I. AT WILL EMPLOYMENT

In New York and New Jersey, Employees Can be Fired without Due Cause

New Jersey and New York are both "employment-at-will" states. Without a contract restricting termination (such as a collective bargaining agreement), an employer has the right to discharge an employee at any time for any reason. An employer may fire an employee for "no reason" - or even for a reason that might seem arbitrary and unfair -- and the employee is equally free to quit at any time without being required to explain or defend that decision.

Exceptions to At Will Employment

There are a few exceptions to "employment-at-will" in New Jersey and New York. The most significant of these are laws which prohibit discrimination based upon race, creed, national origin, age, handicap, gender, sexual orientation or marital status. For physicians in New York, Public Health Law ' 2801-b provides protection of hospital privileges.

> It shall be an improper practice for the governing body of a hospital to . . . deny or withhold from a physician . . . staff membership or professional privileges in a hospital, or to exclude or expel a physician . . . from staff membership in a hospital or curtail, terminate or diminish in any way a physician's . . . professional privileges in a hospital, without stating the reasons therefor, or if the reasons stated are unrelated to standards of patient care, patient welfare, the objectives of the institution or the character or competency of the applicant.

Employment is presumed to be at will. Though the employment relationship is still considered to be contractual, the "at will" relationship may be terminated at any time by either party. Parties may restrict the right to terminate either by providing that the employment is for a "definite term" or by limiting the circumstances under which the employer may terminate the employee (e.g., for "cause").

II. EMPLOYEE HANDBOOKS

Employment Handbooks as a Source of Rights Against Termination at Will. A principal area of litigation has been employment handbooks. The New Jersey Supreme Court held in Woolley v. Hoffmann-LaRoche, Inc., 99 N.J. 284, *modified*, 101 N.J. 10 (1985), that representations made in employee handbooks are enforceable in certain circumstances:

> [w]hen an employer of a substantial number of employees circulates a manual that, when fairly read, provides that certain benefits are an incident of the employment (including, especially, job security provisions), the judiciary, instead of "grudgingly" conceding the enforceability of those provisions . . . should construe them in accordance with the reasonable expectations of the employees.

Woolley v. Hoffmann-LaRoche, Inc., 99 N.J. at 297-98.

In so holding, the Woolley court did not make an exception to the doctrine of employment at will in situations where there is an employee handbook, but instead recognized "basic contract principles concerning acceptance of unilateral contracts." McQuitty v. General Dynamics Corp., 204 N.J. Super. 514, 520 (App.Div. 1985).

The meaning and effect of handbook's provisions and the circumstances under which handbooks were prepared and distributed are crucial factors to consider in determining whether or not their provisions will be enforced. Woolley v. Hoffmann-LaRoche, Inc., 99 N.J. at 302-04.

Distribution a Key Factor in Enforceability

The extent to which the handbook is distributed is an especially important factor in determining whether it should be considered binding. General distribution of the handbook, "forms a basis for the legal presumptions that (1) the employer intended to

be bound and (2) employees were generally aware of and could have reasonably relied upon the manual's terms." Alito, N.J. Employment Law (2d ed.), §1:6-1, at 16 (1999).

"The Woolley court found that a presumption of reliance arises and the manual's provisions become binding at the moment the manual is distributed to the general work force." Labus v. Navistar Int'l Trans. Corp., 740 F.Supp. 1053, 1062 (D.N.J. 1990).

Conversely, if an employee handbook has not been generally distributed, it cannot form the basis of a Woolley claim, because employees cannot show that they actually relied on their provisions. Alito, N.J. Employment Law (2d ed.), §1:6-1, at 16 (1999).

Clear and Explicit Language a Key Factor in Enforceability

The court in Woolley found that the language regarding job security was "explicit and clear," and that comprehensive provisions regarding termination and discipline were set out. Woolley v. Hoffmann-LaRoche, Inc., 99 N.J. 284, 306, modified, 101 N.J. 10 (1985).

Contrast this with the following language, which was found to be too vague to establish a promise of promotion:

> The policy of Prentice-Hall is that all management personnel be supportive of employee efforts both to improve in their present jobs, and to be promoted to jobs of greater responsibility.
>
> Available jobs will be posted on bulletin boards in accordance with Prentice-Hall's policy. Employees who apply will be considered on the basis of their skills and abilities.

> Where prior experience in any department has given an employee knowledge and familiarity with the character and procedures which are required in the performance of the higher level job, the department head may give preference to such applicant.

Levinson v. Prentice-Hall, Inc., 1988 WL 76383, p.1 (D.N.J. 1988), aff'd in part and rev'd in part, in other grounds, 868 F.2d 588 (3d Cir. 1989).

Avoiding the Employee Handbook being treated as an Employment Contract

To avoid having the employee handbook create an implied contract, you must use a clear and prominent disclaimer:

> All that need be done is the inclusion in a very prominent position of an appropriate statement that there is no promise of any kind by the employer contained in the manual; that regardless of what the manual says or provides, the employer promises nothing and remains free to change wages and all other working conditions without having to consult anyone and without anyone's agreement; and that the employer continues to have the absolute power to fire anyone with or without good cause.

Woolley v. Hoffmann-LaRoche, Inc.,99 N.J. 284, 309, modified, 101 N.J. 10 (1985).

Existence of Employment Contract Precludes Treating Employee Handbook as a Contract

An employee who has an employment contract would not be able to assert a Woolley claim, because it would not be reasonable for them to rely on the employee handbook as an employment contract, when they have an actual employment contract. Ware v. Prudential Ins. Co., 220 N.J. Super. 135, 143 (App.Div. 1987), certif. denied, 113 N.J. 335 (1988).

III. EMPLOYMENT CONTRACTS

As with any other contract, the terms of an employment contract must be definite enough that the courts can tell reasonably certainly what each party has promised to do under the contract. Friedman v. Tappan Development Corp., 22 N.J. 523, 531 (1956). These terms should include, at a minimum, the length of employment and the circumstances under which it can be terminated.

Where there is an employment contract for a fixed period of time, and that period has passed, the courts will not find that the contract has become a year-to-year contract, unless the intent to do so is clearly stated in the contract. Craffey v. Bergen County Util.,315 N.J. Super. 345, 352 (App.Div. 1998), certif.. denied, 158 N.J. 74 (1999).

IV. RESTRICTIVE COVENANTS FOR PHYSICIANS IN NEW JERSEY AND NEW YORK

A restrictive covenant is an agreement by which an employee agrees not to engage in competition against an employer, after the employment has ended. Not all states recognize restrictive covenants for physicians. New Jersey and New York, however, do allow such agreements. Restrictive covenants physicians generally include:

1. A non-compete agreement (the physician will not practice medicine within a certain geographic area for a specified period of time),

2. A non-solicitation agreement (the physician will not solicit patients from the employer),
3. An agreement that the physician will not have privileges at specified hospitals, and
4. A confidentiality agreement, whereby the physician will not use or disclose proprietary information of the practice (e.g., patient lists).

A. NEW JERSEY

New Jersey courts recognize and enforce restrictive covenants in appropriate circumstances. The Courts have held that restrictive covenants for physicians are acceptable, as long as they are reasonable. These agreements must be in writing. A sample agreement is attached as Exhibit "C".

In *The Community Hospital Group, Inc. t/a JFK Medical Center v. Jay More*, 183 N.J. 36 (2005), and its companion case, *Pierson v. Medical Health Centers, P.A.*, 183 N.J. 65 (2005), The New Jersey Supreme Court recently upheld a long-standing ruling, that restrictive covenants for physicians can be valid if they are reasonable. (*see, Karlin v. Weinberg*, 77 N.J. 408, 1978).

> Although post-employment restrictive covenants are not viewed with favor, if under the circumstances a factual determination is made that the covenant protects the legitimate interests of the hospital, imposes no undue hardship on the physician and is not injurious to the public, it may be enforced as written or, if appropriate, as reduced in scope.
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> (*Community Hospital Group v. More, supra*)

Thus, a restrictive covenant for physicians is considered reasonable if it meets this three-prong test:

1. The covenant must be necessary to protect legitimate interests of the employer,
2. It must not pose an undue hardship on the employee (factors to consider are whether it is reasonable in both duration and geographic scope) and
3. The covenant must not be harmful to the public.

In evaluating a restrictive covenant according to this test, New Jersey courts take into account many factors. The following is a non-exhaustive list of relevant factors to consider when determining the enforceability of restrictive covenants among physicians:

a. The time the employer-physician needs to rebuild the practice following the employee-physician's departure;
b. The reasonableness of the geographic scope;
c. Whether the activities the departing physician is prohibited from engaging in are the same as those performed by the employer physician;
d. The hardship on the employee and the reason for the departure (e.g., physicians who choose to leave can be seen as bringing the hardship on themselves);
e. The likelihood that another physician in the area can provide the medical services left vacant by the departing physician; and
f. The effect that enforcement of the covenant would have on the public interest.

In *Community Hospital Group v. More*, the court found applied this standard and found that the restrictive covenant was valid. Under this covenant, Dr. More was prohibited from practicing within a 30-mile radius of his former employer for a period of two years. The court was willing to enforce this VERY STRONG restrictive covenant because:

1. The hospital had been working to develop a broad clinical neurological program and had devoted about $14 million to this since 1992, including $200,000 on advertising and promotion each year.

2. Dr. More, a neurosurgeon, was hired immediately after completing his residency, having no patient base or practice prior to his employment with the hospital. He built his base during eight years at the hospital, and then decided to leave and compete with the hospital.

3. Dr. More was a specialist, a neurosurgeon, and it was shown that patients regularly travel over 30 miles to seek specialized care; New Jersey is a state with great mobility and 17% of the hospital's patients live more than 30 miles away from the hospital.

If a departing employee violates a restrictive covenant agreement, you should consult with counsel, to discuss the next step to protect the company. These measures generally take the form of applications for emergent relief which must be filed in a timely manner. Thus, your consultation with counsel should occur in a timely fashion.

If you are a department employee who signed a restrictive covenant, you should consult with counsel – prior to giving any notice to the practice group that you are considering leaving.

B. NEW YORK

As you recall, New Jersey courts use a three-prong test to evaluate restrictive covenants (To be reasonable, a restrictive covenant for physicians must: be necessary to protect legitimate interests of the employer; not pose undue hardship on the employee; and not be harmful to the public). New York courts use basically the same

standard. The court in *North Shore_Hematology/Oncology et al. v. George A. Zervos*, 717 N.Y.S.2d 250, 2000, held that,

> "Covenants restricting . . . a physician, from competing with a former employer or associate are common and generally acceptable (*see*, e.g., *Karpinski v. Ingrasci*, 28 NY2d 45, 47-49; see generally, *Validity and Construction of Contractual Restrictions on Right of Medical Practitioner to Practice, Incident to Partnership Agreement, Ann.*, 62 ALR3d, 970). As with all restrictive covenants, if they are reasonable as to time and area, necessary to protect legitimate interests, not harmful to the public, and not unduly burdensome, they will be enforced (*see, Reed, Roberts Assoc. v. Strauman*, 40 NY2d 303, 307 *mot for rearg den* 40 NY2d 918; *Karpinski v. Ingrasci*, 28 NY2d 45, 49-51, *supra*)" (*Gelder Med. Group*, 177 AD2d 623).

In *Gelder Med. Group*, *supra*, the court found that a restrictive covenant barring the physician from practicing within 30 miles of a rural village, for a period of five years, was reasonable; this was enforceable even though, unlike in the New Jersey case, the physician was expelled from the practice without cause. *Gelder Med. Group*, 177 AD2d 623 (N.Y. 1977). In this case, the court took into consideration that: (1) the doctor did not allege that the practice sought to enforce the provision in bad faith, (2) the practice had been developed over twenty years at great cost, (3) the doctor had no roots in the area, and had had affiliations with other practices in several other areas, and (4) enforcing the covenant would not harm the public interest, as there were other physicians available to serve the public need.

Blue-Pencilling

As noted above, an agreement which is too restrictive can be revised by the Court, which will amend one or more terms. This is known as "blue-pencilling." This technique

is used by both New Jersey and New York courts, which will modify agreements as necessary. A restrictive covenant which is too stringent can be relaxed, so that overall the agreement is reasonable. (see, e.g., *Muller v. N.Y. Heart Center*, 238 A.D.2d 776, 3rd Dept. 1997).