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# MOONLIGHTING WOONLIGHTING

**MARCH 2019**

**EMPLOYMENT CONTRACT TOOLKIT**  
for Clinicians Who Want to  
Moonlight as Abortion Providers

# EMPLOYMENT CONTRACT TOOLKIT

for Clinicians Who Want to  
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## > AN OVERVIEW

Employment contracts are an agreement between two parties that creates obligations for both parties.

Many new clinicians approach employment contracts with a sense that they don't have much power to negotiate a contract, especially when employers claim that the contract is boilerplate. This is a misconception. New clinicians can and successfully do negotiate their contracts all the time.



**You always have the right to try to negotiate or renegotiate your employment contract to protect your ability to moonlight in abortion services or to obtain abortion training.**

Going into negotiations, it is important that you know what to look for. This toolkit will help you identify the kinds of provisions that could restrict your ability to moonlight in abortion services or obtain abortion training. As you enter negotiations, it is important to have a good sense of what you hope to get out of it and your employer's priorities and concerns. This toolkit also helps to identify other resources that can support you in negotiations, such as policy statements from medical professional organizations and federal and state laws addressing clinician employment contracts.

While you should enter negotiations with every expectation for success, it is possible that your prospective employer may still refuse to alter the contract. If an employer is unwilling to alter the contract, you will have to decide whether or not to move forward with that employer. If you decide to accept employment, it is important at the very least for you to have a clear understanding of what the contract does and does not prohibit you from doing, and what the employer's policies allow.

## EMPLOYER MOONLIGHTING POLICY

Regardless of what is in a contract, or whether an employer has offered you a contract yet, you should always ask whether an employer has a moonlighting policy and get the answer in writing. If the employer says that they do have a moonlighting policy, ask for the policy in writing. You should also ask any questions you have about the way the policy operates, and, again, obtain the answers in writing.

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## WHAT TO LOOK FOR IN AN EMPLOYMENT CONTRACT

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### RESTRICTIVE COVENANTS

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Many health care employers include what are called “restrictive covenants” in employment contracts that limit an employee’s ability to work elsewhere.

There are many types of “restrictive covenants,” including the following:

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- **NON-COMPETE CLAUSES.** This kind of provision states you will not compete with the employer in a specified area for a specified time after you leave employment. Sometimes these clauses are explicitly written to also restrict your ability to moonlight during your employment.

- *“Provider agrees that, during the term of this Agreement and for a period of one (1) year after termination of Provider’s employment with Hospital, Provider shall not engage in the practice of medicine in any office, hospital or clinic located within a thirty (30) mile radius from any location in which Provider has provided services on behalf of Hospital.”*

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- **FULL TIME DEVOTION TO DUTY.** This kind of clause explicitly states that while you are employed you are to devote your entire working time solely to your employer, and not to any other employment. It could be used to prevent you from “moonlighting” as an abortion provider outside of your normal work.

- *“During his or her employment, Provider shall devote Provider’s full professional time and best efforts to performing his or her duties under this Agreement.”*

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- **MOONLIGHTING OR OUTSIDE EMPLOYMENT CLAUSE.** This kind of clause addresses whether and under what circumstances an employee would be allowed to moonlight. Sometimes these clauses are labeled separately as “moonlighting” or “outside employment” clauses, and sometimes this language is found within a non-compete clause or a devotion to duty clause described above.
  - *“Except as otherwise expressly permitted, Provider shall not, without the prior written consent of Hospital, engage in the practice of medicine other than that through and on behalf of Hospital, regardless of whether Physician is paid for such services.”*

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## MORALITY CLAUSE

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Some health care providers are asked to sign “**morality clauses**” or “morality statements,” as a condition of their employment.

For example, some Catholic hospital employers require health care employees to sign statements saying that they will “live by Catholic values.” Sometimes employers claim that these kinds of statements or morality clauses prevent employees from moonlighting in abortion services.

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- *“Physician shall provide services in a manner consistent with The Ethical and Religious Directives for Catholic Health Care Services, as approved by the United States Conference of Catholic Bishops.”*

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## DUTY OF LOYALTY

Regardless of what is in a contract, you should be aware that you may owe your employer a ‘duty of loyalty.’ This is a duty that exists for some employees in many states, regardless of whether a non-compete clause is included in your contract. It could mean that even if your contract does not expressly prohibit competition, they might be allowed to terminate your employment if you engage in competitive behavior during your employment. You should consult with an attorney licensed in your state to determine whether a duty of loyalty might apply to you.

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## NEGOTIATING TO REMOVE OR ALTER RESTRICTIVE CLAUSES

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### THE BASICS

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Sometimes, all you have to do is ask a prospective employer to remove or change a clause. But you may also need to do some negotiation, balancing your priorities and your employer's priorities.

If being able to moonlight periodically as an abortion provider is important to you, know where moonlighting falls among your various priorities. For example, would you be willing to work a less than ideal schedule if you are able to moonlight? Would you be willing to work less than full time hours for less than full time pay if you are able to moonlight? You should feel confident about what on your personal priority list you are willing to compromise and what you aren't.

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It also important to understand your employer's priorities. You should ask questions that get at the employer's motivations behind particular provisions so that you can acknowledge their concerns and propose your change to the contract in a way that is least likely to undermine an employer's goals.

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#### FOR EXAMPLE:

- An employer includes an anti-moonlighting clause because they want to make sure that the employee is able to be fully rested and present to serve the employer's patients. You propose that you limit the amount of time you moonlight at an abortion clinic (for example, no more than twice a month) and assure your employer it will not affect your work for the employer.
- An employer includes an anti-moonlighting clause in order to prevent employees working for competitors. If the employer itself does not provide abortion, you offer assurances that you will only provide abortion as part of your moonlighting, thereby avoiding competition with your employer.

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- An employer includes an anti-moonlighting clause in order to protect itself from malpractice liability. You assure the employer that you will obtain separate malpractice insurance through the clinic or on your own.

You should also keep in mind the value you bring to your employer. For example, young clinicians often have more power than they think in contract negotiations with major hospital systems or practice groups. Clinicians who have recently completed their medical training may be perceived to be more current on various treatments and procedures. Additionally, as communities face worsening physician and nurse shortages across the U.S., health care employers often know they need to work to attract and retain clinicians.

This is especially true for nonmetropolitan communities and in communities where there is a particular shortage of primary care providers or providers of other subspecialties. Know as much as you can about the community needs for the services you provide. This will help you feel confident about how much you can ask for in your negotiations.

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## > USING MEDICAL PROFESSIONALISM AND ETHICS AS A CONTRACT NEGOTIATION TOOL

You can also point to professional associations' ethics and policy statements when negotiating your contract to support your request to modify or eliminate a restrictive covenant.

For example, the American Medical Association disfavors restrictive covenants in physician contracts because they reduce patients' access to health care. In a 2014 report from the AMA Council on Ethical and Judicial Affairs expanding on the AMA Code of Medical Ethics' opinion on restrictive covenants, the Council made the following statements:<sup>1</sup>

- “[R]estrictive covenants have the potential to restrict competition, disrupt continuity of care, and deprive the public of medical services. Covenants-not-to-compete may be unethical if they are ‘excessive in geographic scope or duration’ or fail to make ‘reasonable accommodation’ of patients’ choice of physician.”
- “To be ethically justifiable, restrictive covenants must carefully balance the medical needs of individual patients and communities and the business interests of health care organizations.”
- “Physicians in training should not be asked to sign covenants not to compete as a condition of entry into any residency or fellowship program.”

State and local medical professional associations may also have statements disfavoring noncompete clauses. Check the ethics guidelines and policies of your local, regional, and national professional associations to learn whether there are more medical ethics statements you can point to during your contract negotiations.

<sup>1</sup> AM. MED. ASS'N COUNCIL ON ETHICAL AND JUDICIAL AFFAIRS, RESOLUTION 9-A-13: RESTRICTIVE COVENANTS, CEJA REPORT 3-A-14 (2014), available at <https://www.ama-assn.org/sites/default/files/media-browser/public/about-ama/councils/Council%20Reports/council-on-ethics-and-judicial-affairs/ceja-3a14.pdf> (expanding on Code of Medical Ethics Opinion on Restrictive Covenants).

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## USING THE LAW AS A CONTRACT NEGOTIATION TOOL **TO REMOVE OR ALTER RESTRICTIVE CLAUSES**

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If it's not enough to negotiate based on your and your employer's priorities, you can bolster your ask – that you should not be required to sign a clause prohibiting you from moonlighting as an abortion provider – by pointing to various laws and court decisions.

At this point, if you have not already engaged an attorney to help you, you should consider doing so now. An attorney can help advise you on the legal environment in your state and can help you negotiate with the employer. An attorney can also provide a buffer between you and your employer so that you can preserve a positive relationship with them should you decide to move forward with employment.

### LAW RELATING TO RESTRICTIVE COVENANTS

A good way to show a potential employer that they should remove or alter a contract clause is to argue that, if you were to sue your employer over the contract later, a court would strike out that clause under federal or state law. This does not mean you should threaten a potential employer with a lawsuit if they do not change a contract. It simply means you can use the law to support your argument that you should not have to sign a particular contract clause because it might be legally unenforceable.

Generally, courts do not like restrictive covenants. However, most laws and court decisions around restrictive covenants address the kind of clauses that restrict employees after they leave a job. There is relatively little specific law around restrictive covenants that prohibit health care providers from moonlighting, making



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it more difficult to predict whether any given clause would be struck out by a court. In general, a judge is more likely to enforce a general anti-moonlighting clause than other kinds of restrictive covenants. However, it is possible for a court to find a general anti-moonlighting clause unreasonable as it applies to your ability to moonlight in an abortion clinic. A judge could also invalidate a restrictive covenant that prevents you specifically from moonlighting as an abortion provider based on the laws and policies that do exist.

For example, you can argue to an employer or prospective employer that a judge might invalidate a restrictive covenant in your state if:

- 1 Your state has laws or prior court decisions prohibiting non-compete clauses in all employment contracts, or in health care provider contracts specifically.** These kinds of state laws and court decisions usually refer to clauses that restrict employees after they leave their jobs; but a judge could use them to support a decision to invalidate a clause that prevents employees from moonlighting as an abortion provider.
- 2 Your contract prevents you from moonlighting in abortion services but your employer does not itself provide abortion.** Courts in many states are reluctant to enforce restrictive covenants unless they are needed to protect “legitimate business interests.” If the employer does not provide abortion, it should have a hard time arguing to a judge that it is protecting itself from “competition” by preventing you from moonlighting at an abortion clinic.
- 3 Your contract prevents you from moonlighting in abortion services in an area where patient access to abortion is scarce.** Courts are more likely to invalidate non-compete clauses, especially in physician contracts, where the employee wants to provide services that are difficult for the patient to access in that region. Since abortion is often a scarce service, judges may invalidate restrictive covenants that prevent health care providers from participating in abortion services based on a public policy of protecting patient access to abortion.

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## ANTI-DISCRIMINATION LAWS PROTECTING ABORTION PROVIDERS

Some laws specifically protect health care professionals from discrimination based on their participation in abortion services. As with more general laws around restrictive covenants, you (or your attorney) can raise your knowledge of these laws to assist in a contract negotiation.

The Affordable Care Act's antidiscrimination protection, known as the **Health Care Rights Law**, protects abortion providers from discrimination based on their relationships with their patients who decide to have abortions. This is because the Health Care Rights Law prohibits discrimination against individuals when that discrimination is based on their association or relationship with people who fall in protected categories.<sup>2</sup> The Health Care Rights Law prohibits discrimination against individuals based on race, color, national origin, sex, age, or disability.<sup>3</sup> The protection against discrimination on the basis of sex includes protection against discrimination because of someone's decision to terminate a pregnancy.<sup>4</sup> Thus, the law protects any individual who faces discrimination due to their association with someone who decides to have an abortion.

Another federal law known as **the Church Amendments** states that employers receiving certain federal health care funding cannot discriminate against health care personnel "because he performed or assisted in the performance of a lawful sterilization procedure or abortion... or because of his religious beliefs or moral convictions respecting sterilization procedures or abortions."<sup>5</sup> This law applies to a wide range of employers, including public and private hospitals, clinics, and other medical practices, so long as they receive certain federal funds. It prohibits discrimination that includes "the employment, promotion, or termination of employment," as well as "the extension of staff or other privileges," including admitting privileges, to any health care personnel.<sup>6</sup>

<sup>2</sup> 45 C.F.R. § 92.209 (2018).

<sup>3</sup> 45 C.F.R. § 92.209 (2018).

<sup>4</sup> 45 C.F.R. § 92.4 (2018).

<sup>5</sup> 42 USC 300A-7 (2018).

<sup>6</sup> *Id.*

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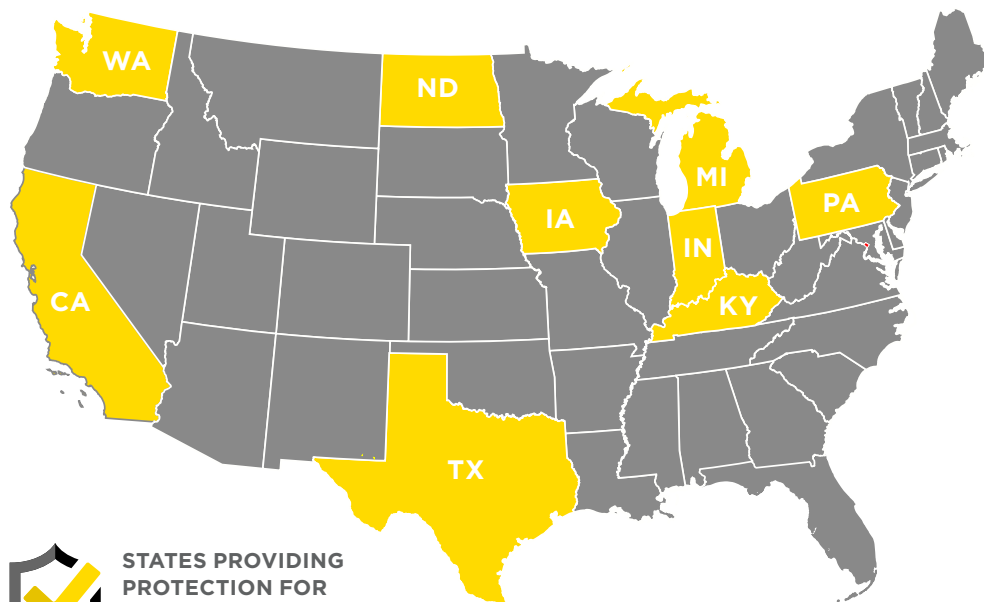
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Some states – California, Iowa, Indiana, Kentucky, Michigan, Pennsylvania, North Dakota, Texas, and Washington – have similar laws that provide varying levels of protection for health care professionals who provide abortion.



STATES PROVIDING PROTECTION FOR HEALTH CARE PROFESSIONALS

These laws may help you in your contract negotiation, but you should also be aware of these laws once you are employed. If you do face discrimination once you are employed, you may be able to file a complaint or lawsuit against your employer for violating these laws. You should consult with an attorney licensed to practice law in your state to determine whether and what course of action makes sense for you.

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## > WHEN YOU ARE ALREADY UNDER A CONTRACT

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### RENEGOTIATING A CONTRACT THAT YOU HAVE ALREADY SIGNED

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If your contract prohibits moonlighting, or it requires your employer's permission and your employer refuses to grant you permission, you can try to use many of the same strategies that you would use for negotiating a contract in the first place to renegotiate or to obtain employer permission.

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You should also take note of whether you think moonlighting policies or general provisions in your contract are being applied differently to you than they are to other employees, or in situations that do not involve abortion services. You can contact a local attorney to review or help renegotiate a contract, or to figure out whether you may have a legal claim if general contract provisions or policies are being applied inconsistently.

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### INTERPRETING A CONTRACT THAT YOU HAVE ALREADY SIGNED

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If you are already under a contract, and you are not sure whether you are allowed to moonlight, you should ask an attorney to help you understand what limitations the contract currently contains.

If your signed contract says nothing about your ability to moonlight in abortion services, you have a good argument that your employer cannot use your contract to keep you from moonlighting now based on how courts in your state have treated ambiguous employment contracts.

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1

**First**, courts disfavor restrictive covenants in general for health care professionals. So, if a restrictive covenant is not specifically laid out in a contract, a court will be unlikely to read in an implied restrictive covenant.

2

**Second**, courts read employment contracts using the principle of “contra proferentem.” This principle means that courts read contracts in favor of whichever person or entity did not provide the exact wording in the contract. The idea here is that if the entity providing the wording wanted something specific in the contract, it would have made that wording clear. Any ambiguity in the contract will likely be interpreted in favor of the person or entity that didn’t provide that wording.

In most cases, employment contracts are written by the employer and presented to the prospective employee to sign, so courts usually read the contract in favor of the employee’s interpretation of any ambiguity. Therefore, if a contract says nothing about whether an employer can moonlight in abortion services, a court is likely to find that the employer cannot use the employee’s contract to keep them from moonlighting.



**Remember: you should always ask whether an employer has a moonlighting policy and get the answer in writing.**

If a contract says nothing about your ability to moonlight, the employer’s moonlighting policy will govern you, if the employer has such a policy. If you’d like, you can ask to include a provision in your contract that allows you to moonlight. It is up to you how specific you want that clause to be, and you should consult an attorney in your state to better understand the pros and cons of asking for a clause that specifically permits you to moonlight at an abortion clinic.

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## SPECIAL CONSIDERATIONS ABOUT MORALITY CLAUSES

The law is not very clear about the legality or effect of morality clauses, but courts do seem to indicate that employers can legally ask employees to sign these kinds of statements as conditions of employment.

You should always ask to have these clauses removed, because if you sign a morality clause and then violate the clause, a court is likely to find in favor of the employer.

However, if you cannot get a clause removed, the law also suggests that signing a morality clause does not necessarily prevent you from moonlighting in abortion services, advocating for abortion access, or suing your employer for discrimination based on your participation in abortion services or advocacy outside of that employment. If your contract contains a morality clause and you want to moonlight in an abortion clinic, you should talk to a local attorney about what your particular contract prohibits and whether you might still have an argument that you should be allowed to moonlight under your contract.

If you have signed a morality clause or similar statement, keep track of the ways in which your employer enforces that clause among your colleagues. The best defense in court against an employer enforcing a morality clause against you is to show that the employer has enforced it unfairly or inconsistently.

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## CONTACT US FOR MORE INFORMATION OR ASSISTANCE

If you are concerned about restrictive clauses in your employment contract, or you want to learn more, please contact the National Women's Law Center. We can provide further information and may also be able to help you find a local attorney to assist you with your contract negotiations, employment law violations, or challenging your employment contract.



### PLEASE CONTACT:

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### DISCLAIMERS

While text, citations, and data are, to the best of the authors' knowledge, current as of the date the report was prepared, there may well be subsequent developments, including legislative actions and court decisions, that could alter the information provided herein.

This toolkit has been prepared by NWLC for informational purposes only and does not constitute legal advice. The information contained herein is not intended to create, and receipt of it does not create, an attorney-client relationship. You should not act on this information without seeking advice from a lawyer licensed in your own jurisdiction.

Furthermore, these materials do not address all the aspects of an employment agreement that may be important to you to negotiate, such as compensation, benefits, or workload. You should contact a local employment attorney for comprehensive contract review.

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