Position Statement on the Use of Non-Compete Agreements with Applied Behavior Analysis Workers

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Status: Position Statement

BHCOE Accreditation

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Purpose

The purpose of this position statement is to provide guidance to organizations regarding hiring practices that potentially could restrict the future employment of Applied Behavior Analysis (ABA) therapy workers. Employers have been using non-compete agreements with healthcare and homecare workers for a long time. Within the field of ABA, the increasing competitiveness of acquiring staff is causing employers to use agreements that are more and more restrictive and are using them more frequently. Oftentimes, this results in patients and clients not having access to specialized care because of the small number of qualified workers in our practice areas. The position of Behavioral Health Center of Excellence (BHCOE) is based on its experience working with organizations and their staff and our understanding of the challenges these that non-compete agreements create in the ABA employment market.

What is a Non-Compete Agreement?

First, it is important to understand that the term "non-compete" has both a general and a specific meaning. Many people use the term generically to describe any restriction on competition by an employee after employment ends, like the way people use Kleenex to describe any brand of facial tissue. However, it is important to understand that there are many different types of post-employment restrictions that fall within this overall category, all of which are treated differently by the courts asked to enforce them. These are the typical covenants used in employment agreements.

1. **Non-Compete Covenant.** The most restrictive covenant is the true non-compete, which prohibits departed employees from performing *any* competitive services for a period of time after termination in a specific geographic territory.
2. **Non-Solicitation Covenants.** The most common restriction is one against soliciting customers, clients, or patients, or from accepting unsolicited business from them. However, unlike non-competes, non-solicitation covenants generally will not prevent a former employee from working for a competitor or providing competing services. Instead, these covenants generally restrict the former employee's ability to solicit or service former customers, clients, or patients for a limited period of time in *any* geography. No-raiding or employee non-solicitation clauses are similar but are pointed at recruiting or hiring the former employer's employees.
3. **Non-Disclosure Covenants.** Non-disclosure, or confidentiality covenants, are typically the easiest to enforce, as they only prevent employees from using, disclosing, or distributing a former employer's confidential business information or trade secrets, such as confidential patient lists, pricing and profitability figures, marketing and growth plans, etc.
4. **Intellectual Property Covenants.** Although not always found in every agreement, Intellectual Property Assignment covenants govern and clarify the ownership of inventive ideas that might be patented, as well as creative works like, employee handbooks, proprietary curricula,

proprietary assessments, forms, policies, and other specialized materials developed on behalf of the organization.

Enforcement of Non-Competes

Understanding and enforcing these restrictive covenants with employees is complicated because the covenants generally are controlled by the law of a particular state or region, which can vary drastically from one state to the next. For example, virtually all employees in California are protected by the California Business Code prohibition against employers using non-competes and customer nonsolicitation agreements with employees (with a few, very narrow exceptions). In fact, California employers violate the Business Code by even asking employees to sign these agreements.

Conversely, states like Florida and Georgia are very friendly to enforcement of these covenants and the Florida statute even requires judges to rewrite overbroad agreements to make them enforceable. The rest of the states have their own approaches, with some like Oklahoma, South Carolina, and Nebraska taking a very restrictive approach, and others like Nevada, Texas, and New York being relatively friendly to the enforcement of non-competes.

Regardless of whether a state takes a friendly or less friendly approach to enforcement, all of the states that enforce these covenants only permit their use if doing so does not violate their state's public policy. Physicians and other specialized health care and home care professionals warrant special public policy considerations because of the unique positions and skill sets many of these workers offer, oftentimes ones for which there is no ready substitute in a particular market.

As such, BHCOE urges those who utilize non-compete agreements to analyze these covenants and closely consider whether enforcing them will impact the public good by causing a shortage of qualified professionals in a particular area, which can negatively affect a patient's right to be treated by their chosen health care professional, or even get any assistance in some areas.

Many states have addressed the issue of how non-compete agreements for healthcare workers could impact the public good, and more states are joining the group. For example, Massachusetts has prohibited non-competes with physicians since 1977. Mass. Gen. Law Ch. 112 § 12X. Delaware and Colorado enacted similar laws not long afterwards. 6 Del. Code Ann. § 2707; Colo. Rev. Stat. § 8-2-113. Colorado actually amended its non-compete statute in April 2018 to exempt physicians who treat patients with "a rare disorder" from even paying damages for violating a non-compete. C.R.S. § 8-2-113(3)(b).

Progressively, more states, such as Oregon, Washington, Massachusetts, and Illinois also have passed recent laws that prohibit or limit agreements from being used with non-management workers or with workers below a certain income range, regardless of the type of work they perform. Additionally, many

states without specific statutes have published cases that strictly analyze enforcement of restrictive covenants in the area of health and home care workers, and even the federal government is discussing enacting a federal law governing non-compete agreements.

Considerations When Using Non-Compete Agreements

If an organization decides to use non-compete agreements when hiring clinical staff, careful consideration should be taken as to how and when these agreements are presented, arranged, and disseminated. A number of concerning trends have become apparent in the field of behavior analysis and other industries, and it is important that organizations actively seek to resolve and mitigate the potential for ethical issues related to these covenants.

BHCOE encourages organizations to ensure that all employees are aware that signing a non-compete agreement is a condition of employment *before* they accept an employment offer. According to the US Department of the Treasury's Office of Economic Policy, 37% of employees that reported signing a non-compete said they were required to do so *after* signing their job offer letter. Requiring these documents to be signed after an employee has accepted the job offer, and oftentimes after they have turned down other viable offers or informed their current employer that they are leaving, creates obvious ethical implications. This also can invalidate these agreements in some jurisdictions. Accordingly, BHCOE suggests that organizations inform employees well in advance that they are expected to sign a non-compete requirement and allow them sufficient time to review, understand, and ask questions about the agreement before deciding whether to work for that organization. The best time to let candidates know is in the interview, or at least in the actual offer letter. This allows for potential employees to seek guidance, determine whether the post-employment restrictions are acceptable, and attempt to negotiate the terms of these restrictions if not. The worst time to present these agreements for the first time is on the first day of work or later, especially since many states will require an extra payment or other consideration for agreements entered into after employment has begun for them to be enforceable.

BHCOE also suggests that employers consider the effect these agreements can have on the quality and availability of service in our important industry, as well as on the morale of employees who might feel trapped in a position because they cannot easily pursue other employment in their chosen field. For this reason, BHCOE recommends that employers consider using the least restrictive covenants (non-solicitation, non-disclosure, and IP) necessary to protect their legitimate business interests against *unfair* competition and consider alternative strategies to non-compete agreements.

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Ultimately, when it comes to employing clinical staff, BHCOE recommends that employers take the following actions:

1) Consider whether these types of restrictive agreements really are necessary for clinical staff, especially when there is a short supply, and because there is such an urgent need for their services.
2) If an organization wants to hire an employee that is subject to a current agreement with their prior employer, consult with an attorney who works in this area to determine the enforceable parameters of these agreements.
3) When possible (and only with the prospective employee's permission) contact the former employer to see if they can make an exception against enforcement for a particular employee or potential employee due to short supply of staff or modify the terms of the agreement.
4) Use the least restrictive covenants necessary to protect legitimate business interests and consider alternative strategies for organizational protection, such as only using non-solicitation, non-disclosure, or intellectual property assignment agreements.
5) Consult with an attorney or human resources representative regarding how best to use non-compete agreements in your specific state and only include those covenants that can be legally enforced.
6) Ask prospective employees about the existence of non-compete agreements or other obligations that might affect their new employment prior to offering them a position.
7) Lastly, consider the impact that using these agreements can have on our industry, the patients we serve, the employees who do this work, and your own company culture before deciding how and when to use these agreements.