

TO: MSSNY Officers, Councilors and Trustees

FROM: MSSNY Legislative & Physician Advocacy Committee

DATE: January 2, 2024

RE: Resolution 58 – 2023 House of Delegates
Introduced by the Michael Ziegelbaum, MD

The following resolution was referred to the Council by the House of Delegates. The resolution was forwarded to the Legislative and Physician Advocacy Committee for further study and recommendation for the Council's consideration.

RESOLVED, that MSSNY will advocate for limits on non-compete provisions that include the following:

- (1) the non-compete provision must be limited to no more than one year from when the professional left their current practice;**
- (2) the non-compete provision should not create geographic limits on the departing physician;**
- (3) the non-compete provision must not cause any harm to the public;**
- (4) the non-compete provision must not cause any undue burden on the professional;**
- (5) the non-compete provision must have a rational business purpose for its enforcement;**
- (6) the non-compete provision must not restrict the professional from providing services at**
- (7) the practice from which a physician departs must provide contact information to any patient requesting such information not-for-profit entities or anywhere that the physician does not have a financial stake; and be it further**

RESOLVED, that MSSNY shall ask the AMA to advocate for similar rational limitations on non-compete provisions in physician contracts.

At the House of the Delegates, the reference committee heard extensive testimony on this resolution, both in support and opposition. MSSNY has for several years had policy (155.991) to support legislation to prohibit restrictive covenants imposed by health systems and private-equity owned practices, but that policy is silent as to restrictive covenants used by private physician practices. They further noted that last year, the MSSNY HOD debated a resolution that would have called for MSSNY to support legislation to prohibit restrictive covenants used by ALL health care employers. Ultimately, that resolution was referred to Council, where after further extensive debate a substitute resolution was adopted re-affirming existing MSSNY policy prohibiting restrictive covenants used by hospitals and MSOS, and calling for a MSSNY Work

Group to be created to study and make recommendations to the MSSNY Council on the use of non-competes by private physician practices.

Physicians in support of prohibiting restrictive covenants discuss the very difficult position they find themselves when they are subject to contractual non-compete provisions that limit where that physician can deliver care if they leave employment. Physicians in opposition discuss the burden on private practice physicians, particularly the risk of bringing on a younger physician to expand care availability to patients, but then have that physician leave their employ and start their own medical practice in the same region.

Since the time that the Resolution 58 was debated at the MSSNY HOD and referred, legislation (S.3100A/A1278B) was passed by the Legislature that would prohibit all restrictive covenants after the effective date of the bill. This legislation went much further than the proposed FTC rule because it would apply to non-profit employers, the primary form of business structure for hospitals and health systems in New York State. On December 22nd, the Governor vetoed this legislation, noting that she “attempted to work with the Legislature in good faith on a reasonable compromise. My top priority was to protect middle-class and low-wage earners, while allowing New York's businesses to retain highly compensated talent. New York has a highly competitive economic climate and is home to many different industries. These companies have legitimate interests that cannot be met with the Legislation's one-size-fits-all approach.”

Highlighting the division on this issues, MSSNY heard from physicians on both sides of this issue as it was being considered by the Governor, with some physicians and specialty societies urging for the bill to be signed into law as written, while other physicians (representing large medical groups) urging that the bill be vetoed or significantly narrowed. Given the extensive interest by the Governor and the Legislature in seeking to limit the use of non-compete agreements, this issue will continue to be a major source of discussion for 2024.

Through the sponsor of the legislation, MSSNY was made aware that there were substantial efforts being undertaken by the business and hospital lobbies to gut the bill by establishing an income limit on the applicability of the prohibition, or by deleting healthcare employment from the prohibition altogether. In fact, an affiliate of the Business Council of New York has launched a \$1 million public campaign to urge the Governor to veto the bill. As a result, MSSNY together with 5 specialty societies wrote to Governor Hochul urging that she sign into law legislation to prohibit the use of non-compete agreements by all employers in New York State, with a requested “chapter amendment” to exempt from its applicability community-based physician practices not located in Health Professional Shortage areas. Also signing the letter were the New York State Academy of Family Physicians, New York State Osteopathic Medical Society, New York Chapter of the American College of Physicians, New York State Society of Anesthesiologists and the New York State Neurosurgical Society.

At the discussion of this resolution on October 17, it was referenced that the AMA had recently (at the 2023 Annual HOD) adopted the following resolution with similarities to MSSNY policy.

Prohibiting Covenants Not-To-Compete in Physician Contracts H-265.988

- 1) Our American Medical Association support policies, regulations, and legislation that prohibits covenants not-to-competete for all physicians in clinical practice who hold employment contracts with for-profit or non-profit hospital, hospital system, or staffing company employers.
- (2) Our AMA will oppose the use of restrictive covenants not-to-competete as a contingency of employment for any physician-in-training, regardless of the ACGME accreditation status of the residency/fellowship training program.
- (3) Our AMA will study and report back on current physician employment contract terms and trends with recommendations to address balancing legitimate business interests of physician employers while also protecting physician employment mobility and advancement, competition, and patient access to care - such recommendations to include the appropriate regulation or restriction of a) Covenants not to compete in physician contracts with independent physician groups that include time, scope, and geographic restrictions; and b) De facto non-competete restrictions that allow employers to recoup recruiting incentives upon contract termination.

At the November 29th meeting, the Committee members noted that this nuanced policy could form the basis for an expanded MSSNY policy. Such policy would balance existing advocacy efforts to prohibit non-competete clauses in physician employment contracts where there are often disparate bargaining power dynamics while also assessing on an ongoing basis circumstances where the limited use of restrictive covenants for privately owned community-based physician practices may be appropriate.

RECOMMENDATION: That the MSSNY Council adopt the following substitute resolution:

RESOLVED, that MSSNY Policy 155.991 BE RE-AFFIRMED; and be it further

RESOLVED, that MSSNY advocate to oppose the use of restrictive covenants as a contingency of employment for any physician-in training, regardless of the ACGME accreditation status of the residency/fellowship training program; and be it further

RESOLVED, that MSSNY continue to work with AMA and federation of medicine to study and report back on current physician employment contract terms and trends with recommendations that balance the legitimate business interests of physician employers while also protecting physician employment mobility and advancement, competition, and patient access to care.

155.991 Restrictive Covenants

The Medical Society of the State of New York will support legislation that prohibits a “restrictive covenant” provision in a health system-physician employment contract or in a contract between a Management Services Organization (MSO) and a physician that limits the ability of such physician to deliver care in the same region after the physician leaves employment from such health system or leaves the medical practice that utilizes that MSO.

The Medical Society of the State of New York will conduct a survey of physicians to assess their support or opposition to legislation to prohibit all restrictive covenants. (HOD 2020-54 and 55, referred to Council, adopted 11/5/20)