

**RESOLUTION 03.2023-02 (A-24)
OPPOSITION TO RESTRICTIVE COVENANTS
AND NON-COMPETE CLAUSES**

ISMS Board Action Taken on 10/21/23

Did Not Adopt Resolution 03.2023-02 (A-24).

Medical Legal Council Recommendation to ISMS Board on 10/21/23

Resolution 03.2023-02 (A-24), Opposition to Restrictive Covenants and Non-Compete Clauses and member survey results were reviewed by the Council. The Council previously considered this resolution at its June 2023 meeting, which the author attended and engaged in a considerable and thoughtful discussion with the Council. The Council was given information regarding the Illinois Freedom to Work Act, which provides that employers cannot enter a non-compete agreement with an employee unless the employee's earnings exceed certain thresholds; information regarding the FTC proposed rule regarding abolishing noncompete clauses; the AMA's letter to the FTC in response; and information regarding the National Labor Relations Board's memo regarding non-compete agreements and their conflict with the National Labor Relations Act.

At the June meeting, the Council was supportive of current ISMS policy that supports abolishing restrictive covenants or post-employment non-compete clauses from any contract of a hospital or hospital affiliate. Additionally, the Council noted that ISMS policy supports the use of use of liquidated damages or other contractual means in lieu of these provisions. The Council was informed that AMA ethics policy opposes the use of unreasonable non-competes but does not support an outright ban on non-compete requirements. At the conclusion of its June meeting, the Council decided that further study of the issue was required, and requested additional information regarding what qualifies as a small group practice.

The Council again considered the resolution at its October meeting. The Council was presented with research indicating that the AMA's 2022 Physician Practice Benchmark Survey, which reviews changes in the ownership and organization of physician practices, categorizes practices sizes into 5 categories: fewer than 5 physicians; 5-10; 11-24; 25-49; and 50+ physicians. It considers a "small practice" to be one that has 10 or fewer physicians.

35 The Council additionally took note of recent action at the AMA's Annual Meeting in
36 June following the Council's last meeting. The AMA adopted a resolution to ban non-
37 compete contracts for physicians in clinical practice who are employed by for-profit or
38 nonprofit hospitals, hospital systems or staffing company employers. The Council also
39 received an update regarding the Federal Trade Commission's proposed rules
40 prohibiting non-compete clauses: around 27,000 comments were received, and action is
41 not expected before April 2024. The AMA previously submitted a letter to the FTC
42 outlining its objections to the rule.

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44 Council members discussed the investment made by small practices, and the challenging
45 competitive position with which they often find themselves when trying to recruit and
46 retain talent. The Council took note that recent AMA action aligns with ISMS policy
47 that supports abolishing restrictive covenants or post-employment non-compete clauses
48 from any contract of a hospital or hospital affiliate as defined by the Illinois Hospital
49 Licensing Act. Therefore, the Council recommends that the Board of Trustees not adopt
50 Resolution 03.2023-02 (A-24).

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52 The Medical Legal Council recommends that the ISMS Board of Trustees not adopt
53 Resolution 03.2023-02 (A-24).