



# Restrictive covenants

## FAQ

### What is a restrictive covenant?

A restrictive covenant is a clause in an employment contract that prevents the employee from practicing his or her profession in some fashion, in the event the employee terminates the employment contract or if the employee is terminated with or without cause. In Minnesota, restrictive covenants are measured by their “reasonableness,” which is generally examined by the geographical scope of the restriction, the length of the restriction, and the scope of the restricted practice. Minnesota courts will enforce restrictive covenants in physician employment contracts, so long as the restrictions are reasonable. Minnesota courts will also “save” an unreasonable restrictive covenant by re-writing it to be reasonable.

Every state has different rules about the use of restrictive covenants, and some actually prohibit their use completely. Always make sure to consult with an attorney who knows the state where the contracting employee is located (or the state law that governs the contract) to completely understand the implications of a restricted covenant.

### How are restrictive covenants used in physician employment contracts?

Restrictive covenants are thought by many employers – both private practice physician groups and large systems – to be a tool that “protects” the investment the employer makes in a new hire. For example, practices may invest in physician recruitment, signing bonuses, and the infrastructure that permits the physician to practice (e.g., office space, medical supplies, imaging devices, etc.). Restrictive covenants also ensure that departing physicians do not compete directly with the former employer for a discrete patient pool.

Restrictive covenants prevent the departing physician from practicing usually for a year or two, and usually only at sites within a defined radius of the employer’s location (10 miles is a common distance). Defining the location, however, can be controversial and complicated when the employer has multiple sites over a large portion of the state. If not written carefully, the “geographic scope” provision can render it impossible for a departing physician to practice in an entire metro area, in any metro areas in a given state, a region of a state, or even an entire state.

### What is a buyout provision?

Many restrictive covenants contain a “buyout” or liquidated damages clause, which permits the departing physician to pay a pre-identified sum in exchange for freedom from the restrictions. The buyout may be a specific amount (such as \$250,000) or it may be a number that is linked to recent net income, average profit, or other metrics.

### Is there a way to avoid a restrictive covenant?

Restrictive covenants are widely used in Minnesota. Their use in other states varies. Often an employer will negotiate on specific terms – such as shortening to one year, or to 5 miles – but is often unwilling to remove the restriction entirely.

Depending on practice setting and up-front investment, some employers will agree that the restrictive covenant shall not attach until after one year of employment. Other employers will agree to a clawback provision instead of a restrictive covenant. A clawback provision compels a new physician employee to give back the signing bonus or other dollars spent in the course of recruitment, if the employee leaves within the first few years of employment.

### Can a restrictive covenant be imposed at any time during employment?

Yes, but not without meeting certain conditions. Because the employee is giving up a “right” to practice, there must be some benefit conferred upon the employee in exchange; this is called “consideration.” In a new employment situation, the benefit conferred is being hired. However, if a restrictive covenant is sought during the course of employment, the employer must confer some additional benefit beyond “staying employed.” This usually takes the form of a lump sum payment, such as \$10,000.

### Are restrictive covenants physician-friendly?

That depends on whom you ask. Some find them to be helpful to protect physician-owned practices from encroachment from larger entities, by helping to protect the relatively large expenditure a small practice might invest in physician recruitment. However, restrictive covenants are challenged by many who believe they unfairly restrict the physician-patient relationship and limit professional autonomy.

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### **What should physicians do when faced with a restrictive covenant?**

Read the restrictions very carefully and consider what would happen if they were triggered. It is hard at the beginning of an often-happy new employment relationship to imagine things “going bad,” but it is important to get specific about the impact of the geographic limitations, in particular. You have the right to seek to negotiate more favorable restrictions and many employers will compromise. Because what is a “reasonable” restriction changes over time, it is especially helpful to retain an attorney with experience in physician contracts, who will be able to advise you on current standards for what is and is not “reasonable” according to Minnesota law.

#### **Disclaimer**

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#### **For more information, contact:**

*Becca Branum, JD*

*Policy Counsel*

*Minnesota Medical Association*

**PHONE:** 612-362-3738

**EMAIL:** [bbranum@mnmed.org](mailto:bbranum@mnmed.org)