

TYPES NOT MAPPED YET February 10, 2023 | TTR not mapped yet | Nicole K. Jobe, Kevin C. Kifer

Diagnosing a proposal to eliminate non-competes: Five ways it impacts the health care industry

On January 5, 2023, the Federal Trade Commission (“FTC”) proposed an all-encompassing new rule to bar employers from including non-compete clauses in contracts with their employees. See below for the answers to five important questions about how this proposed rule impacts non-competes in the health care industry.

1. ***What does the proposed rule prohibit?*** The proposed rule decrees it “an unfair method of competition for an employer to [1] enter into or attempt to enter into a non-compete clause with a worker; [2] maintain with a worker a non-compete clause; or [3] represent to a worker that the worker is subject to a non-compete clause....” To avoid any gamesmanship or clever contract drafting, the proposal bars *de facto* non-compete clauses as well, where, for example, a non-disclosure agreement or training repayment agreement functionally “precludes the worker from working in the same field after the conclusion of the worker’s employment with the employer.”
2. ***Will the proposed rule impact currently existing non-competes?*** The far-reaching proposal is *retroactive*. As drafted, it would require the rescission of any applicable non-compete clauses entered into *prior* to the issuance of the proposed rule, and those rescissions must be done within 180 days after publication of the final rule. Moreover, any employer rescinding a non-compete clause must provide an individualized written or digital notice informing both *former and current* workers that the non-compete clause is no longer effective.
3. ***Are there any exceptions for job type or income levels?*** In a January 11, 2023, conference call regarding the new rule, the FTC Director of the Office of Policy Planning, Elizabeth Wilkins, opined that the proposed rule would reach as far as allowed by the FTC’s jurisdiction to regulate “unfair competition” and would encompass both employees and independent contractors at all job types and income levels. She did note that the FTC is seeking comment on whether lines should be drawn differently on these issues, and it has been reported elsewhere that the FTC is specifically seeking comment on whether non-competes for senior executives should be exempt or subject to a rebuttable presumption of unlawfulness.
4. ***Are there any exceptions?*** While the rule is broadly written, it has a few noted exceptions. It will not apply to banks or non-profits (they are outside FTC jurisdiction), nor to business-to-business non-compete agreements or to non-compete agreements related to the sale of a business, as long as the business holder at issue owns at least 25% of the sold entity. Director Wilkins explained that this 25% threshold was included to close potential loopholes regarding stockholding employees, but again noted that the FTC is interested in comments on the wording and function of this exception. The FTC is currently accepting comments on the proposed rule, and the comment period is open through March 10, 2023.
5. ***How does the rule impact the health care industry?*** The FTC’s proposed rule devotes significant attention to the effects of non-competes in the health care industry and, in particular, non-competes in physician contracts. Non-competes are a common feature of physician employment agreements, and the FTC anticipates that eliminating non-competes from physician contracts would generate significant growth in physician earnings. Despite the FTC’s broad statements in the proposed rule regarding physician contracts, the fact remains that non-profits (who are not subject to the rule) are prevalent



throughout the healthcare industry and it remains to be seen what impact the rule would have as these non-profits compete with other employers who are subject to the rule.

This blog was adapted for the health care industry from a publication recently published. You can read that publication [here](#).

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