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ClientAlert

Health Law Update

April 24, 2015

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SB 325: RESTRICTING PHYSICIAN NON-COMPETE CLAUSES IN NEW MEXICO

On April 8, 2015, Governor Susana Martinez signed into law a recently passed piece of legislation that significantly affects contractual relationships between health care practices/employers and health care practitioners. Senate Bill 325 ("SB 325"), which was sponsored by Senator Stuart Ingle of Portales, renders non-compete provisions in certain health care practitioner agreements unenforceable.[i] *The stated purpose of this newly-signed law is to allow certain practitioners, whose employment or provider agreements contain non-compete provisions, to continue working in their chosen field and current geographic location after the agreement has terminated. Supporters of the bill have argued that limiting non-compete provisions will be especially beneficial to rural communities as practitioners previously would have been forced to leave their communities if they opted to change employers.*

Summary of SB 325

Under SB 325, a "health care practitioner" is defined as (1) a dentist; (2) an osteopathic physician; (3) a physician; (4) a podiatrist; and (5) a certified registered nurse anesthetist. Interestingly, the definition of "health care practitioner" omits most types of mid-level providers, including nurse practitioners and physician assistants. SB 325 states that non-compete provisions which restrict the right of a practitioner to provide clinical health care services are unenforceable upon the termination, renewal or extension of the agreement. Any non-compete clause is also unenforceable upon the termination of a health care practitioner's employment with a party seeking to enforce the agreement.

SB 325 does, however, provide for some exceptions to this rule. Specifically, it does not limit the enforceability of certain provisions, including provisions that require practitioners who have worked for an employer for less than

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three years to repay all or part of any loans, expenses, or bonuses received from the employer. Also, SB 325 does not limit the enforceability of certain nondisclosure and nonsolicitation provisions. SB 325 does allow for an agreement to contain a liquidated damages provision in an amount that is reasonable in light of anticipated harm and difficulty in proving the amount of loss extending from a breach. However, unreasonably large liquidated damages clauses will be deemed void.

Perhaps most importantly, SB 325 does not apply to all agreements. SB 325 is not retroactive: it explicitly does not apply to agreements, renewals, or extensions executed before July 1, 2015. SB 325 also does not apply to agreements between practitioners who are shareholders, owners, partners, or directors of a health care practice.

How Will SB 325 Affect Me?

Although SB 325 is relatively short, it can be challenging to navigate. While SB 325 provides a general prohibition against the enforceability of non-compete provisions, certain practitioners will not necessarily benefit from this prohibition. Practitioners, therefore, should not assume that SB 325 alleviates all obligations under all non-compete clauses. Similarly, health care entities that are interested in being able to recover certain expenses paid to practitioners should understand the permutations of SB 325 and revise their standard practitioner agreements accordingly.

In order to assist practitioners and health care practices/employers in understanding the implications of the new law, below are a few hypotheticals which illustrate how the various sections of SB 325 will operate.

Example A:
Practitioner A signs an agreement on January 1, 2015, that contains a non-compete provision. The provision states that the practitioner may not work for a competitor within fifty (50) miles for two (2) years after termination of Practitioner A's employment.

If Practitioner A terminates her employment on, or before, June 30, 2015, is she subject to the non-compete provision?
Yes. SB 325 only applies to agreements, renewals, or extensions executed on or after July 1, 2015. The non-compete clause in Practitioner A's agreement will continue to be valid.

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If Practitioner A terminates her employment after July 1, 2015, is she still subject to the non-compete provision?

Yes. As stated above, SB 325 only applies to agreements, renewals, or extensions executed on or after July 1, 2015. Because the agreement was executed before July 1, 2015, and because the law is not retroactive, Practitioner A is not relieved of her non-compete obligations.

Example B:

Practitioner B began working for her employer on July 30, 2014. One year later on July 30, 2015, she executes a one (1) year extension employment agreement. Her extension includes a non-compete clause and the following provision: "a health care practitioner who has worked for an employer for an initial period of less than three years must repay all or a portion of (1) a loan, (2) relocation expenses, (3) a signing bonus or other remuneration to induce the health care practitioner to relocate or establish a health care practice in a specified geographic area, or (4) recruiting, education and training expenses."

If Practitioner B terminates her employment on July 1, 2016, is she subject to the non-compete provision?

No. SB 325 does apply to agreements, renewals, or extensions executed on or after July 1, 2015. The non-compete clause in Practitioner A's agreement will not be enforceable.

If Practitioner B terminates her employment on July 1, 2016, will she be required to repay certain expenses?

Yes. Although non-compete provisions are generally unenforceable under SB 325, SB 325 does not apply to certain repayment provisions, certain nondisclosure/nonsolicitation provisions, and liquidated damages provisions.

Example C:

Practitioner C executes an agreement on July 1, 2015. The agreement contains a non-compete provision.

Is Practitioner C limited by the non-compete provision if she terminates the agreement?

Maybe. If Practitioner C is a shareholder, owner, partner or director of a health care practice, SB 325 would not apply and the non-compete provision would remain valid.

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i. House Bill 52 ("HB 52"), which was sponsored by Nora Espinoza and Cliff Pirtle, likewise sought to address non-compete provisions, however it contained a more expansive definition of "health care practitioner" and applied specifically to practitioners in Lea, Chavez, and Eddy Counties. HB 52 died before reaching a final vote in the Senate.