

ILLINOIS STATE MEDICAL SOCIETY

**Resolution 12.2021-19
(A-22)**

Introduced by: Niva Lubin-Johnson, MD, ISMS Member

Subject: Inference of Non-Compete/Restrictive Covenant Clauses to Prevent Physicians from Earning Additional Income

Referred to: Medical Legal Council

1 Whereas, the Illinois State Medical Society has adopted policy asking for the
2 abolition of restrictive covenants or post-employment non-compete clauses and policy
3 to advance or support legislation that allows non-enforcement of these items related to
4 hospitals or their affiliates and ban such clauses of the same; and

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6 Whereas, the consolidation of hospitals, their affiliates, other healthcare entities,
7 has caused fewer physician employment options; and

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9 Whereas, since March 2020, some physicians both employed or in private
10 practice in Illinois have suffered a decrease in income due to the COVID-19 Pandemic
11 and are currently working under a contract that includes these items; and

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13 Whereas women physicians have had lower incomes before the pandemic and
14 recent data shows women physicians earn 2 million dollars less than male physicians
15 during their lifetime; and

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17 Whereas, women physicians face decreasing opportunities, decreasing incomes,
18 and these unfair impediments to seeking and acquiring more satisfying employment;
19 and

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21 Whereas employers are preventing physicians from working outside of these
22 contracts by saying that those additional lines of service could be coming to their
23 systems (i.e., substance abuse and treatment, separate telemedicine/telehealth entities);
24 therefore, be it

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26 RESOLVED, that the Illinois State Medical Society advocate, advance
27 legislation, and support the ability of physicians to gain additional income with positions
28 not in the specialty that they are currently employed and positions in telehealth or
29 telemedicine; and be it further

30 RESOLVED, that ISMS reaffirm current policy to support non-enforcement and
31 elimination of restrictive covenants and non-compete clauses.

Fiscal Note:

n/a

Existing ISMS policy and action related to this issue:

The Board of Trustees approved that ISMS cause the introduction or support of legislation that eliminates enforceability of non-compete clauses or restrictive covenants in hospitals or hospital affiliates as defined by Illinois Hospital Licensing Act and that such legislation also ban such clauses in physician contracts with hospitals or hospital affiliates as defined by the Illinois Hospital Licensing Act. (BOT - JAN 2019)

ISMS supports abolishing restrictive covenants or post-employment non-compete clauses from any contract of a hospital or hospital affiliate as defined by the Illinois Hospital Licensing Act. (HOD 2018)

House of Delegates adopted as amended Resolution B205 (A-17), Elimination of Medical Center Restrictive Covenant and Non-compete Clauses, which states: RESOLVED, that the Illinois State Medical Society (ISMS) policy be to abolish restrictive covenants or post-employment non-compete clauses from any contract of a hospital or hospital affiliate as defined by the Illinois Hospital Licensing Act; and be it further RESOLVED, that ISMS introduce or support legislation that eliminates enforceability of non-compete clauses and restrictive covenants in hospitals or hospital affiliates as defined by the Illinois Hospital Licensing Act, and that such legislation also ban such clauses in physician contracts with hospitals or hospital affiliates as defined by the Illinois Hospital Licensing Act.(HOD 2018; Unfinished Business Report C)

It is the policy of ISMS to champion the development of an “Employed Physician’s Bill of Rights;” which calls for the following: 1) that compensation should be based on the totality of physician activities for the organization, including, but not limited to: educational endeavors and preparation, committee participation, student/resident activities and administrative responsibilities; 2) that physicians have academic freedom, without censorship in clinical research or academic pursuits; 3) that physicians should not be solely responsible for data entry, coding and management of the use of electronic medical record systems; 4) evaluation of clinical activity requires the peer review process and judged only by clinicians and not corporate executives; 5) that physician activities performed outside of defined employed time boundaries are the sole prerogative of the individual physician and not the employer organization unless it

directly conflicts or increases the risk of the organization; 6) conflict of interest disclosures should be limited to physician activities that directly affect the organization and should only be disclosed to entities that directly reimburse the physician during their employed time period; 7) that restrictive covenants should be limited to only physicians with partnership stakes in the organization and should not apply to salary-based physicians; 8) that resources should be appropriately allocated by the organization for continuing medical education as defined by state licensure guidelines; that employed physicians have the right to the collective bargaining process as outlined in the National Labor Relations Act of 1935 (The Wagner Act); 9) that all physicians be empowered to first be the patient advocate and be allowed to adhere to the spirit of the Hippocratic Oath allowing patient privacy, confidentiality and continuity of a patient's health care and dignity (HOD 2017; Reaffirmed 2017)

Board of Trustees approved the Medical Legal Guideline "Restrictive Covenants in Physician Employment Agreements" for final editing and publication. (BOT 2011-JAN)

Board of Trustees approved a survey of physicians, asking how physicians are employed and the terms of any restrictive covenants under which they work. (BOT 2011-JAN)

House of Delegates adopted Resolution 49 (A-10), as amended, which directed that ISMS continue to study the practice of large hospital systems employing increasing numbers of physicians, with employment agreements containing non-compete provisions, because these practices have the potential to shift the way health care is provided within the state, for report back to the House of Delegates. (HOD 2010)

House of Delegates adopted Substitute Resolution 47 (A-09), which directed that current ISMS policy abolishing restrictive covenants be amended to state that ISMS supports abolishing employment, partnership, or corporate agreements that restrict the right of physicians to practice medicine, and advocates the use of liquidated damages or other contractual means in lieu of these provisions; and that the Board of Trustees provide educational materials concerning professional service contracts and restrictive covenants to medical students, residents and physicians negotiating contracts. (HOD 2010)

House of Delegates adopted Resolution 80 (A-04), which directed that the ISMS educate its members about their right to privately contract with their patients and provide sample contracts and other materials, and that the ISMS send a similar resolution to our AMA. (HOD 2004)

Board of Trustees approved that an article be written in Illinois Medicine EXPRESS to publicize the issues raised in Resolution 63 (A-02) to ensure that physicians are aware of this policy; to encourage our members to exercise due diligence in signing contracts to ensure that they are reimbursed for all services provided, including those provided by nurse practitioners; and that ISMS inform insurers of ISMS policy related to Resolution 63 (A-02). (BOT 2003-JAN)

It is the policy of the Society to limit hospital exclusive contracts for physicians' services to anesthesiology (excluding pain management), emergency medicine, neonatology, pathology and radiology. ISMS supports legislation permitting hospital medical staff to review and make recommendations to the governing body related to exclusive contract arrangements, prior to any decision being made, in the following situations: (1) the decision to execute an exclusive contract in a previously open department or service; (2) the decision to renew or otherwise modify an exclusive contract in a particular department or service; (3) and the decision to terminate an exclusive contract in a particular department or service. In addition, prior to termination of an exclusive contract the medical staff should hold a hearing, as defined by the medical staff and hospital to permit interested parties to express their views on the hospital's proposed action. (HOD 1999; Reaffirmed 2006; Last BOT Review 2011)

ISMS is opposed to inclusion of unilateral and unfair "hold harmless" clauses in managed care contracts. (HOD 1996; Last BOT Review 2013)