



# THE VALUABLE EMPLOYEE: STEPS THE DME SUPPLIER CAN TAKE TO PREVENT THE EMPLOYEE FROM LEAVING AND COMPETING

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# INTRODUCTION

# REGULATORY GUIDANCE

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- Telephone Solicitation Statute
  - Prohibits unauthorized contact (cold calling) of Medicare beneficiaries unless
    - Calling about an item that was provided by the supplier
    - Has provided an item to the patient within the last 15 months
    - Has the patient's written permission

# REGULATORY GUIDANCE

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- Supplier Standard 11 - A supplier is prohibited from direct solicitation to Medicare beneficiaries. 42 CFR 424.57 (c) (11).
  - Direct solicitation means direct contact, which includes, but is not limited to, telephone, computer, e-mail, instant messaging or in-person contact, by a DMEPOS supplier or its agents to a Medicare beneficiary without his or her consent for the purpose of marketing the DMEPOS supplier's health care products or services or both.

# REGULATORY GUIDANCE

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- Health Insurance Portability and Accountability Act (HIPAA)
  - Prohibits the use of Protected Health Information (PHI) for purposes other than treatment payment and operations without consent.
  - Marketing would require an authorization.
  - Section 164.501 defines “marketing” as making a communication about a product or service that encourages recipients of the communication to purchase or use the product or service.

# REGULATORY GUIDANCE

Violation Category–Section 1176(a)(1)	Each Violation	All such violations of an identical provision in a calendar year
(A) Did Not Know	\$100–\$50,000	\$1,500,000
(B) Reasonable Cause	1,000–50,000	1,500,000
(C)(i) Willful Neglect–Corrected	10,000–50,000	1,500,000
(C)(ii) Willful Neglect–Not Corrected	50,000	1,500,000

# WHO NEEDS AN EMPLOYMENT AGREEMENT?

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- High level employees
- Hard to replace employees
- Employees exposed to sensitive or confidential information
- Employees who will be bound by post-employment restrictions

# EMPLOYMENT AGREEMENTS: BE SURE TO INCLUDE

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- Specific and accurate job description
- Required work hours
- Pay and frequency of pay
- Benefits (vacation, PTO, medical, dental, 401K)
- Termination of employment provisions
- Post-employment restrictions



# EMPLOYMENT AGREEMENTS: BE SURE TO INCLUDE

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- If the employment agreement will contain post-employment restrictions, also include
  - Exclusivity provision; and
  - Certification that the employee is not bound by any non-disclosure, non-solicitation, or non-competition agreement
- Not requiring exclusivity may be a barrier to enforcing a post-employment restriction

# TYPES OF POST-EMPLOYMENT RESTRICTIONS

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- Confidentiality or Non-Disclosure Agreement
  - Prevents the employee from using or disclosing the employer's confidential or proprietary information, except in the performance of his duties
- Non-Solicitation Agreement
  - Prevents the employee from soliciting the employer's customers, patients, or referral sources
- Non-Competition Agreement
  - Prevents the employee from working for a competing business for a specific length of time within a specific geographic location

# CONFIDENTIALITY AGREEMENT

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- Every employee who receives confidential, proprietary information should sign a confidentiality agreement
- Identify confidential information the employee will receive. Be specific.
- Include a provision that allows you to seek an injunction in the event of breach

# CONFIDENTIAL INFORMATION

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- Referral sources
- Vendor lists
- Client lists
- Patents
- Writings and research
- Business plans
- Marketing plans
- New product development
- Sales data
- Profit margins
- Pricing information
- Training materials

# NON-SOLICITATION AGREEMENT

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- Is the employee actively engaged with clients or referral sources?
- Did you introduce the employee to the clients or referral sources?
- Identify the clients/patients/referral sources with whom the employee had contact
- Prohibit direct and indirect solicitation
- Consider an employee non-solicitation provision

# NON-COMPETITION AGREEMENT

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- Purpose is to prevent an employee from working for a competing business within a certain area for a specific period of time
- Most severe post-employment restriction
- Not tied to existing customers or referral sources
- Not everyone needs a non-compete

# BASICS OF ENFORCEABILITY

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- Part of an otherwise enforceable agreement
- Independent, valuable consideration
- Includes reasonable restrictions
- Signed upon receipt of consideration

# INDEPENDENT CONSIDERATION

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- Confidential Information
- Unique or specialized training
- Stock Options
- Employment for a Term



# SIGNED UPON RECEIPT OF CONSIDERATION

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- Ideally, employees should sign a non-competition agreement upon hire, before receiving any confidential information.
- If you want an employee to sign later, give them something new
  - Offsite training
  - Additional, new confidential information
  - Employment for a term
  - Stock options

# REASONABLE RESTRICTIONS

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- Narrowly tailor the restrictions
- Define competitive business
- The geographic restriction should mirror
  - The employee's sales territory
  - The business' sales area
- Length should be based on how long it will take the new employee to successfully transition business

# COURT REFORMATION

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- Some states allow courts to reform or “blue pencil” post-employment obligations that are overly broad
- BUT, some states will simply refuse to enforce the restriction
- Know your state’s law before drafting a non-compete
- Consider your purpose
- Potential consequences of attempted enforcement of overly broad non-compete

# ENFORCEABILITY TIPS

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- Include a tolling provision
- Include the employee's acknowledgement of receipt of unique, valuable information or training
- Include injunctive relief
- Include provision allowing notice to new employer
- Identify jurisdiction and venue

# SAFEGUARDING CONFIDENTIAL INFORMATION

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- Restrict access to only those with a need to know
- Password protect files
- Require return of specific information upon termination
- Physically lock file rooms and other places where confidential information is kept
- Require employees to be discreet

# ENFORCEABILITY PROBLEMS

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- Inconsistency
- Waiver of enforcement for former employees
- Knowledge of a former employee's breach
- Inclusion of a liquidated damages provision

# REDUCE THE LIKELIHOOD OF BREACH

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- Require the return of confidential information and other equipment
  - Keys
  - Log-in information
  - Employee badges
  - Company-issued devices
- Terminate the employee's access to electronic systems, including email and company-maintained databases
- Have IT delete company email from any personal device

# REDUCE THE LIKELIHOOD OF BREACH

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- Hold an exit interview
- Ask where the employee is going to work
- Send a reminder letter
- Include a copy of the signed non-compete



# IDENTIFYING A POTENTIAL BREACH

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- Do your homework
  - Who is the new employer?
  - What is the employee's new job?
  - Where is the new employer located?
  - Have your customers/referral sources seen the employee lately?
- Get in touch with your legal team to
  - Update relevant caselaw
  - Strategize on how to gather additional evidence
  - Identify possible courses of conduct

# RESPONDING TO A BREACH

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- Send a formal demand letter
- Consider copying the new employer
- Request an affirmation that the employee will abide by the non-compete
- Include potential consequences for failure to comply

# THE INITIAL DEMAND LETTER

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- Identify the new employer and the type of business it conducts
- Identify location at which the employee works
- Quote employee's agreement not to compete, solicit, etc.
- Include accounts of the employee's prohibited solicitation, competition, or disclosure of confidential information
- Include consequences for the new employer
- BUT, consider the size, nature, and history of the new employer

# FOLLOW UP

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- Send a second, more aggressive demand letter
- Consider including a draft petition for injunctive relief
- Set deadline in which to respond
- Have a plan for when the employee fails to respond

# FILE A LAWSUIT

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- Request a TRO?
- Go straight for a temporary injunction?
- Request damages?
- Sue the new employer?



 QUESTIONS?





THANK YOU

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