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Healthcare Client Alert - PA's Fair Contracting for Health Care Practitioners Act

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On July 17, 2024, Pennsylvania Governor Josh Shapiro signed into law the Fair Contracting for Health Care Practitioners Act, Act 74-2024 (Act), which introduces significant changes to the contractual and employment conditions for certain health care practitioners in the Commonwealth of Pennsylvania. **The Act becomes effective on January 1, 2025.**

It does not go unnoticed that the Act was passed at a time when many states and governmental agencies are seeking to reduce or nullify the impact of noncompete covenants in employment contracts. For example, as of this writing, the Federal Trade Commission (FTC) rule banning noncompete covenants in employment contracts is set to become effective on September 4, 2024. The Act has the effect of expanding the scope of the FTC ban on noncompetes specific for health care practitioners in Pennsylvania since the FTC rule is not applicable to not-for-profit employers (which includes most hospital systems).

General Scope of Ban of Noncompete Provisions

Pursuant to the Act, a noncompete covenant is an agreement (or a provision in an agreement) entered into between an employer and a "health care practitioner" in Pennsylvania that has the effect of impeding the ability of the health care practitioner to continue treating patients or accepting new patients, either practicing independently or in the employment of a competing employer, after their term of employment ends with said employer. Specifically, the Act makes noncompete covenants entered into after January 1, 2025 void and unenforceable as contrary to public policy; however, the Act does not impact noncompete covenants entered into before the January 1, 2025 effective date of the Act, and those will remain enforceable to the extent permitted by existing law.

Applicable Parties

It is interesting that the Act defines a "health care practitioner" to include *only* licensed physicians (M.D. or D.O.), certified registered nurse anesthetists (CRNA), certified registered nurse practitioners (CRNP), and physician assistants (PA). The Act does not apply to any other "individual authorized to practice some component of the healing arts" as set forth and provided for in the Pennsylvania Health Care Facilities Act of 1979, as amended.

Exceptions to General Rule

Much like the FTC rule and other state laws, the Act does provide exceptions to the general ban on noncompetes with health care practitioners:

- The Act provides an exception to allow employers to enforce a noncompete covenant if the length of the term of the noncompete covenant is no more than one year, provided that the health care practitioner was not dismissed by the employer. However, the Act does not specify whether there is a difference

between a “without cause” dismissal or a “with cause” dismissal by an employer, and presumably *any* dismissal by an employer could nullify the one-year noncompete provision. Also, the Act does not contain any geographical restriction with respect to noncompete covenants at all and only speaks in terms of the temporal aspect of the noncompete covenant not to exceed one year.

- In addition to the foregoing exception, the Act makes clear that it does not prohibit an employer from seeking to recover reasonable expenses from a health care practitioner, if the expenses are: (i) directly attributable to the health care practitioner and accrued within the three years prior to separation (unless separation is caused by dismissal of the health care practitioner); (ii) related to relocation, training and establishment of a patient base; and (iii) amortized over a period of up to five years from the date of separation by the health care practitioner.

- The Act also does not prohibit noncompete covenants entered into with a health care practitioner with an interest in a business entity as a direct result of: (i) the sale of an ownership interest or all or substantially all of the assets of the business entity; (ii) a transaction resulting in the sale, transfer, or other disposition of the control of the business entity (including by merger or consolidation); or (iii) the health care practitioner’s receipt of an ownership interest in the business entity; provided, however, the Act makes clear that the health care practitioner must be a party to the aforementioned sale, transfer, or other disposition.

Patient Notification Requirement

In addition to the general restrictions on noncompete covenants, the Act also includes new patient notification requirements that are triggered upon the “departure” of a health care practitioner from an employer.

Specifically, the Act requires that, within 90 days of a health care practitioner’s departure from an employer, the employer must notify the health care practitioner’s patients (that were “seen within the past year” and had an “ongoing outpatient relationship for two or more years”) of: (a) the health care practitioner’s departure; (b) how the patient may transfer the patient’s health records to the departed health care practitioner or to another health care practitioner other than with the employer, if the patient so chooses; and (c) that the patient may be assigned to a new health care practitioner within the existing employer if the patient chooses to continue receiving care from the employer.

It is interesting to note that the Act does not explicitly require an employer to notify the patient of where the departing health care practitioner will be rendering services in the future.

A Rocky Path Forward?

Ultimately, the Act is not well written and leaves many terms and concepts undefined and unclear. The Act fails to address patient non-solicitation provisions (which are common alongside noncompete covenants), and there are no provisions associated with enforcement of the Act (and/or by whom) and with penalties for noncompliance. Also, in addition to the various issues noted above, the Act’s lack of clarity generates just some of the following additional issues and questions:

- Is there a prescribed method or manner for the making/issuing the patient notice? Is a website posting or newspaper advertisement sufficient?
- Does the Act apply to pre-January 1, 2025 employment agreements with non-competes longer than one year that automatically renew? What about any post-January 1, 2025 amendments to existing employment agreements with noncompete covenants longer than one year?
- Based on the definition and application of “health care practitioners” in the Act, do patients really need notification when a PA, CRNP and/or CRNA departs the employer? What is they are “transferred” or “re-assigned” to a different practice or department of the employer?
- Is the patient notification triggered regardless of the reason for the departure of the health care practitioner – i.e., with cause, voluntary, without cause, etc.? For example, does the death or retirement of a health care practitioner trigger a patient notice requirement?

- If the health care practitioner is employed for less than two years (i.e., 23 months or less), is there a patient notice requirement since there has been no “ongoing outpatient relationship” for two years or more?

It is likely that the future of the Act will spur litigation and legal challenges, especially in terms of the Act’s application and enforcement. **Until such time, however, health care employers should look to edit and revamp their noncompete covenants in future employment contracts after January 1, 2025, including the consideration of more robust no-hire provisions, non-solicitation provisions and liquidated damages and/or expense recovery provisions.**

If you have questions about this update or other healthcare law matters, please contact Mark Denlinger, your Knox Law Attorney, or call us at 814-459-2800.



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