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Wednesday, April 19, 2023

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

Re: Non-Compete Clause Rulemaking, Matter No. P201200

Dear Chair Khan:

On behalf of our more than 10,000 physician members, the Pennsylvania Medical Society (PAMED) opposes adoption of the proposed Federal Trade Commission (FTC) Non-Compete Clause Rule. Numerous variables impact the issues surrounding access to care and quality of care. The use of non-compete provisions in healthcare provider employment contracts being one such variable. While recognizing there are positive and negative aspects to the use of non-competes, PAMED has long opposed their use in physician contracts.

While it may appear counter-intuitive, PAMED must oppose adoption of the proposed rule for several reasons. Adoption of the proposed rule would cause undue harm to independent physician practitioners, treat non-profit healthcare employers and independent practitioners inequitably, and constitute exceedingly broad action taken without the appropriate consideration. PAMED believes this proposed rule should be abandoned to afford individual states the opportunity to address the issues concerning non-compete provisions.

However, for independent practitioners, the harms inflicted by an outright ban at this time would outweigh any benefits.

Adoption of the proposed rule would cause undue harm to independent physician practitioners.
Independent practitioners invest significant funds in the recruitment, training, and retention of physician and non-physician

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personnel. Restrictive covenants, including non-compete clauses, provide a measure of protection for the outlay of resources necessary to staff and operate an effective and economically viable practice. These provisions also foster practice stability to facilitate the confidence needed to maintain and/or grow a practice. Patients benefit from both the access to care and quality of care aspects. The proposed rule fails to adequately address how a practitioner can expect to recoup these necessary investments.

Adoption of the proposed rule would create other negative financial impacts on practitioners. While any existing non-compete provision would be rescinded, any benefit bargained-for in return for the non-compete provision would remain enforceable. As a result, practitioners would need to pay-out on financial incentives such as salary increases, benefits or severances without receiving the benefit of their bargain. This dichotomy would cause further economic harm to independent practitioners.

The rule treats non-profit healthcare employers and independent practitioners inequitably.

While adoption of the proposed rule would ban independent practitioners from utilizing non-competes, the FTC Act's non-profit jurisdiction limitation would exempt non-profit hospital and healthcare organizations from the ban. This inequity will greatly harm independent practitioners who compete with non-profit hospitals for staff. The non-profits enjoy great advantages in market power due to economies of scale and comparative wealth. As a result, independent practitioners face a David vs. Goliath-type environment when competing for staff. Disarming independents via the ban while allowing non-profits to continue to use them will only deepen the inequity of this power dynamic. The end result will be diminished quality of care and access to care for patients.

The short timeline and broad scope of this proposed rule warrants more thoughtful and nuanced consideration.

While some market concepts apply across the entirety of the U.S. labor market, there exist distinct factors related to specific labor markets. The healthcare labor market, in particular, is subject to distinct forces. Healthcare delivery requires workers possessing the widest possible range of skills, education, and training. From a skills, education and training standpoint, the gamut runs from service staff up through specialty-practicing physicians and C-suite-level administrators and executives. Narrowing the focus to look at providers, further demonstrates the broad range, encompassing the various delineations of nurses, nurse practitioners, physician assistants and physicians.

The examination of an action, such as this, that stands to significantly impact such a sensitive and varied labor market warrants great care and precision. What distinctions or special considerations are needed to ensure that the proposed action positively impacts the market and its customers? Here, the FTC has failed to take the time and effort to answer that question. Instead, a blanket rule has been introduced that makes no conscious exemptions, only exemptions based upon explicit limitations of the FTC's authority. The FTC

bases this broad rule on only the results of a few high-level studies, an amount of effort and depth wholly insufficient to form the basis for such impactful change.

The functional test analysis to determine the permissibility of any given provision further stands to cause economic harm to independent practitioners. The lack of clear guidance as to what constitutes a non-compete provision will inject uncertainty and mistrust into the employer-employee relationship. Pennsylvania courts have required any non-compete to be reasonable in terms of geographic scope and duration. The functional test injects subjectivity into this review process. This uncertainty will make it more difficult for employers to include critical provisions, such as a clause that provides for the recoupment of training costs, with any level of confidence that the provision will be enforceable.

The states are better positioned to address these issues.
Pennsylvania's physicians strongly encourage the Commission to drop the proposed rule in its entirety. Instead, the states should possess a clear field to address these issues. The states are better positioned to thoughtfully consider the relevant issues. State legislatures can work with interested parties in their respective states and address the non-compete issue in a manner that appropriately balances competing interests while accounting for market and industry differences in the respective state. Each state can fashion a thoughtful, sensible, and nuanced arrangement that works for employers and employees alike.

Sincerely,

F. Wilson Jackson, III, MD, AGAF, ASGE, FACG, FACP
173rd President, Pennsylvania Medical Society