AMERICA'S PHYSICIAN GROUPS

April 19, 2023

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

Re: Notice of Proposed Rulemaking, Federal Trade Commission; Non-Compete Clause Rule; RIN: 3084-AB74

Dear Chair Khan:

America's Physician Groups (APG) appreciates the opportunity to respond to the Federal Trade Commission's (FTC) proposed rule that would ban the usage of non-compete clauses nationwide.

The legality and scope of allowable non-compete clauses currently vary from state to state. This reality causes confusion for many workers and businesses alike; workers leaving a job may be uncertain about whether a noncompete clause limits their options for reemployment, and businesses may be uncertain about whether a potential hire is also subject to a noncompete clause. APG's member organizations believe that there is a need for greater nationwide uniformity in the use and applicability of non-compete clauses.

APG does not wish to take the same position as some physician groups have, which is to oppose any and all federal action to bar non-compete clauses in employment agreements. Instead, APG wishes to raise for the commission's consideration some complexities in the health care market that should be taken into account in its rulemaking process. In doing so, the Commission could better draft a federal standard that balances the interests of both employers and highly skilled employees in health care employment contracts. Below, APG details these items for consideration and discusses ways in which a new federal standard could take them into account.

About America's Physician Groups

APG is a national association representing more than 360 physician groups that are committed to the transition to value, and that engage in the full spectrum of alternative payment models and Medicare Advantage (MA). APG members collectively employ or contract with approximately 195,000 physicians (as well as many nurse practitioners, physician assistants, and other clinicians), and care for roughly 90 million patients, including nearly 30 percent of MA enrollees.

APG's motto, "Taking Responsibility for America's Health," underscores our members' preference

for being in risk-based, accountable, and responsible relationships with all payers, rather than being paid by plans on a fee-for-service basis. Delegation of risk from payers to providers creates the optimal incentives for our groups to provide integrated, coordinated care; make investments in innovations in care delivery; advance health equity; and manage our populations of patients in more constructive ways than if our members were merely compensated for the units of service that they provide.

Comments

The FTC's proposal seeks to ban the inclusion of non-compete agreements within employment contracts and rescind such agreements previously established within existing contracts. As a result, a new national framework would be established that would eliminate noncompete clauses across the board to make the workplace more competitive. APG agrees that there are many opportunities for abuse in noncompete clauses that excessively advantage employers at the expense of employees, and that these highly imbalanced arrangements should be avoided.

At the same time, a number of APG's member groups currently utilize noncompete clauses in their contracts with physicians that take into consideration both the interests of these employees and the practices' own proprietary and infrastructural and business investment concerns. Some additional background may be helpful in explaining why.

When an APG member organization is building its practice in a given geographic area, it may recruit a new physician and sign a multi-year employment contract predicated on helping that physician build his or her own practice of patients. For the next three to five years, the organization may invest as much as $1 million in supporting the activities of this physician while he or she sees and treats patients and builds that practice. For a given primary care physician to be successful within a group practice, for example, it may be necessary to build a practice of several thousand patients who will become the regular patients of this physician. As the practice builds, the parent APG organization also guides and trains the physician in conducting his or her practice in the context of value-based health care, which is different from the fee-for-service payment system in which much of the nation still operates.

Despite the growth in utilization of such approaches as telehealth, health care is still by and large delivered in an essentially local market. Some markets are highly consolidated and dominated by larger physician or hospital organizations; others are much less so. Competitive conditions among these different markets vary, including by physician specialty. Local conditions may well require some time-limited use of noncompete clauses so that health care employers that invest in further increasing the skills of their highly skilled physician workforce are not subject to great competitive disadvantage if and when those workers suddenly leave. These noncompete clauses discourage physicians from leaving a practice that has recruited, trained and invested in them; opening up a competing practice in a nearby location; and in effect, taking their patients with them.

For example, one APG member organization with practice locations in 21 states limits its noncompete clauses to a one-year time limitation covering a five (5) mile radius of their physicians' practices with an attached non-solicitation clause for any patients. Another APG member organization headquartered in Washington state with additional facilities in Oregon limits its noncompete clauses to

one year with an approximate eight (8) mile geographic limitation. Including these clauses in an employment contract protects the investments that these organizations have made in recruiting and maintaining these physicians, while also avoiding any arduous geographic or time restrictions that would hamper the ability of any departing physician from continuing to work indefinitely within the same city or region.

APG believes that it would be inadvisable to have a federal standard that barred all noncompete agreements of this type, that are both time and geographically limited; that are directed not at all health care employees but at the most highly skilled, educated, and costly health care labor resource, physicians; and that are perhaps unique to health care because of the substantial investments that must be made in guiding physicians in value-based care models in building their local practices.

Because markets vary in size and scope across the country, it would be difficult to draw a single federal standard, in terms of time or geography, that would be relevant across all markets and regions. Rather, it is useful to reflect on ways in which other jurisdictions across the country – namely, some states -- have sought to balance the commercial and financial interests of businesses and industries with employees' rights to seek employment when and where they choose.

One such example is Washington State, which amended its non-compete law in important ways in 2019 (see Chapter 49.62 Revised Code of Washington, Noncompetition Covenants).[1] The amended law established income thresholds below which W-2 employees ($$116,593.18 in 2023) and independent contractors ($291,482.95 in 2023) could not be subject to non-compete agreements. There is a rebuttable presumption in the law that non-compete clauses longer than eighteen (18) months are presumed unreasonable unless the employer can prove by clear and convincing evidence that a longer duration is necessary. Employers are also required to present the terms of any agreement in writing to any prospective workers before their acceptance of any position. What's more, a provision in a non-compete agreement signed by a Washington-based employee or independent contractor is void and unenforceable when the agreement requires the worker to adjudicate the agreement outside of the state. In effect, this provision protects Washington residents from being subjected to noncompete provisions by an out-of-state employer.

Washington's approach recognizes the need to balance the interests of both employers and employees while also protecting employees from abuse. Similarly, Texas law recognizes the harm that overly broad non-compete agreements create for employee mobility while leaving room for enforcement under specific circumstances.

[1] 2019 Revised Code of Washington Title 49 - Labor Regulations Chapter 49.62 - Noncompetition Covenants, RCW 49.62, 66th Leg. (2019).

The Texas Free Enterprise and Antitrust Act of 1983[2] states that "Every contract, combination, or conspiracy in restraint of trade or commerce is unlawful," but the Covenants Not to Compete Act of 1989 established a framework for resolving contractual disputes that arise in specific cases and providing a specific exception to the general prohibition of non-compete agreements under Texas law. As a result, in Texas, a non-compete agreement contained within a contract may still be enforceable as long as it is: (1)"ancillary to an otherwise enforceable agreement"; (2) supported by valid consideration (consideration defined as each party to a contract promising to give something of value to the other, in this case, the employer providing something of value to the employee); and (3) includes restrictions that are "reasonable in scope" as it pertains to time, geographical area, and scope of activity and that protect the employer's legitimate business interests.

Within these restrictions, Texas' state and federal courts have generally upheld agreements that have ranged from two to five years in length. The longer time periods in non-compete agreements have generally been allowable for key employees who have access to an employer's major customers and possess important proprietary information. Enforcement of noncompete clauses is limited to geographic areas where the employer in question does business or has customers, and where the employee provides services to the company's clients or customers. Noncompete clauses also must not prohibit employees from engaging in a certain career or occupation or forbid them from working in a certain industry in any capacity, as long as employees do not use proprietary information obtained while working in a former position to perform in a new position.

Texas's standard effectively requires employers to show that they have legitimate business interests to be protected through noncompete agreements, and that these agreements are narrowly focused as to their duration in time, location, and the scope of work involved. As in the case of Washington, these provisions provide flexibility for both employees and employers that takes the interests of both parties into account. They also do not substantially financially harm employees or constrict their ability to conduct business within a given field once their contract for employment has ended.

Were the FTC to use existing state-level frameworks such as these to guide the establishment of new national standards for noncompete clauses, a happy medium could be achieved. The Commission would achieve its goals of protecting competition and employee rights by imposing reasonable time frames and geographic limitations on agreements, while also avoiding any impediment to businesses' ability to protect their interests, intellectual property, and other capital should their employees seek employment elsewhere.

[2] Texas Free Enterprise and Antitrust Act of 1983, 68th Leg. (1983).

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Conclusion

Although APG appreciates the FTC's goal of ending abusive noncompete arrangements and making the workplace more competitive, APG is concerned that the FTC's proposed rule imposing a blanket invalidation of non-compete agreements nationwide is too far-reaching. Such an approach fails to consider the previously established state frameworks that better balance the interests of employers and employees; take local circumstances and market conditions into account; and have been in place for years in many areas of the country. We encourage the Commission to draw on these existing statutes, regulations, and state court rulings in amending its proposal. APG would welcome further opportunities to work with the Commission as its proposal is revised. If our organization can be of further assistance, please contact Jennifer Podulka, Vice President of Federal Policy, at jpodulka@apg.org.

Sincerely,

Susan Dentzer
President and CEO
America's Physician Groups