The FTC's Non-Compete Ban: Anticipated Impacts on the Health Care Industry

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The Federal Trade Commission (FTC) issued its Final Rule banning non-compete agreements on April 23, 2024, effective September 4, 2024. The Final Rule prohibits any person from the following:

- entering into or attempting to enter into a contract containing a non-compete clause with a worker;
- enforcing or attempting to enforce a non-compete clause with a worker; or
- representing that the worker is subject to a non-compete clause.

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The Final Rule does not prohibit non-competes with senior executives that were entered before the effective date. Senior executives are workers who are in policy-making positions and were paid at least $151,164 in the preceding year. Any non-compete agreements entered with senior executives *after* the effective date of the Final Rule are prohibited.

Impact on the Health Care Industry

The Final Rule estimates that banning non-competes will result in $74 billion to $194 billion in reduced spending on physician services over the next decade. Clinical professionals and consumers are the clear winners under the Final Rule. Clinical professionals will have improved autonomy in seeking employment and competitive pay. Consumers will subsequently benefit from the estimated reduction in costs that result from increased competition and an increase in access to clinical professional services that may result from the Final Rule.

Conversely, employers of clinical professionals will no longer be able to rely on non-compete restrictions to control clinical staff retention, wages and salary.

Private equity companies using captive professional corporation models, management service arrangements and other structures to invest in physician practices, dental practices, and other health care delivery structures, may want to utilize new incentives to tie physicians to their arrangements, as the non-compete restrictions private equity companies often use to tie physicians to such arrangements will no longer be available.

Tax-Exempt Organizations

Many health care organizations are tax exempt under the Internal Revenue Code. On its face, the Final Rule does not apply to tax-exempt organizations, as Section 5 of the Federal Trade Commission Act of 1914, which provides the statutory basis for the Final Rule, prohibits "persons, partnerships or *corporations* from using unfair or deceptive acts or practices in or affecting commerce." In part, the Act defines a corporation as an entity "organized to carry on business for its own profit or that of its members." Tax-exempt status alone, however, is not a sufficient basis to fall outside the FTC's jurisdiction. To fall outside the FTC's jurisdiction (and be exempt from the Final Rule), a tax-exempt entity must show that there is an adequate nexus between the entity's activities and its alleged public purposes, and its net proceeds are properly devoted to recognized public, rather than private, interests.

Action Steps for Health Care Organizations

Health care organizations should review existing agreements with their employees and contractors to gauge the scope and impact of the Final Rule. Form employment or independent contractor agreements should be revised to remove non-compete clauses.

Organizations should evaluate other lawful mechanisms to protect their commercial interests and implement them accordingly. The Final Rule does not ban non-solicitation and non-disclosure restrictions, so long as those restrictions do not function to restrain workers from seeking or accepting other work or starting a business after their employment ends. The Final Rule also does not apply to restraints on *concurrent* employment (i.e., moonlighting with another health care organization).

Organizations may also consider alternative strategies for physician and other clinical, professional retention, including offering longer-term employment and contractor agreements and longer notice periods for termination.

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