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Don't Throw out the Employee Dentist Covenant-not-to-Compete Baby with the Exploitive Employer Bathwater

In our legal system's attempts to curb overreaching employer conduct, it must legislate strict controls, rather than overbroadly ban reasonable covenants not to compete that protect the dentist-patient relationship and incentivize dental practices to nurture one of society's most valuable assets: patient goodwill.

Proposed federal and state legislative bans on employee covenants not to compete are intended to protect all employees from overreaching restrictions on their future job potential and economic opportunities. The timing of these proposed bans may reflect, in dentistry, the current rise in the commercialization of oral health-care delivery and inappropriate covenant-not-to-compete applications. Barring covenants not to compete in dentist employment, however, robs most private practice owners, who focus upon building trust in dentist-patient relationships, the right to protect the owner's investment of time, money and ethical decision making to earn their patients' goodwill.

Narrowly tailored covenants can protect and promote patient goodwill without harming the economic interests of dentist employees or access to care for patients. Dental practice owners must reaffirm our commitment to prioritize patients' best interests above profit and commercialized care, eliminate the use of overreaching covenants not to compete, and lobby lawmakers to codify stricter requirements in covenant enforcement rather than ban all covenants not to compete.

Covenants Not to Compete and Proposed Bans
Covenants not to compete (also known as, "Re-

strictive Covenants" or "Non-Compete Agreements") describe terms within an Employment Agreement or in a separate agreement between an employer and employee that limits the employee's right to perform similar duties for another employer or independently during, and for a reasonable time after termination of the current employment, and within a reasonable geographic area surrounding that employer's location. Historically, these agreements evolved to protect an employer's legitimate business interests from unfair competition, primarily from client or patient-based professionals, corporate executives, or persons with knowledge of confidential information or relationships that the terminating employee could leverage to unfairly compete against or entice patients or clients to leave the former employer.

Most states, approximately 40 as of 2022, to varying degrees support and enforce reasonable restrictive covenants.^[1] In these states, courts typically apply a balancing test to determine the legal enforceability of a specific covenant. The restriction must protect a legitimate business interest. In dentistry, the covenant protects patient goodwill, i.e., the individual dentist owner's characteristics, attributes, expertise, skills, knowledge, reputation, dentist-patient and other professional relationships,

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any other intangible factors that may motivate patients to select or remain with the practice, and any clinical or administrative proprietary information integral to its operation. The restriction must, in addition, extend only to a reasonable geographic scope and duration so as not to impair a terminating employee from earning a living or the public from accessing preferred care.

Currently, no federal ban on non-compete agreements exists. In 2021, President Biden issued an Executive Order encouraging the Federal Trade Commission (FTC) to ban or limit the use of noncompetes.^[2] The FTC has responded with proposed federal regulations that would ban all covenants not to compete and effectively preempt states' authority to legally enforce such agreements.^[3] As the country awaits a federal decision, New York State, a long-time staunch supporter of covenants not to compete, this year passed a bill, currently awaiting the governor's signature, banning all restrictive covenants.^[4]

Codified Restrictions

The purposes of law include, among others, to identify and promote societal values and to protect against potential abuses. Employee covenants not to compete reasonably drafted and suitable under the circumstances do not unreasonably harm employees' job potential and economic opportunities. Rather, any harm stems from the inappropriate and overreaching use of noncompetes against low-wage, hourly employees who do not enter into fiduciary relationships with the employer's clients, customers or patients, or possess confidential information sufficient to unfairly compete against their former employers. Hence, to reduce covenant abuses and, in the case of dentistry, still protect patient goodwill from the unfair competition of patient-based professionals, such as dentist employees, legislatures should propose codified covenant parameters, not bans. In dentist employment, the codified restrictions ideally would follow a typical state's three-part balancing test for covenant enforcement.

First, acknowledge patient goodwill as a legitimate business interest, entitled to protection. Society wants dentists to develop skill, knowledge and expertise; nurture ethical patient relationships; invest time and money in establishing safe and efficient practice operation; hire and train competent auxiliaries; then share these attributes with new dentist employees who can preserve the assets going forward and preserve it as a societal value. As evidenced in the sale of dental practices, patient goodwill, as an intangible asset, typically represents approximately 80% of a practice's economic value. Most importantly, the future of quality oral healthcare depends on the cultivation and protection of this asset.

However, employer dentists will have less incentive to continue to establish these desirable resources if, because of

a legislative ban on restrictive covenants, they risk losing the goodwill they established to the unfair direct competition of former dentist employees. Without a legal remedy to protect a dentist owner's business investment, practice owners will invest less in dentist-patient relationships and hire and mentor fewer dentist employees, which will, ultimately, depress the dentist employee job market.

In addition, covenant bans would accelerate the commercialization of oral healthcare. Commercialization reduces ongoing dentist-patient relationships to isolated transactions and transforms oral healthcare services into a commodity that, by design, inhibits the development and nurturing of patient goodwill. Hence, bans on noncompetes that directly fuel unfair competition would synergistically, along with the existing commercialization of oral healthcare delivery, further disincentivize and reduce the development of patient goodwill.

Second and third, protect the future economic and job opportunities of the terminating employee and the rights of patients to preferred care. Legislation must limit covenant use to only dentist employees and not other supporting staff and the geographic area and duration of the covenant to extend

only minimally to protect employer goodwill. The restrictions must require employers to utilize creative geographic borders narrowly tailored to reflect the practice patient base, possibly with carve-out areas the employee may wish to target as future practice sites, that do not threaten the employer's goodwill. In cases where one corporate employer operates multiple practice locations in a region, the legislative restrictions must limit covenant use only to the primary location where the dentist employee maintained regular and significant patient contact. In addition, restrictions should prohibit covenants against dentists that terminate either too soon to gain significant confidential information or develop patient relationships, terminate for good cause or are terminated without cause.

Reasonably drafted covenants still allow patients to maintain access to preferred care. Dentist employees can always professionally announce their new location without violating covenant restrictions, and patients can legally authorize release of their records to the terminating employee's new office, as desired, to continue their relationship with the terminating dentist.

Finally, outlawing employee covenants not to compete will, in general, damage our economy. The Public Policy

As a Practice Owner, You Should be Able to Answer the Following Questions:

1. Do you have or have you considered an exit strategy?
2. How long do you plan on being a practice owner? If your health allows, would you like to continue practicing after that point?
3. Do you know what your practice is worth today? How do you know? When was your last Practice Valuation done?
4. Have you met with a financial planner and have a documented plan? Have you established a liquid financial resources target that will enable you to retire with your desired lifestyle/level of income?

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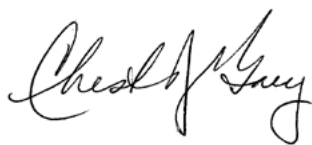
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Institute of New York State, Inc., a nonprofit, nonpartisan organization that promotes public policies that will restore New York State economic competencies, recently initiated statewide communications to inform New York residents that the pending noncompete ban “poses a serious risk to innovation and job growth.”^[5]

Lobby to Protect Patient Goodwill

Strong dentist-patient relationships and the goodwill they create represent the basis of quality oral healthcare. Practicing dentists must continue to nurture these relationships and invest in their practice goodwill. Lawmakers must recognize this goodwill as a societal value worthy of legal protection. The current proposed federal and state covenant-not-to-compete bans overbroadly and unnecessarily remove this protection in an attempt to control covenant misuse. Organized dentistry must alert lawmakers to the value of properly drafted and applied noncompetes and lobby to withdraw the proposed covenant bans and, instead, codify the necessary restrictions in covenant enforcement that adequately protect practice goodwill concurrently with employee and patient rights.



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