

NON-COMPETE CLAUSES: THE LAW AND PRACTICLITIES

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If there is a topic which occupies more of my time in law and consulting practice than non-competition terms, I can't think of it. I receive a relentless barrage of e-mail from veterinarians requesting help either deciding whether or not to sign a non-compete, or help figuring out what to do to deal with a non-compete which they have already signed.

THE NATURE OF NON-COMPETITION LAW

Practice owners tend to think of non-competition terms as vital to the process of hiring an associate while associates seem to think of them as an unfair and unjustified burden placed upon them by a potential new employer. In reality, they are neither; they exist as a rational technique allowing an employer to offer a professional position to a candidate without having to unduly worry that that employee will damage the good will value of a business which has taken a great deal of time to build. (Note: There are jurisdictions where non-competition terms in employment contracts are prohibited by statute.)

For our purposes in this material, remember that there are two basic types of non-competition agreements. First is the kind most commonly thought of: one which is included in an employment contract prohibiting an associate from practicing veterinary medicine near the employer's facility for a specific period. These types of agreement run a continuum from fair and reasonable to outrageous and blatantly unacceptable.

Distinguish this, however, from the non-competition agreement entered into by a practice owner and practice purchaser. In that instance, the seller is agreeing not to compete in the same type of veterinary business or practice within a certain distance for a specified period. ***The willingness not to compete is an essential element of the deal.*** Therefore, since the parties have both had an opportunity to hammer out the details as part of the practice purchase negotiations, such an agreement is much more likely to be assumed by the parties, as well as arbitrators and courts, as being fair and reasonable until proven otherwise.

Here, however, we will focus on the associate-employer non-compete agreement. What makes them fair? What makes them enforceable? Are they negotiable? Should you sign one hoping or expecting to get some court to void it later on? These are the questions most veterinarians are interested in having answered.

FAIRNESS AND REASONABLENESS

A good non-competition clause is designed to do what it is meant to do. It should clearly state that the prohibition against competition is for a **specified time** and for a **clearly defined distance**.

Problems arise when the document is not clear on when employment ends (Does the non-compete survive the renewal of the agreement if it is oral? Does it begin to run when the

employee is reduced to part-time?) Difficulties ensue, also, when the distance is not easy to understand. Many associates think that driving distance governs the non-compete when it is actually air-miles. Other problems arise when the agreement measures the non-compete as having a center which includes “any office currently existing or any future satellite clinic.” What ends up happening later is that new satellites open or other practices merge with the employer making the non-compete region *huge*.

Courts traditionally look to enforce non-competes which are *fair* (do not unreasonably restrict the employee from getting work elsewhere in the immediate region) and *reasonable* (last for a period of time which adequately protects the employer without unduly burdening the employee.) Figuring out what is and what is not fair and reasonable can be a very subjective undertaking. Keep in mind that judges have extreme latitude in their decision-making authority. What one judge feels is reasonable may be considered outrageous by another judge even within the same jurisdiction.

NON-COMPETITION CLAUSES CAN AND SHOULD BE NEGOTIATED

Many veterinarians contact me and tell me that they are “locked in” to a non-competition term but otherwise have no real problem with their work environment or employer. They just don’t want to labor under the knowledge that they will never be able to have their own practice in the area where they have come to enjoy working.

Non-competes can be dealt with just the same as any other contractual right. Their terms can be made more or less arduous in exchange for consideration by the other side in the negotiation. For example, say that a long-term associate is under a 10-mile, 2 year non-compete but locates a spot where she would like to put out a shingle that is 8 miles away.

She can always quit her job and work somewhere else while the covenant runs its 24-month course, or she can negotiate. If the clients like her and her boss likes her work, perhaps the non-compete can be dropped to 7 ½ miles in exchange for a smaller than expected raise and an iron-clad “non-solicitation” agreement prohibiting the associate from contacting clients at the old practice once she leaves. Actually, this might work out *better* for the practice owner who inevitably would lose some patients even if the associate went to work as an employee 11 miles away then came into the 10-mile radius 2 years later with an unleashed client-grabbing vengeance.

WHAT ABOUT SIGNING A NON-COMPETE THAT SEEMS UNREASONABLE AND HOPING TO GET IT CANCELLED BY A COURT LATER?

There are two answers: No and Hell, no. First, there is an old-fashioned concept that a person’s word is his bond and this idea flies in the face of that silly old concept which I don’t think is particularly silly. Second, if there is this degree of disagreement between employer and associate at the beginning of the employment period, *how good can this job be for you anyhow?*

Most importantly, however, is the **dearth of practicality** of the strategy. At arbitration or trial, it will be up to the employee to explain to some lawyer or judge exactly why the contract was

signed if it seemed unfair to the associate in the first place. Then, there is always the possibility that the judge might not void the clause but *rather substitute* something less unreasonable yet still inconsistent with the associate's "hopes and dreams of his own practice..."

Finally, remember that fighting a contract is an expensive undertaking and pretty often, the practice owner has a far larger war chest for litigation than the associate does. The smarter move would have been to discuss the non-compete with the boss *before it was signed*. It is hard for me to understand why anyone would legally commit to promises they fully intended to later ignore. Fundamentally, doing so can be extremely expensive in terms of time, legal fees and lost wages.