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ISSUE ALERTS

ANOTHER CHALLENGE TO RESTRICTIVE COVENANTS — THIS TIME TO SUCH AGREEMENTS FOR KANSAS HEALTHCARE PROVIDERS

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By: Clayton J. Kaiser and C. Edward Watson II

The legality and use of restrictive-covenant agreements is back in the spotlight. But this time, it is the Kansas Legislature and not the Federal Trade Commission ("FTC") that is considering the issue.

You may recall that in April 2024, the FTC approved a final rule that would have banned noncompete agreements nationally. As shared in prior Foulston issue alerts, this ban was challenged across the country and ultimately struck down by a Texas federal district court. The FTC later dropped its appeal of that order. As a result, the FTC is now taking a more targeted approach against employers attempting to use noncompete clauses, as opposed to a nationwide prohibition.

However, on Tuesday, Feb. 10, the Senate Committee on Federal Affairs chaired by Senator Mike Thompson (R-Wichita) introduced Senate Bill 504, which, if passed, would institute a statutory prohibition against "noncompete agreements" in the health care industry by enacting the Healthcare Professional Employment Mobility and Patient Access Act. Subject to a few limited exceptions, this bill would prohibit or void restrictive-covenant agreements that limit post-employment options for physicians and mid-level practitioners – both retroactively and prospectively.

If passed as proposed, the impact of SB 504 will be far-reaching. SB 504 defines "noncompete agreements" very broadly to mean "any agreement or contractual provision that restricts a healthcare professional from engaging in the practice of their profession or providing patient care services after termination of employment or contractual relationship." Thus, SB 504 would apply to non-accept and non-solicitation agreements in addition to true noncompetes. In short, this bill could impact nearly every agreement that health care employers have with their physicians and mid-level practitioners regarding their post-employment activities.

SB 504 does allow employers to include a limited restriction in their employment agreements for the first 24 months of a physican's or mid-level's employment. However, this exception only applies when the medical professional voluntarily terminates employment. Furthermore, the restriction cannot exceed 15 miles from the employer's

primary practice location and must include a mandatory financial buyout for documented recruitment and location costs. Lost profits, anticipated revenue, training costs, or punitive liquidated damages cannot be included in the agreement. Employers will be able to continue to require confidentiality and nondisclosure agreements to protect trade secrets and proprietary information. Also, a seller of a medical practice where goodwill is transferred can enter into "restrictive covenants" with the buyer. These provisions will provide healthcare employers with some flexibility in crafting restrictive-covenant agreements, but that flexibility will be dramatically reduced compared to what they currently have.

As of the writing of this issue alert, this bill has not been scheduled for a hearing. But the bill was introduced by an exempt committee – meaning that it can become active at any point during the remainder of the legislative session. So, to the extent that you are concerned about the contents of this proposed legislation and would like support in articulating and advocating your opposition, Foulston's experienced government affairs team would be happy to assist you in that endeavor.

FOR MORE INFORMATION

If you have questions or want more information regarding the use of restrictive covenants, contact your legal counsel. If you do not have regular counsel for such matters, Foulston Siefkin LLP would welcome the opportunity to work with you to meet your specific needs. For more information, contact Clayton J. Kaiser at 316.291.9539 or ckaiser@foulston.com or C. Edward Watson, II, at 316.291.9589 or cewatson@foulston.com. For more information on the firm, please visit our website at www.foulston.com.

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