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THIS TOWN AIN'T BIG ENOUGH FOR THE TWO OF US: SHOULD CONTRACT LAW TAKE A BACKSEAT TO PUBLIC HEALTH?

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Even before the Covid-19 pandemic, Tennessee faced a shortage of healthcare workers, especially nurses.[2] Now, facing a potential fifth wave with the Omicron variant and an extraordinarily vocal minority refusing the Covid-19 vaccine,[3] the stage is being set for yet another statewide medical emergency; one where doctors and hospitals need all hands on deck. One facet of Tennessee contract law stands in some workers' way: covenants not to compete.

Covenants not to compete, also called noncompete agreements, seem reasonable on the surface. They are generally disfavored under Tennessee law as they are seen as a restraint

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[2] *See* Nikki McGee, *Tennessee nursing shortage could pose risk to healthcare access*, WKRN (Oct. 3, 2021), https://www.wkrn.com/news/tennessee-nursing-shortage-could-pose-risk-to-healthcare-access/.
[3] *See* Brett Kelman, *As omicron looms, Tennessee braces for another winter of COVID-19*, Nashville Tennessean (Dec. 1, 2021), https://www.tennessean.com/story/news/health/2021/12/02/omicron-looms-tennessee-braces-another-winter-covid-19/8808555002/.

on trade.[4] Noncompete covenants are construed strictly in favor of the employee and may only be imposed if there is a legitimate public interest and the time and territorial limitations are reasonable.[5] "Factors relevant to whether a covenant is reasonable include: (1) the consideration supporting the covenant; (2) the threatened danger to the employer in the absence of the covenant; (3) the economic hardship imposed on the employee by the covenant; and (4) whether the covenant is inimical to the public interest."[6] Time and territorial limits cannot be greater than necessary to protect the employer's business interest.[7]

"Covenants not to compete that implicate important policy issues are even more strictly construed."[8] In *Murfreesboro Medical Clinic, P.A. v. Udom*, the Tennessee Supreme Court tackled the issue of covenants not to compete as a restriction on the practice of medicine.[9] Dr. Udom was employed by the Murfreesboro Medical Clinic until they decided not to renew his contract at the end of its term, and they informed Dr. Udom that they would enforce his noncompete covenant.[10] The covenant disallowed Dr. Udom from practicing within twenty-five miles of Murfreesboro's public square for eighteen months after termination.[11] Though he attempted to gain employment at multiple hospitals in the area that did not compete with them, the clinic would not allow Dr. Udom to work.[12] Finally, Dr. Udom broke the covenant by opening a solo practice in Smyrna, about fifteen miles from the public square, and the clinic sued.[13] The court found for Dr. Udom, ruling that "except for restrictions specifically provided for by statute [see below],

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[4] *See* Hasty v. Rent-A-Driver, Inc., 671 S.W.2d 471, 472 (Tenn. 1984).
[5] *Id*.
[6] Murfreesboro Medical Clinic, P.A. v. Udom, 166 S.W.3d 674, 678 (Tenn. 2005) (citing *Hasty*, 671 S.W. 2d at 472-73).
[7] Allright Auto Parks, Inc. v. Berry, 409 S.W.2d 361, 363 (Tenn. 1966).
[8] Udom, 166 S.W.3d at 679.
[9] *See generally id*.
[10] *Id*. at 676-77.
[11] *Id*. at 676.
[12] *Id*. at 677.
[13] *Id*. at 678.

covenants not to compete are unenforceable against physicians."[14]

Additionally, Tennessee Code Annotated Section 63-1-148 restricts noncompete covenants on health care practice.[15] Subsection (c) applies this code section to only certain chapters of that title, and chapter 13, which covers physical therapy, is not one of them.[16] Rather, this code section only applies to podiatrists, chiropractors, dentists, general physicians, surgeons, optometrists, osteopathic physicians, and psychologists.[17]

In *Columbus Medical Services, LLC v. Thomas*, several non-physician healthcare workers, most of them therapists, sued over their noncompete covenant.[18] They argued that their covenants were unenforceable based on several rationales, one of them being public policy under *Udom*.[19] Though physical therapy is within the medical field, the *Thomas* court read *Udom* to include only physicians.[20] Regardless, the court found that this case implicated the public interest because therapists cultivate a similar "special customer relationship" that is often found in a "medical setting with especially vulnerable patients whose interests must be safeguarded."[21] The court found for the therapists, though they did not make some blanket rule like in *Udom*.[22] The court, instead, relied on several factors, with the public policy as part of the analysis.[23] Essentially, the *Thomas* court did not extend the physicians' noncompete protections to other healthcare workers.[24]

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[14] *Id*. at 684.
[15] Tenn. Code Ann. §63-1-148 (Westlaw Edge 2021).
[16] *Id*.
[17] Tenn. Code Ann. §63-1-148 (Westlaw Edge 2021).
[18] Columbus Medical Services, LLC v. Thomas, 308 S.W.3d 368, 378-79 (Tenn. Ct. App. 2009).
[19] *See id*. at 393.
[20] *Id*.
[21] *Id*. at 394.
[22] *Id*.
[23] *Id*.
[24] *Id*.

Under the current situation, the rationale of the *Thomas* court seems a bit dated. Healthcare workers not covered under *Udom* or Section 63-1-148, including nurses and nurse practitioners, are still bound by their non-competes. This is a restriction on the free-market principles that allow Tennessee's healthcare industry to allocate workers. On its face, disallowing an entire type of provision may seem counter to the free market. These provisions, however, restrict the free movement of employees and often produce inefficient outcomes.

For instance, let's say a nurse working at the Children's Hospital in Nashville was offered a job with better pay at Nashville General. If the nurse left Children's, they could be barred from working for up to one year within thirty miles of their former employer.[25] In the setting of a pandemic, this could mean a competent nurse could be stuck working with children, who see significantly fewer hospitalizations and deaths from Covid-19, when they could best be utilized in another facility working with those actually suffering from Covid. This produces an economically inefficient outcome where the flow of skilled labor is artificially restricted and can potentially have real-world consequences. Those stuck in Covid wards could be sicker, and some may needlessly die, because there just aren't enough healthcare workers to go around.

Even if there isn't a pandemic, this legal construct can make healthcare professionals needlessly uproot their entire lives just so they can feed their families. And to protect what? A fraction of a percent of labor productivity slipping from one international conglomerate to another in one of the most profitable industries in America?

This is not just an urban issue, either. From Mountain City to Memphis, this is a problem healthcare professionals face regardless of setting. Such a provision can be especially exacerbating in rural areas where hospitals can be major employers. Leaving a job at a regional hospital could mean commuting very long distances or leaving one's home entirely

[25] *See* Tenn. Code Ann. §63-1-148 (Westlaw Edge 2021).

just to find work. These are inefficient outcomes regardless of the pandemic, but there is a better way.

What steps can legislators take to improve the mobility of healthcare workers within their communities? The Tennessee General Assembly should amend Tennessee Code Annotated Section 63-1-148 to include all healthcare workers, but especially nurses and nurse practitioners. Such a measure would not unilaterally solve Tennessee's shortage, but it would go a long way in better allocating the state's vital resource of healthcare workers.