

TO: MSSNY's Officers, Councilors and Trustees

FROM: MSSNY Legislative & Physician Advocacy Committee

DATE: December 14, 2022

RE: Resolution 50 – 2022 House of Delegates
Introduced by the Monroe County Medical Society

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 advocate for unanimous support of Senate Bill S6425 which addresses this issue.

The legislation referred to in the resolved, S.6425/A.9591 [Bill Search and Legislative Information | New York State Assembly \(nyassembly.gov\)](#), would prohibit most restrictive covenants, also known as “non-compete” clauses, in all employment contracts in New York State.

At the House of Delegates, the reference committee heard extensive testimony on this resolution. There was much testimony in support of the goal of the resolution to prohibit all restrictive covenants, as well as testimony in opposition to the resolution and/or in favor of re-affirming existing MSSNY policy in lieu of the proposed resolution. Physicians in support discussed 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, as well as the impact on their patients. Physicians in opposition discussed the risk to some private practice physicians, specifically the risk of bringing on a younger physician to expand care availability to patients, but then faced with the possibility that the employee physician will leave and then compete with that medical practice in the same region.

Weighing the varying concerns, the Reference Committee recommended that MSSNY support prohibiting restrictive covenants altogether because of the concern that MSSNY would not have sufficient credibility to advocate for the restriction or prohibition of restrictive covenants on hospital-employed physicians if at the same time we were seeking to exempt many of our private practice members from its application.

However, because of the extensive debate that occurred at the House of Delegates raising concerns about the impact to small physician practices, the resolution was referred for Council consideration. Both perspectives were also extensively discussed at the October 17th meeting of the L&PA Committee, but the majority of the comments were from physicians who believed that an across the Board prohibition of restrictive covenants in health care employment contracts went too far, and could adversely impact many physician practices.

In seeking to find ways to balance these competing perspectives, staff research found a recently enacted Connecticut law that limits employed physician restrictive covenants to no more than one year and no further than 15 miles from the primary practice location of the employment, which could be helpful in preserving developed patient care relationships. Staff suggested that

this could be a suitable compromise for the question of restrictive covenants used by private practice physician groups training younger physicians in their practices. However, the suggested alternative was still met by concerns at the December 14 meeting, so instead it was suggested that MSSNY create a work group that would make recommendations going forward for how best to address some of the thorny issues that have been identified.

Subsequent to the Committee meeting discussion, on January 5, 2023, the Federal Trade Commission announced [FTC Proposes Rule to Ban Noncompete Clauses/Federal Trade Commission](#) a proposal that if implemented would prohibit most restrictive covenants across the country as an unfair method of competition and would therefore violate Section 5 of the Federal Trade Commission Act. MSSNY has reached out to the AMA and other physician advocacy groups in an effort to coordinate how best to respond to this proposal.

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 create a Work Group to make recommendations for how best to regulate the use of Restrictive Covenants in health care delivery in New York State.

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)