

Frequently Asked Questions Regarding the Non-Compete Agreement:

(From comment cards and emails received as of 3/11/13)

1. What is a non-compete agreement?

Answer: A non-compete agreement is a contract that generally prohibits an individual from competing against his employer during the employment relationship and for a specified period of time and in a specified geographic area after the employment relationship ends.

2. What is the difference between a non-compete agreement and a non-solicitation agreement?

Answer: A non-compete agreement generally prohibits competition within a specified geographic area and for a specified period of time. A non-solicitation agreement generally prohibits solicitation of patients or referral sources for a specified period of time following termination of the employment relationship.

3. What is the difference between solicitation of patients and notification of patients?

Answer: Physicians are restricted from soliciting former patients for their new practice, other than through general advertisements. MUSCP notifies patients when their physician leaves in accordance with all applicable laws.

4. Are non-compete agreements enforceable in South Carolina?

Answer: Yes.

- **Recent South Carolina Opinion Enforcing Non-Compete Agreement Against Departing Physicians:**

1. On January 16, 2013, the South Carolina Court of Appeals issued an important ruling enforcing a non-compete agreement against two cardiologists who established a practice in violation of the non-compete provisions contained in a partnership agreement. *Baugh v. Columbia Heart Clinic, P.A.*, --- S.E.2d ----, 2013 WL 163955 (S.C. App. 2013).

2. Upheld 20-mile territorial restriction prohibiting competition in practice of cardiology or assisting in practice.
3. Held goodwill and referral sources were legitimate protectable interest.
4. Analyzed location of patients and physicians' practices to determine reasonableness of 20-mile restriction.
5. Upheld forfeiture provision for violation of non-compete.

5. What length of time restrictions has the court found to be reasonable?

Answer: Non-compete agreements of one to three years in duration have been routinely enforced in South Carolina. With respect to the sale of a business or partnership interest, non-compete agreements of 5 years have been enforced.

6. What type of geographic restrictions have courts found to be reasonable?

Answer: The geographic restriction is generally considered reasonable if the area covered by the restraint is limited to the territory in which the employee was able, during the term of his employment, to establish contact with his employer's customers (e.g. the geographic area within which the majority of patients reside).

7. What are liquidated damages and are they recoverable for breach of a non-compete agreement?

Answer: The parties to the agreement can agree on other contractual remedies such as liquidated damages. Liquidated damages (i.e. "buy-out") are recoverable to the extent that the sum is not so large that it is plainly punitive or disproportionate to any probable damage resulting from breach of the non-compete.

8. Can a non-compete agreement be enforced against an individual who was fired or laid off?

Answer: Most non-compete agreements, by their own terms, prohibit competition following termination of the employment relationship regardless of whether the employee voluntarily quit, was fired, or was laid off.

9. I have circumstances extenuating or otherwise (i.e. retirement, personal issues, changing specialties) that should exempt me from the non-compete, what options do I have?

Answer: The MUSCP non-compete appeals process allows individuals who are under the non-compete to present their individual circumstances to the MUSCP Executive Committee for review and request a waiver of the non-compete. Typically the circumstances are presented by the department chair. The Executive Committee then advises the Vice President for Medical Affairs and the Dean of the College of Medicine, whose decision is final.

10. I work in a department that provides clinical services that are “single, episodic care vs. continuous patient care”, (i.e. – ED, Anesthesiology, Radiology, Pathology) why does the non-compete apply to me?

Answer: The non-compete restrictions apply to all practicing clinicians who are Members of MUSCP because of the impact on referral sources and goodwill. The impact of a departing physician has a “rippling” effect on all departments and all 3 entities MUSC, MUSCP and MUHA.

Issues Brought Up At 3.5.13 Town Hall Currently Under Review By Task Force:

1. **Telemedicine:** Will telemedicine be restricted?

Will the revised non-compete clause apply to telemedicine sites?

2. **Termination for any reason:** This issue was widely discussed at the Town Hall meeting and we received several comments such as:

Termination for any reason is a significant concern especially for those who are primarily funded through grant funding. If they are laid off due to lack of external funding, they may not be able to practice elsewhere in the community.

I don't think we should be held to non-compete if UMA/MUSC chooses to terminate the faculty or contract is not renewed, especially junior faculty can't afford to up and move if terminated.

I attended the meeting on Tuesday, and appreciated the opportunity to hear the comments made by all those present. I would like to add that I think that the phrase “terminated for any reason” is a very difficult to accept.

3. **Area of restriction:** The task force reviewed 20 UHC institutions' non-compete agreements and saw a wide range of geographic restrictions. See chart in Town Hall presentation. We received multiple comments during the Town Hall meeting and through email and comment cards regarding the geographical restriction that ranged from "25 for all" to the following:

Distance: Primary care should be closer to the University. It is a benefit to the University to have many primary care in their community.

Perhaps you should consider noncompetes that are different based on specialty rather than actually the individual.

4. **Liquidated Damages:** During the Town Hall meeting we received several comments regarding "Amortizing" the damages to recoup investment costs and also comments were received regarding individualizing or applying a formula to damages based on specialty.

Amortization would make this much more palatable

5. **Representation in Appeals Process:** During the Town Hall meeting there were comments made regarding the current non-compete appeals process. Particularly, should additional advocates be permitted other than the chair of a department to represent a clinician?

In regards to an appeal process, I think that there needs to be someone involved to mediate the process who does not have a stake on either side.

*** For ease of purpose the terms "employee" and "employer" were used. The use of such terms does not change or otherwise alter the relationships established between MUSC, MUSCP and MUSC Clinical Faculty.