



April 19, 2023

Federal Trade Commission
Office of the Secretary
600 Pennsylvania Avenue NW, Suite CC-5610 (Annex C)
Washington, DC 20580

Non-Compete Clause Rulemaking, Matter No. P201200

The American Academy of PAs (AAPA), on behalf of the more than 168,300 PAs (physician assistants/associates) throughout the United States, appreciates the opportunity to provide comments on the Federal Trade Commission's (FTC) proposed Non-Compete Clause Rule.

In its overview of the proposed rule, the FTC defines non-compete clauses as contractual agreements between an employer and an employee or independent contractor that blocks a worker from working for a competing employer, or starting a competing business, within a certain geographic area and/or period of time after the worker's employment ends. The FTC's proposed prohibition of non-compete clauses is based on the concept that non-compete clauses are a violation of section 5 of the FTC Act, which covers unfair employer practices. Non-compete clauses have traditionally been addressed by state legislatures and regulatory agencies. However, the changing healthcare landscape has resulted in health systems with locations in multiple jurisdictions. The Academy feels this calls for a more uniform solution, like FTC's proposed rule.

AAPA believes that contractual non-compete clauses often represent an unfair restriction to workers' freedom of choice, reduce the ability for workers to seek new employment at will, has the potential to diminish the ability to increase earnings, and broadly decreases competition in the workforce. The ultimate impact of such restraints is to limit competition in the marketplace. Patients, health professionals, and access to care are all diminished when competition is restricted.

The Academy applauds the Biden Administration's Executive Order on Promoting Competition in the American Economy,¹ especially the concept of "banning or limiting non-compete agreements and unnecessary, cumbersome occupational licensing requirements that impede economic mobility."² AAPA also supports, in principle, the FTC's proposed rule to prohibit contractual non-compete agreements that serve to prevent a worker from seeking or accepting employment or operating a business, after leaving an employer.

¹ Executive Order on Promoting Competition in the American Economy, July 09, 2021. Available at: <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/07/09/executive-order-on-promoting-competition-in-the-american-economy/>. (Accessed March 16, 2023).

² FACT SHEET: Executive Order on Promoting Competition in the American Economy, July 09, 2021. Available at: <https://www.whitehouse.gov/briefing-room/statements-releases/2021/07/09/fact-sheet-executive-order-on-promoting-competition-in-the-american-economy/>. (Accessed March 16, 2023).

If adopted, the rule would also require employers to rescind existing non-compete provisions in contracts and inform workers in writing via letter, email, or text message that the agreement is no longer in effect and will not be enforced.

The Importance of Competition and Continuity

Competition benefits consumers. Competition in healthcare improves quality, enhances patient choice of available services, lowers patient costs, and encourages innovation. Access to care is a serious issue in many communities throughout the country and is often brought about by the lack of available health professionals. The existing and worsening shortage of health professionals in all medical specialties will harm patient access to timely care. Several factors are responsible for the inability of healthcare workers to meet the growing needs of patients including:

- Healthcare-related mergers and acquisitions in recent years have led to increased consolidation and concentration in markets across the country. This level of consolidation often limits worker choice by controlling labor markets.
- Burnout among health professionals, which was already a problem, significantly intensified during the COVID-19 pandemic.

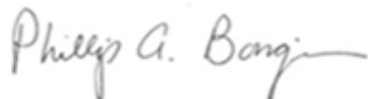
Contracts that contain non-compete clauses limit the mobility of health professionals and therefore cannot be discounted as yet another factor inhibiting access to care. This limited mobility can also mean that if a provider does leave, he or she will no longer be able to practice within a reasonable distance of existing patients. Especially for patients with complicated issues, this disruption in care could be detrimental to their overall health and well-being.

AAPA acknowledges that employers may have legitimate concerns regarding the protection of intellectual property, pricing information, confidential business, strategic and financial information, and/or ensuring that departing employees don't attempt to take customers (or patients in the case of healthcare workers) to their new employer. The proposed rule as written does not prohibit appropriate non-disclosure or customer non-solicitation agreements in employee contracts. Employers will be able to reasonably protect their interests in these matters if such agreements do not function as de facto non-compete clauses.

The Academy also recognizes the possible existence of specific business justifications for certain employment restrictions. For example, when employers offer fellowships, residency programs, or other unique and costly specialized training, it might be reasonable for those employers to require an agreement for employment for a limited period of time or to request a reasonable payback of training costs.

Thank you for the opportunity to provide feedback on the FTC's non-compete clause proposed rule. AAPA welcomes further discussion with the agency regarding these issues. For any questions you may have please do not hesitate to contact Michael Powe, AAPA Vice President of Reimbursement & Professional Advocacy, at michael@aapa.org.

Sincerely,



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Advocacy and Government Relations