggressive in terms of what they view as horizontal and vertical. And it'll be interesting to see what the FTC does. I'm sure they one coming up somewhere that they won't decide to take on.

Maurice Jenkins (24:48):

But Mary, the irony of it all is, and there seems to be a disconnect similar to the Build Back America bill, where you had hundreds of thousands of jobs and inflation looming and hitting us and the bill would've put trillions of dollars back into the economy, further overheating it. I would draw that analogy to the issue we're discussing today. And that is, there has never been a time, I think, in recent memory and certainly as far as I can recall, where individuals have had more opportunity to negotiate a favorable wage and this massive quit, if you will, or where people are changing altogether, what they had done career wise up until this epiphanous moment. Non-competes become less prevalent, less interesting because people aren't even staying in the same industry.

Mary Smith (25:54):

No, you're absolutely right. I think, and non-solicitation provisions while they exist, they are not litigated quite frankly, in the civil sector as often as people think. The non-compete provisions are litigated very frequently. But we do not see a tremendous amount of litigation directed towards non-solicitation agreements by themselves. We see taking of confidential affirmation combined with non-solicitation for violations. But it's interesting that the government, right, the big government or DOJ, FTC have focused on that particular provision really from a wage fixing perspective. Right? Which I think to your point is sort of a miss because I don't think that that might be the reason why wages are suppressed. And it's an area where I do think we will see a tremendous amount of activity. Whether it will change how the healthcare industry does business, I'm not so sure.

Maurice Jenkins (26:48):

Yeah. And just to double down on this paradox of regulation here. At a time when more and more states are enacting legislation requiring private sector employers to publish compensation, okay, the DOJ study along with the FTC, suggested that publishing those rates of pay would actually diminish competition because it would essentially alert your competitive to what you're paying and acting as a reasonable competitor you would then know that you wouldn't have to pay X dollars more per hour or X dollars more in salary, because look what everybody else is paying. And so, I find that interesting that those two trends seem to be aimed at different purposes, but they conflict in their essence of transparency, aiding wage fixing from

the DOJ's standpoint, versus your state legislatures believing that the failure to be transparent has allowed employers to discriminate.

Mary Smith (28:07):

Yeah. I mean, I do think in this particular area, the takeaway we should recommend to most of our healthcare clients is they should probably take some time to take a look at their existing non-compete agreements, their existing non-solicitation and specifically who is either signing a non-solicitation, or if they have a horizontal non-solicitation with another entity, it is for an equitable and good business purpose and it's not just a wage fixing, no poach non-solicitation provision and rework those agreements. Because I think you are correct. Ultimately, I don't know between the federal approach and the state approach, it seems to me that in certain industries, no matter what you do, you probably are going to end up in court at some point, whether it's with the government or with an individual litigant.

The last point I'll make is that I do think what I've noticed is that after we have a Department of Justice or FTC investigation or announcement, we see a tremendous increase in private litigation on these issues, right? So the plaintiff's bar is aware of it and they have, I think, grabbed onto it. And to your point, they will use whatever information and data is available to them to create causes of action, whether they're breach of contract, whether they're antitrust or whether they're discrimination.

Maurice Jenkins (29:30):

Which is interesting because I think the beneficiaries in the healthcare space of this unprecedented demand for healthcare during this pandemic is that nurses, if we just take that as one segment of the overall ecosystem of healthcare or physicians, they have more leverage than ever before, which is interesting. And many of them work through agencies that contract them to competitors. And so the case that comes to mind was a therapy source LLC, which was provided like many hospitals are going to these employee contracting agencies for nurses and even physicians, and they found that really it was therapies invitation and text messages among the companies, horizontal competitors, where they were sharing wage rates. And there was a tacet agreement as alleged in the consent decree to hold those wages in place, a wink and a nod kind of thing. But the fact of the matter is, it seems to me that there are very few positions, regardless of industry out there now, where the individual lacks leverage. In other words, where an agreement can actually fix it.

If anything, the wages are going up and up and up. And sure, horizontal competitors would prefer that they agree. I'm reminded of the NFL and major league baseball and whenever a free agent is unable to sign with another team, they allege collusion. Well, I don't think when you look at the unemployment numbers and just the overall rise in wages now, which was one of the evils, if you will, of restrictive covenants that the DOJ back in 2016 and coming forward, has announced it was going after, the fact of the matter is that suppression of wages, if you will, doesn't appear to be in place. I don't know. Is that your experience that, I mean, I only anecdotally, I went into a Wendy's yesterday and they're offering free college.

Mary Smith (32:00):

Yeah. I know.

Maurice Jenkins (32:01):

I almost went in and applied.

Mary Smith (32:04):

So I think what I have noticed and that particular nurse case, I've read about that case as well, I think what the Department of Justice is focused on is the fact that the nurses themselves never signed a non-solicitation agreement. The agreement was between the companies. And I think that seems to be where companies, if you will, tended to get into trouble. And so it's one thing to present an employee at Wendy's for instance, and say, we'll pay for you to go to college but you have to promise to work for us for four years while you go. And if we train you, you have to go work at our manager program. And if you don't, we're going to ask you to sign this agreement. It's another to do all that, but never tell the employee that you go to restrict them for working across the street at Burger King.

Maurice Jenkins (32:50):

Yes.

Mary Smith (32:50):

And I think that's where the healthcare staff and companies in particular, but also some of the healthcare organizations got into trouble, which is understanding the difference between the non-solicitation provision in the agreement between the companies, which was really heavily scrutinized by the DOJ and probably will be by the FTC and there are a lot of those agreements, third party agreements, and then looking at what you ask your employees to sign. Hopefully before they start work, you tell them about it, but certainly you give them the document. I'm always impressed when an employer gives the employee the document, asks them to read it and they sign it and they understand what they're signing.

So I think for healthcare industries, that's really what they have to look at, is where are those non-solicitation provisions contained? And are we okay? Are we asking the employees and upfront? And if we have them in third party contracts, can we really articulate the value of why they're in those contracts and have an equitable explanation for them?

Well, I think that covers most of our topic for today, Maurice. This was a great conversation with you and I'm sure we will circle back again sometime.

Maurice Jenkins (33:55):

Yes. Thoroughly enjoyed it, Mary.

Alitia (34:00):

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