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What President Biden's Executive Order on Non-Compete Agreements May Mean for Healthcare Providers

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President Biden's executive order on "Promoting Competition in the American Economy" arguably could have little to no immediate--or even long term impact--on physicians in the healthcare industry, as physician non-compete agreements ("NCAs") are already subject to the strictures of state law in a purposeful manner that promotes access and continuity of care, while concomitantly preserving healthcare providers' ability to protect their investment. Perhaps more than in any other industry, courts historically have taken specific care to ensure that, in order to be enforceable, physician NCAs must be drafted in a very narrow manner. Given the intent of the order, it could have more of a potential impact on lower income workers in the industry. The order, issued on July 9th, 2021, directs various federal agencies to take action to reduce the cost of prescription drugs, amend merger guidelines, promote hospital price transparency, and curtail the use of non-compete clauses in employment agreements.[1] While the order encourages the FTC to exercise its rulemaking authority to limit NCAs, it does not invalidate or prohibit any NCAs.

NCAs are common in the United States. A recent survey estimates that at least 36 million Americans have signed an agreement not to compete.[2] The healthcare industry is no exception. Approximately 45% of primary care physicians are subject to a NCA.[3] However, as in other industries, NCAs are not exclusively used to bind highly compensated workers like physicians. Some healthcare providers may require many or all of their employees to enter a NCA.

For many healthcare employers, NCAs play an essential role in protecting the company's proprietary and trade secret information. NCAs also help healthcare providers maintain valuable patient relationships, as they reduce the risk that an employee may leave and take patients to a competing practice. Additionally, NCAs give providers a powerful incentive to train their employees, since an employee subject to such an agreement is less

likely to abandon the practice to work for a competitor. NCAs may also be mutually beneficial for physicians, executives, and healthcare providers. NCAs have been linked to higher salaries for physicians and increased revenue for hospitals and practice groups.[4]

Currently, while North and South Carolina restrict the enforceability of physician NCAs, both states have upheld NCAs that are narrowly tailored. In North Carolina, to be enforceable, a non-compete agreement must be 1) written, 2) part of an employment contract, 3) supported by reasonable consideration, 4) reasonable with respect to time and territory, and 5) not counter to public policy.[5] Although NCAs with physicians are indeed enforceable,[6] they are carefully scrutinized.[7] If enforcement of a physician's covenant not to compete "would create a substantial question of potential harm to the public health," it will not be enforced.[8] Under South Carolina law, to be enforceable NCAs must be 1) supported by valuable consideration, 2) necessary to protect a legitimate interest of the employer, 3) reasonably limited with respect to duration and geographic limitation, 4) not unduly burdensome on the employee's ability to earn a living, and 5) reasonable from a public policy perspective.[9] Covenants not to compete are disfavored and "are strictly construed against the employer."[10] Nonetheless, NCAs may still be enforced against physicians so long as they satisfy the foregoing elements.[11]

Accordingly, to support the best argument for enforceability, NCAs for physicians should include elements of narrowly tailored territorial limitations (often tethered to the physician's respective geographic area), restrictions to the physician's area of practice or specialty, and time limits. Additionally, provisions that afford physicians the option to practice in violation of the NCA, so long as they pay a predetermined sum to their employer, are also enforceable under South Carolina law.[12] Such provisions support public policy considerations of fairness, as they simultaneous protect the interests of a physician in continuing to practice, as well as the interests of employers seeking to avoid damages incurred by a physician's sudden departure.

President Biden's order has several implications for the future viability of NCAs in healthcare. The order does not compel the FTC to issue any rules, but the President's encouragement makes inaction unlikely. It is uncertain whether the FTC will attempt to issue an outright prohibition on NCAs or take a more measured approach. However, the order directs the FTC to *curtail unfair use* of non-compete clauses, not eliminate them entirely.[13] Accordingly, the FTC should likely focus its efforts on curtailing enforcement of NCAs against workers with lower income or levels of educational attainment. Eleven states have already instituted similar prohibitions on NCAs, further increasing the likelihood of harmonious action.

The scope of the FTC's action may determine the likelihood of a challenge to a prohibition on NCAs. If the FTC issues a rule that only prohibits NCAs for lower income workers, the rule may be less susceptible to a challenge. For example, many of the considerations that motivate healthcare providers to pursue NCAs (like the protection of patient relationships or proprietary information) are not as compelling when applied to mid or lower-level employees on the organizational chart. Consequently, a rule that only impacts NCAs for such employees may be more defensible. Conversely, a rule banning NCAs for all workers would almost certainly be challenged. Healthcare employers often have legitimate reasons for pursuing NCAs (especially with highly compensated employees and those closest to the patient relationship) and NCAs entered into for an illegitimate or unfair purpose are already generally unenforceable.

Furthermore, it is unclear whether the FTC possesses authority to issue rules that supplant State law governing NCAs. NCAs have traditionally been subject to state by state regulation, rather than a federal standard. When the FTC held a public workshop discussing NCAs in 2020, it solicited opinions from interested parties that would help it examine the legal and empirical justifications for an FTC rule restricting NCAs.[14] The FTC specifically asked interested parties to identify potential statutory authority that would enable it to issue a rule on NCAs.[15] The American Medical Association responded to the request with a comment that advised against the FTC using its rulemaking authority to influence NCAs in physician employment agreements.[16] Instead, the AMA favored an approach that afforded states the opportunity to establish policies addressing the enforceability of NCAs for physicians.[17] Similarly, the American Bar Association's Antitrust Law Section submitted a comment that the issue of NCAs was likely ill-suited to rulemaking given that "the perceived "unfairness" of such clauses would seem to raise a broad normative issue, unless the Commission were able to confine its inquiry to, say, a specific class of workers, or a specific industry in which the use of such clauses has been prevalent."[18] The section also noted that the propriety of an approach that emphasized federalism as an alternative to rulemaking given the history of NCA regulation at the state level.[19] No FTC rule governing NCAs ensued from the 2020 public workshop. However, Biden cites the Federal Trade Commission Act as statutory authority for the FTC to issue a rule limiting NCAs in his executive order.[20] Whether Biden's order will change the position of any interested groups or the Federal Trade Commission Act provides the FTC with sufficient authority to make rules governing NCAs, remains to be seen.

These issues are compounded by other emerging questions regarding the enforceability of NCAs. For instance, the advent of telemedicine may make it difficult to determine whether an employee has violated a territorial or practice area restriction of a NCA. Biden's order or a subsequent federal policy disfavoring NCAs may influence developing case law on the subject. This will certainly be an issue for healthcare providers to watch in the coming months.

Conclusion

Any further action that challenges the viability of non-compete agreements will have to tightrope between two important aims of healthcare providers: 1) ensuring employees have mobility to afford patients quality care, regardless of the entity for which they provide it, and 2) protecting the significant investment in valuable patient relationships and employee training. Regardless of the relative lack of immediate effects stemming from President Biden's order, healthcare providers would be wise to examine any existing NCAs to ensure strong arguments for enforceability under current state law, and keep an eye on future developments as the FTC begins its rulemaking process.

This article was co-authored by Law Clerk Patrick Ellis.

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[1] Exec. Ord. No. 14036, 86 C.F.R. 36987 (2021).

[2] The White House, FACT SHEET: Executive Order on Promoting Competition in the American Economy (Jul. 9, 2021), https://www.whitehouse.gov/briefing-room/statements-releases/2021/07/09/fact-sheet-executive-order-on-promoting-competition-in-the-american-economy/.

[3] Kurt Lavetti, et al., *The Impacts of Restricting Mobility of Skilled Service Workers: Evidence from Physicians*, 55(3) Journal of Human Resources 1025, 1030 *http://kurtlavetti*.com/UIPNC_vf.pdf.

[4] *Id.* at 1064.

[5] *Aesthetic Facial & Ocular Plastic Surgery Ctr., P.A. v. Zaldivar*, 264 N.C. App. 260, 263, 826 S.E.2d 726 (2019) (quoting *United Labs., Inc. v. Kuykendall*, 322 N.C. 643, 649-50, 370 S.E.2d 375, 380 (1988)).

[6] *See Iredell Digestive Disease Clinic, P.A. v. Petrozza*, 92 N.C.App. 21, 30, 373 S.E.2d 449, 454 (1988) (stating that doctors are not immune from covenants not to compete).

[7] *Jeffrey R. Kennedy, D.D.S., P.A. v. Kennedy*, 160 N.C. App. 1, 9, 584 S.E.2d 328, 333 (2003).

[8] *See Iredell Digestive Disease Clinic, P.A. v. Petrozza*, 92 N.C.App. 21, 27, 373 S.E.2d 449, 453 (1988) (citing *Dick v. Geist*, 107 Idaho 931, 693 P.2d 1133 (App. 1985).

[9] *See Baugh v. Columbia Heart Clinic, P.A.*, 402 S.C. 1, 12, 738 S.E.2d 480, 486 (Ct. App. 2013) (citing *Rental Unif. Serv. of Florence, Inc. v. Dudley*, 278 S.C. 674, 675–76, 301 S.E.2d 142, 143 (1983)).

[10] *Faces Boutique, Ltd. v. Gibbs*, 318 S.C. 39, 42, 455 S.E.2d 707, 708 (Ct. App.1995) (citing *Rental*, 278 S.C. 674, 675, 301 S.E.2d 142, 143 (1983)).

[11] *See Baugh v. Columbia Heart Clinic, P.A.*, 402 S.C. 1, 15–21, 738 S.E.2d 480, 488–491 (Ct. App. 2013) (upholding a NCA that prohibited cardiologists from assisting another person's cardiology practice within twenty miles of their former employer).

[12] *See Id.* at 23–25, 492–93.

[13] Exec. Ord. No. 14036, 86 C.F.R. 36987 (2021).

[14] Fed. Trade Comm'n, *Non-Competes in the Workplace: Examining Antitrust and Consumer Protection Issues* (Jan. 9, 2020, 8:30 AM), https://www.ftc.gov/news-events/events-calendar/non-competes-workplace-examining-antitrust-consumer-protection-issues

[15] *Id.*

[16] Letter from James L. Madara, MD, Exec. Vice President/CEO, Am. Med. Ass'n, to Joseph J. Simons, JD, Chairman, FTC (Feb. 7, 2020), https://searchlf.ama-assn.org/undefined/documentDownload?uri=%2Funstructured%2Fbinary%2Fletter%2FLETTERS%2F2020-2-7-Letter-to-Simons-re-Non-Compete-in-the-Workplace.pdf.

[17] *Id.*

[18] Letter from Brian R. Henry, Chair, ABA Antitrust L. Section, to Bilal Sayyed, Dir., FTC Off. of Pol'y Plan. (Apr. 24, 2020), https://www.americanbar.org/content/dam/aba/administrative/antitrust_law/comments/april-2020/comment-42420-ftc.pdf.

[19] *Id.*

[20] Exec. Ord. No. 14036, 86 C.F.R. 36987 (2021).