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FTC Proposes Banning Non-Compete Clauses

Latest step in the federal government's push (over two presidential administrations) to increase competition in the health care industry

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On January 5, 2023, the Federal Trade Commission (FTC) published a proposed rule that would ban employers from imposing non-competes on their employees. The FTC asserted that this practice is widespread and often exploitative, and such actions can suppress wages, hamper innovation, and block entrepreneurs from starting their own businesses.¹ Notably, while the proposed rule will affect all industries, not just health care, this proposal comes at a time when health care employers across the U.S. are struggling with staffing shortages.² This article will discuss the proposed rule, reactions from health care industry stakeholders and potential implications.

Non-compete agreements are defined as “employment provisions that ban workers at one company from going to work for, or starting, a competing business within a certain period of time after leaving a job.”³ About 30 million Americans are restricted from pursuing other employment opportunities, as they are bound by non-compete clauses.⁴ Further, a 2020 study found that approximately 18% of the labor force is bound by non-competes, with 38% agreeing to a non-compete in the past. Regardless of the timing of non-competes, the study also found lower wages associated with areas where non-compete enforcement is easier.⁵

In health care, the medical profession has grown from small practices comprised of just a few physicians to mega-practices totaling a few hundred physicians, especially in urban settings. Non-competes in health care have traditionally been utilized as a tool to limit the harm that a physician may inflict upon departing a practice. While these large practices need to protect their investments, non-compete clauses may make it hard for a departing physician to seek employment within the same geographic area. Non-compete clauses in specialty

practices further complicate the ability for physicians to seek employment, as specialists only serve a subset of the population (i.e., there may be fewer outside opportunities for specialists).⁶



By halting the practice of imposing non-competes, the FTC aims to increase wages by upwards of \$300 billion per year and expand career opportunities for approximately 30 million Americans.¹

Multiple states have provisions that flat out ban or place a limit on an employer seeking to restrict the activity of a physician or other health care professional post-employment. States that ban such clauses include Alabama, Arkansas, Colorado, Delaware, Massachusetts, New Hampshire, New Mexico, Rhode Island and South Dakota. Some states, such as Arkansas, allow non-competes, but have exceptions carved out for medical professionals. Other states, such as Florida, impose limitations on health care non-competes, banning agreements for physicians specialists in a county when all those within the specialty are employed by a single entity.⁶



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Non-Compete Clauses ... *continued*

In response to the proposed rule, while the American Medical Association (AMA) did not take a position on the issue, noting their membership's "diverse perspectives on non-competes," it noted that their ethics policy opposes unreasonable non-competes.² Additionally, the AMA stated how the "balanced approach [of states that have already legislated against health care-specific non-competes clauses] must be considered against a proposed universal federal ban on all non-competes agreements."² In addition, the American Hospital Association (AHA) asserted that the FTC lacks the authority to outright ban non-competes and stated their intention to submit comments highlighting their observed shortcomings.² The final rule, pending potential edits from the FTC based on commentators' suggestions, may face legal challenges down the road.⁶

This proposed rule is the latest step in the federal government's push (over two presidential administrations) to increase competition in the health care industry. In December 2018, the U.S. Department of Health and Human Services, as well as the Treasury and Labor departments, issued a 119-page report comprising over 50 recommendations to increase quality, decrease cost and promote competition in health care.⁷ Some of the report's main recommendations included:

- An endorsement for broadening the scope of practice for advanced practice registered nurses (APRNs), physician assistants (PAs), optometrists, pharmacists and other highly trained professionals, to combat the lack of competition with the limited supply of providers;
- Encouraging entry into markets through the repeal of restrictive certificate of need (CON) laws, which would affect states that had some form of the CON program;
- Urging Congress to consider repealing Patient Protection & Affordable Care Act (ACA) changes to the Stark Law that limited physician-owned hospitals in order to increase competition and provide consumers with more choices; and
- Shifting toward consumer-driven health care through the expanded utilization of health savings accounts (HSAs) and health reimbursement arrangements (HRAs).⁸

Nearly one year later, the Centers for Medicare & Medicaid Services finalized requirements that certain health care service and item prices be posted publicly by all hospitals in a "consumer-friendly manner."⁹ The final rule asserted that informing patients of the prices of their health care services could allow more patients to knowledgeably shop for their medical expenditures, which may subsequently drive down prices, foster high-value health care, and increase competition in the health care marketplace.⁹

Subsequently, in 2021, President Biden issued an executive order to promote competition in the American economy.¹⁰ The executive order directed the FTC to combat consolidation in the health care industry, arguing that consolidation drives up prices for consumers and limits access to care. Beyond responding to the executive order (which directive the FTC has pursued with a vengeance, resulting in a number of scrapped hospital deals over the past year¹¹), the FTC has signaled that it also has an interest in pursuing other legal theories of antitrust enforcement aside from traditional mergers, such as those related to vertical mergers.¹²

By halting the practice of imposing non-competes, the FTC aims to increase wages by upwards of \$300 billion per year and expand career opportunities for approximately 30 million Americans.¹ The FTC is currently seeking the public opinion on the proposed rule until March 10, 2023.⁴ ➤

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