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FISCAL IMPACT REPORT

ORIGINAL DATE 01/22/14
 SPONSOR Leavell LAST UPDATED 02/10/14 HB _____
 SHORT TITLE Health Care Contract No Compete Limits SB 46/aSCORC
 ANALYST Daly

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

	FY14	FY15	FY16	3 Year Total Cost	Recurring or Nonrecurring	Fund Affected
Total		NFI	NFI			

(Parenthesis () Indicate Expenditure Decreases)

Duplicates HB 76, as amended.

SOURCES OF INFORMATION

LFC Files

Responses Received From

Department of Health (DOH)
 Administrative Office of the Courts (AOC)
 Attorney General’s Office (AGO)
 Board of Nursing (BN)
 Medical Board (MB)
 Office of Superintendent of Insurance (OSI)
 Regulation & Licensing Department (RLD)
 University of New Mexico Health Sciences Center (UNMHSC)

SUMMARY

Synopsis of SCORC Amendment

The Senate Corporations and Transportation Committee amendment expands the scope of the bill to include agreements concerning the sale of an interest in a business as well as those concerning the sale of a business.

Synopsis of Original Bill

Senate Bill 46 limits non-compete covenants for certain healthcare practitioners in certain situations. A covenant not to compete in an agreement ancillary to the sale of a business is not enforceable if:

- the restraint is greater than needed to protect the buyer’s legitimate interest;
- the buyer’s legitimate interest is outweighed by the hardship to the seller; or
- enforcement of the covenant would duly interfere with the public interest in a health care underserved area (which areas are determined by the DOH).

A covenant not to compete in an agreement that is not ancillary to the sale of a business becomes void upon termination of the agreement or any renewal or extension, although all other provisions, including those governing payment of damages by reason of termination, are enforceable.

Health care practitioners covered by SB 46 include certified nurse midwives, dentist or dental hygienists, optometrists, osteopathic physicians or osteopathic physician assistants, physicians or physician assistants, podiatrists, clinical psychologists, advance practice registered nurses, and doctors of oriental medicine.

The limitations imposed in SB 46 do not apply to agreements requiring healthcare practitioners working less than two years repay all or a portion of loans, relocation expenses, bonuses, recruiting, and education and training expenses. Additionally, SB 46 limitations are inapplicable to nondisclosure covenants relating to confidential information and trade secrets and non-solicitation covenants of no more than one year as to employees of the health care practitioner's employer.

SB 46 applies to agreements, or renewals or extensions of agreements, executed on or after July 1, 2014.

FISCAL IMPLICATIONS

Responding agencies report no or minimal impact.

SIGNIFICANT ISSUES

Covenants not to compete are restrictions in employment contracts used by employers to limit the ability of an employee to compete with the employer once the employee leaves that employer. MB advises that current law on this issue defers to the courts, on a case-by-case basis, to determine whether a non-compete clause is reasonable based on facts germane to a particular contract. MB expresses concern that the provisions of SB 46 may not themselves be reasonable as applied in some cases and end up resulting in inefficiencies in the market for health care services. It is also concerned that the bill may reduce incentive for established private health care entities in recruiting new talent.

On the other hand, DOH reports that non-competition clauses have not been a major issue for primary care clinic recruitment in New Mexico. It notes that many health care organizations have removed non-compete language from their contracts, and that DOH will not place J-1 Visa physicians with organizations that include such provisions in their contracts. DOH believes non-compete clauses should not be allowed to act as unmovable roadblocks to health care practitioners wishing to work in underserved areas of the state, and that SB 46 may help expedite conflicts related to such clauses, which currently may take a long time to resolve.

Similarly, BN believes SB 46 may enhance the availability of primary care advanced practice nurses in rural areas, where the need for primary care is higher. BN notes that geographical boundary limitations as well as specific scope of practice that may be included in non-compete covenants are not addressed in the bill, and recommends that a non-compete clause that covers a registered nurse in advance practice as a certified nurse practitioner, certified registered nurse anesthetist or clinical nurse specialist should be limited to the specialty area of practice in which they are employed in a limited geographic area.

PERFORMANCE IMPLICATIONS

DOH reports that the determination of health care underserved areas already occurs for purposes of Rural Primary Health Care Act funding. Further, this bill relates to DOH's FY 15 Plan Result Two: Result 2. Improved quality, accessibility and utilization of health care services.

AOC notes that the courts participate in performance-based budgeting, and this bill may impact these district court measures: cases disposed of as a percent of cases filed; and percent change in case filings by case type.

DUPLICATION

Duplicates HB 76.

OTHER SUBSTANTIVE ISSUES

AOC supplies this additional information concerning laws in other states governing restrictive covenants that apply to health care providers and practitioners:

The following state statutes, all of which differ from the new statutory sections proposed by this bill, specifically address physician, licensed healthcare worker or healthcare provider restrictive covenants:

- Colorado (Colo. Rev. Stat. Section 8-2-113)
- Massachusetts (Mass. Gen. Law, Ch. 112, Section 12X)
- Delaware (6 Del. Code Ann. Section 2707)
- Tennessee (Tenn. Code Ann. Section 63-1-148, 68-11-205 and 63-6- 204(f)(2))
- Texas (Tex. Bus. & Com. Code Section 15.50(b) and (c))
- Virginia (Va. Code Section 54.1-111(D))

Many states, including California, Montana, North Dakota and South Dakota, generally prohibit all non-compete agreements as a matter of law. Other states, such as Florida, Idaho, Michigan, Oregon and Georgia, have statutes that restrict enforcement of employee non-compete agreements and establish factors that will be considered in determining whether those agreements are reasonable. (See:

http://www.bassberry.com/files/upload/AHLA_Article_Horton_and_Padgett_April_2013.pdf for a detailed discussion of restrictive covenants in physician employment relationships, including a state-by-state listing of applicable statutes.)

MD/jl