

FTC Passes Final Rule Purporting to Invalidate Non-Compete Agreements and Lawsuit Immediately Ensues: Specific Implications for Healthcare Employers

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On Tuesday, April 23, 2024, the Federal Trade Commission (“FTC”) issued a final rule which purports to prohibit employers from entering into new non-compete agreements with any employee, including senior executives. The rule, which was first proposed on January 19, 2023, comes in response to the Biden Administration’s continuous efforts to promote competition by eliminating any alleged exploitative practices that stunt economic growth and restrict employee mobility within the labor market. FTC Commissioners passed the final rule on a 3-2 partisan vote, and the rule is to become effective 120 days after its publication to the Federal Register.[1] Within 24 hours, the US Chamber of Commerce filed a lawsuit in the Eastern District of Texas to vacate it and stay enforcement.

Existing Senior Executive Exception. The final rule includes a sweeping ban against new non-compete agreements entered between any employee not considered a senior executive and, upon its effective date, will void any existing agreements between employers and any non-executive employee. While the rule implements a total ban with respect to non-executive employees, the rule does provide an exception for “senior executive” employees which is defined as those employees who earn more than \$151,164 annually, and are in “policy-making positions.” The rule defines the “policy-making position” as a “business entity’s president, chief executive officer or the equivalent, any other officer of a business entity who has policy-making authority, or any other natural person who has policy-making authority for the business entity similar to an officer with policy-making authority.” The rule clarifies that any existing non-compete agreement between an employer and a senior executive employee will remain enforceable;

however, employers will be prohibited from entering into *new* non-compete agreements with senior executives.

Nonprofit Exclusion. Notably, the FTC’s ruling does not apply to nonprofits, as these tax-exempt entities fall outside the FTC’s purview and jurisdiction. Thus, the final rule will not apply to nonprofit healthcare systems, which amounts to nearly half of all United States healthcare entities.[2] The Commission warns, however, that merely claiming tax-exempt status is not dispositive and organizations that disguise as nonprofits, but are truly organized for the profit of members, will be subject to the final rule.

Certain Legal Challenges. While the rule is to become effective 120 days after its publication to the Federal Register, immediate legal challenges have ensued and will certainly continue, which will necessarily further stall the potential impact. Within 24 hours of the vote, the U.S. Chamber of Commerce filed a lawsuit challenging the final rule, seeking, among other things, to vacate it and permanently enjoin its enforcement and staying implementation pending resolution.[3] The Chamber announced in an official statement that the FTC’s ruling is a “blatant power grab that will undermine American businesses’ ability to remain competitive.”[4]

Healthcare Implications. Given the existent and forthcoming legal challenges, which will almost certainly stay enforcement of the rule pending the outcome of any litigation, there is no immediate impact on North and South Carolina healthcare employers as to their existing physician and employee non-compete agreements. Until further notice, healthcare employers have the ability to, and should, continue to enforce, and enter into, narrowly tailored existing non-compete agreements with physicians and other employees, staying consistent with their business objectives and protecting their investments. Similarly, when considering immediate hiring needs and implications thereof, healthcare employers should concomitantly continue to respect the agreements of their competitors’ employees and conduct the applicable state law legal analysis as to the potential enforceability of the same.

The Maynard Nexsen Healthcare team will continue to monitor developments and stands ready to provide guidance on how to address questions from current and prospective employees on existing or proposed non-competes, as well as answer any policy or compliance-related questions.

[1] FTC Announces Rule Banning Noncompetes | Federal Trade Commission

[2] Fast Facts on U.S. Hospitals, 2024 | AHA

[3] Complaint-Chamber-v.-FTC-E.D.-Tex.pdf (uschamber.com)

[4] U.S. Chamber to Sue FTC Over Unlawful Power Grab on Noncompete Agreements Ban | U.S. Chamber of Commerce (uschamber.com)