

Issue Brief

FEDERAL ISSUE BRIEF



Analysis provided for MHA by Larry Goldberg, Goldberg Consulting

FTC Proposes Rule that Would Ban Non-compete Clauses

On January 5, 2023, the **Federal Trade Commission (FTC)** issued a press release regarding a proposed rule to prohibit employers from imposing non-compete clauses on workers. As yet, the FTC proposal has not been posted on the **Federal Register** website. Nonetheless, the FTC provides a copy of the 216-page proposal on its website at: <https://www.ftc.gov/legal-library/browse/federal-register-notices/non-compete-clause-rulemaking>.

The rule, if adopted, may impact many providers. The press release notes a comment period is being provided that will close on March 10, 2023.

The press release contains a simple and well-defined explanation and purpose of the rule. The following material is from the press release.

The FTC says that “true to their name, non-competes block people from working for a competing employer, or starting a competing business, after their employment ends. Evidence shows that non-compete clauses bind about one in five American workers, approximately 30 million people. By preventing workers across the labor force from pursuing better opportunities that offer higher pay or better working conditions, and by preventing employers from hiring qualified workers bound by these contracts, non-competes hurt workers and harm competition.”

“Non-compete clauses significantly reduce workers’ wages. When employers use non-compete clauses to restrict workers from moving freely, they have the power to suppress wages and avoid having to compete to attract workers. Based on existing evidence, non-compete clauses also reduce the wages of workers who aren’t subject to non-competes by preventing jobs from opening in their industry. According to FTC estimates, the proposed rule could increase workers’ earnings across industries and job levels by \$250 billion to \$296 billion per year.

“Non-compete clauses stifle new businesses and new ideas. Existing evidence shows that non-compete clauses hinder innovation in several ways — from preventing would-be entrepreneurs from forming new businesses, to inhibiting workers from bringing innovative ideas to new companies. In markets with fewer new entrants and greater concentration, consumers face higher prices—as seen in the health care sector.

“Non-compete clauses can exploit workers and hinder economic liberty. Workers often have less bargaining power than their employer. In many cases, non-compete clauses are take it or leave it contracts that exploit workers’ lack of bargaining power and coerce workers into staying in jobs they would rather leave. To varying degrees, each state restricts employers’ ability to enforce non-compete clauses due to concerns that they harm workers and threaten a person’s ability to practice their trade.

“Employers have other ways to protect trade secrets and other valuable investments that are significantly less harmful to workers and consumers. Employers often justify using non-competes with their workers to protect confidential information and to get the most out of their investments in training and capital. But the record to date shows that in California, North Dakota and Oklahoma — three states in which employers can’t enforce non-compete clauses — industries that depend on trade secrets and other key investments have still flourished. This shows that employers have other ways of protecting these investments.”

Proposed Rule on Non-compete Clauses

- The rule would provide that non-compete clauses are an unfair method of competition. As a result, the rule would ban employers from entering non-compete clauses with their workers, including independent contractors.
- The rule would require employers to rescind existing non-compete clauses with workers and actively inform their employees that the contracts are no longer in effect.
- Would save consumers up to \$148 billion annually on health care costs.

Comment

It has now been nearly a week since the FTC announced this proposed rulemaking and it has yet to be released on the ***Federal Register*** website. The lack of posting may indicate issues with the proposal within the FTC. Further, the press release says that the rule would have a 60-day comment period after publication in the ***Federal Register***. The specified March 10 date may no longer valid.

As noted above, this rule, if adopted, could impact many health care providers.