



SCHA Hospital Financial Leadership Networking Event: Non-Competes
and Trends in Physician Contracting
April 20, 2023
Nikole Mergo and Matthew Roberts

TOPICS FOR DISCUSSION

- The Current State of Non-Compete Agreements
- The FTC's Proposed Rule to Ban Non-Compete Agreements
- Congressional Action Related to Non-Compete Agreements
- Trends in Physician Contracting

Non-Compete Agreements in the Healthcare Context



NON-COMPETE AGREEMENTS GENERALLY

What's the purpose?

Non-Compete

- An agreement not to work for a competitor for a stated period of time

Non-solicitation

- **Of Employees:** Restrict departing employees from recruiting or assisting future employer from hiring your employees (**NOT a no-poach agreement**)
- **Of Customers:** Prevents former employees from contacting clients/customers/patients and definable prospects

The Basics . . .

- A Writing
- Defines protectable interests
- Must be **reasonable** in terms of scope and time
- Clearly states length of restriction, applicable territory, and prohibited activities
- Appropriate consideration (e.g., new employment)

NON-COMPETES IN THE HC CONTEXT IN SC

- Very standard in physician employment agreements and senior executive positions as a condition of employment.
- *E.g., Baugh v. Columbia Heart Clinic*—Ct. App upheld non-compete against cardiologists. Territorial restriction important, limitation to specific field of practice, and inclusion of buy-out, liq. dams.
- In general, such agreements prohibit departing physicians from taking patients and business from prior employer, especially in light of substantial business investment.

NCA State Developments



Partial Bans

New Hampshire, Virginia, and Illinois

- Partial ban on NCAs, prohibiting their use with low-wage employees

New Jersey

- Pending legislation to curtail use of NCAs and non-solicitation provisions
- Prohibit NCAs with non-exempt employees
- Would make all restrictive covenant agreements unenforceable against employees who were employed for less than a year
- Prohibit employers from enforcing restrictive covenants with respect to employees seeking employment across state lines
- Would not allow agreements to prohibit employees from working with any employer's clients or customers as long as the employee did not initiate the contact

Complete Bans



- [California](#) - Non-compete agreements that prevent employees from future gainful employment are void; this ban applies to non-competes that are or remain effective after the termination of employment
- [North Dakota](#) – Also applies to non-solicitation agreements; Court has stated that forcing North Dakota residents to abide by laws in other states is a violation of the state’s labor laws
- [Oklahoma](#) – Can still prohibit the solicitation of clients and other employees

THE FTC'S PROPOSED RULE TO BAN NON-COMPETES

FEDERAL TRADE COMMISSION

- **Established in 1914 with passage of Federal Trade Commission Act**
- **“Empowered and directed to prevent” use of “unfair methods of competition”**
- **Formed in response to monopolistic practices**
- **Composed of five commissioners nominated by President and confirmed by Senate**
- **Usually in news for suing to block big M&A deals**

FTC AND EMPLOYMENT LAW

- **Also enforces FCRA, which puts restrictions on obtaining background checks**
- **And files no-poaching cases (with DOJ) based on antitrust law**
- **Even before non-compete rule has been investigating employers with overly broad non-competes**
- **Issued proposed non-compete ban on Jan. 5, 2023**
- **Comment period extended through yesterday, Apr. 19**

FTC POSITION ON NON-COMPETES

- **30 M U.S. workers covered by non-competes**
- **53% of workers covered by non-competes are hourly**
- **Non-competes are unfair because they:**
 - **Inhibit worker mobility**
 - **Depress wages**
 - **Reduce business formation**
 - **Cause higher prices for goods and services**
- **NDA's and trade secret law can protect interests of employers**

PROPOSED RULE: NON-COMPETES WITH ANY EMPLOYEE WOULD BE VIOLATION OF FTCA

§ 910.2 Unfair methods of competition.

(a) *Unfair methods of competition.* It is an unfair method of competition for an employer to enter into or attempt to enter into a non-compete clause with a worker; maintain with a worker a non-compete clause; or represent to a worker that the worker is subject to a non-compete clause where the employer has no good faith basis to believe that the worker is subject to an enforceable non-compete clause.

ALSO DE FACTO NON-COMPETES (MAY INCLUDE SOME NDA'S AND NON-SOLICITATION AGREEMENTS)

(2) *Functional test for whether a contractual term is a non-compete clause.* The term non-compete clause includes a contractual term that is a *de facto* non-compete clause because it has the effect of prohibiting the worker from seeking or accepting employment with a person or operating a business after the conclusion of the worker's employment with the employer. For example, the following types of contractual terms, among others, may be *de facto* non-compete clauses:

- i. A non-disclosure agreement between an employer and a worker that is written so broadly that it effectively precludes the worker from working in the same field after the conclusion of the worker's employment with the employer.

NOT JUST PROSPECTIVE—EMPLOYER MUST RESCIND ALL EXISTING NON-COMPETES

(b) Existing non-compete clauses.

(1) Rescission requirement. To comply with paragraph (a) of this section, which states that it is an unfair method of competition for an employer to maintain with a worker a non-compete clause, an employer that entered into a non-compete clause with a worker prior to the compliance date must rescind the non-compete clause no later than the compliance date.

NOTICE OF RESCISSION TO EMPLOYEES

(2) Notice requirement.

(i) An employer that rescinds a non-compete clause pursuant to paragraph (b)(1) of this section must provide notice to the worker that the worker's non-compete clause is no longer in effect and may not be enforced against the worker. The employer must provide the notice to the worker in an individualized communication. The employer must

(ii) The employer must provide the notice to a worker who currently works for the employer. The employer must also provide the notice to a worker who formerly worked for the employer, provided that the employer has the worker's contact information readily available.

(iii) The following model language constitutes notice to the worker that the worker's non-compete clause is no longer in effect and may not be

EXCEPTION FOR SALE OF BUSINESS

§ 910.3 Exception.

The requirements of this Part 910 shall not apply to a non-compete clause that is entered into by a person who is selling a business entity or otherwise disposing of all of the person's ownership interest in the business entity, or by a person who is selling all or substantially all of a business entity's operating assets, when the person restricted by the non-compete clause is a substantial owner of, or substantial member or substantial partner in, the business entity at the time the person enters into the non-compete clause.

EFFECT ON STATE LAW

§ 910.4 Relation to State laws.

This Part 910 shall supersede any State statute, regulation, order, or interpretation to the extent that such statute, regulation, order, or interpretation is inconsistent with this Part 910. A State statute, regulation, order, or interpretation is not inconsistent with the provisions of this Part 910 if the protection such statute, regulation, order, or interpretation affords any worker is greater than the protection provided under this Part 910.

CONCERNS

- **Why would company innovate if employee can move to competitor and immediately start using what he/she learned?**
- **If employee is part of team and goes to competitor to do same thing, would hurt rest of team's ability to make living**
- **Doesn't distinguish between executives, engineers, and sales persons vs. others**

DISSENTING STATEMENT



Christine S. Wilson ✓

@CSWilsonFTC



Today, the FTC proposed a Non-Compete Clause Rule that bans essentially all non-competes, a radical departure from 100s of years of precedent. For many reasons, I dissent. I encourage all stakeholders to provide comments.



FEDERAL TRADE COMMISSION
PROTECTING AMERICA'S CONSUMERS

[ftc.gov](https://www.ftc.gov)

Dissenting Statement of Commissioner Christine S. Wilson Concerning the Notice of Proposed Rulema...

U.S. CHAMBER

↻ U.S. Chamber Retweeted



Suzanne Clark  @SuzanneUSCC · Jan 22



As I wrote in an op-ed in the [@WSJ](#), the [@USChamber](#) will go to court if necessary to stop the [@FTC](#)'s legally baseless ban on noncompete clauses. Read more:



[wsj.com](#)

Opinion | The Chamber of Commerce Will Fight the FTC

We'll go to court if necessary to stop the legally baseless ban on

AMERICAN HOSPITAL ASSOCIATION



Advancing Health in America

February 22, 2023

The Honorable Lina M. Khan
Chair
Federal Trade Commission
600 Pennsylvania Avenue, NW
Washington, D.C. 20580

***Re: Notice of Proposed Rulemaking, Federal Trade Commission; Non-Compete Clause Rule;
88 Fed. Reg. 3482 (RIN: 3084-AB74) (January 19, 2023)***

Dear Chair Khan:

On behalf of our nearly 5,000 member hospitals, health systems and other health care organizations, our clinical partners – including more than 270,000 affiliated physicians, 2 million nurses and other caregivers – and the 43,000 health care leaders who belong to our professional membership groups, the American Hospital Association (AHA) opposes the Federal Trade Commission’s (FTC) proposed Non-Compete Clause Rule in its current form.

AMERICAN HOSPITAL ASSOCIATION

lower-wage. But many of these hospital employees, especially physicians and senior executives, do not present the same considerations with respect to non-compete agreements as other types of employees. **The proposed regulation errs by seeking to create a one-size-fits-all rule for all employees across all industries, especially because Congress has not granted the FTC the authority to act in such a sweeping manner.**

Even if the FTC had the legal authority to issue this proposed rule, **now is not the time to upend the health care labor markets with a rule like this.** The COVID-19 pandemic exacerbated

Despite these long-term workforce challenges, the proposed rule would profoundly transform the health care labor market – particularly for physicians and senior hospital executives. It would **instantly invalidate millions of dollars of existing contracts, while exacerbating problems of health care labor scarcity,** especially for medically underserved areas like rural communities. Perhaps most troubling, the FTC would take this monumental step on the apparent basis of economic research that does not actually support the proposed rule. **It also would do so without a fulsome analysis of the benefits that these agreements bring to hospitals and health systems, and without any analysis of the consequences of applying the rule to only for-profit hospitals, as the law necessitates, when nearly 80% of for-profit hospitals operate in the same markets as non-profit hospitals with many of the same demands for highly-skilled labor and senior executives.**



IMPLICATIONS AND WHAT'S NEXT?

- **Note the FTC Act only applies to for profit corporations. Therefore, non-profit corporations are not subject to the regulatory authority or the proposed ban. What constitutes a true non-profit? Scope of the exemption unsettled. AHA shares interpretation it does not apply to non-profits.**
- **Comment period ended yesterday, Apr. 19, 2023**
- **FTC will consider comments and may pare rule down before it's finalized. Then likely 180 day enforcement period. Litigation will then ensue.**

LIKELY LEGAL CHALLENGES

- **Bases for legal challenges**
 - **Non-profit hospitals and healthcare organizations**
 - **FTC lacks authority to make rules on this issue**
 - **Unelected body trying to overturn state law and 100's of years of precedent on non-competes**
 - **... and invalidate contracts already negotiated**
 - **Major questions doctrine**
 - **On issues of major significance, agencies can't regulate unless Congress gives clear authorization**
 - **Non-delegation doctrine**
 - **Congress has never delegated to FTC authority to rule on non-competes**

CONGRESS IS TAKING CLOSER LOOK AT NON-COMPETES

- **Workforce Mobility Act**
 - **Similar to FTC's proposed rule**
 - **Reintroduced Feb. 1, 2023**
 - **Bipartisan and bicameral**
- **Freedom to Compete Act**
 - **Would prevent use of non-competes with non-exempt workers**
 - **Reintroduced Feb. 9, 2023**
 - **Bipartisan**

BOTTOM LINE

- **Don't freak out.**
- **Keep using them for now, ensure they are narrowly tailored.**
- **Know what you have in place.**
- **Continue to follow the SC CON legislation as it makes its way through the General Assembly and its proposed amendment banning non-competes with respect to physicians**

TRENDS IN PHYSICIAN CONTRACTING

- **To use non-competes or not?**
- **Use of one-page deal memoranda instead of employment agreements.**
- **Use of quality and value based compensation methodologies**
- **Move away from production incentive bonuses.**

TRENDS IN PHYSICIAN CONTRACTING

- **Compensation designed toward the physician/executives**
 - **How to bonus?**
 - **Non-compete, non-solicitation, trade secret protection**
- **Use of Value Based Enterprise (VBE) compensation.**

QUESTIONS?



MAYNARDNEXSEN