

ASN Responds to FTC Noncompete Clause Proposed Rule

By Scott Bieber

The Federal Trade Commission (FTC) released a proposed rule on January 5, 2023, to prohibit employers from imposing noncompete clauses on workers. In issuing the proposed rule, the FTC cited evidence suggesting noncompete clauses significantly reduce workers' wages, stifle new businesses and new ideas, exploit workers, and hinder economic liberty.

Traditionally, legislation that impacts noncompete clauses for workers exists at a state level, marking this move as a significant effort on a national level. Three states currently have legislation that prevents employers from enforcing noncompetition clauses: California, North Dakota, and Oklahoma. In its release of the proposed rule, the FTC is quick to point out that despite the absence of noncompete clauses in these states, industries that depend on trade secrets and other key investments have flourished there, suggesting that companies are able to find other ways to protect their investments. The proposed rule has a broad reach and is not specific to the health care industry but has the potential to impact physicians and their employers directly (1).

Recent and historical actions by the FTC have shown interest in health care business operations in kidney care, particularly as it relates to dialysis markets and consolidation. Not long ago, the current FTC regulators recognized the impact that dialysis providers can have on industry consolidation and workforce availability for dialysis facilities. In 2021, the FTC intervened in DaVita, Inc., and Total Renal Care, Inc., on acquisition of The University of Utah clinics, citing a concern over reduced competition. In its decision, the FTC also prohibited DaVita from enforcing noncompete agreements and other employee restrictions (2).

Nephrologists are commonly exposed to noncompete clauses in employment agreements and also in contracting agreements for medical director services with dialysis organizations. The degree to which nephrologists are exposed to these agreements and the impact these agreements have on the health care system are largely unknown. Concern does exist, as illustrated by the FTC in the Utah example, that medical director arrangements between locally established physician groups and consolidated dialysis providers can lead to less competition in local dialysis markets. Established dialysis providers typically will have the advantage in locking physician groups into noncompete arrangements, thus restricting access for new dialysis companies to medical director leadership. This practice has the potential, particularly in rural environments, to lead to "dialysis deserts," limiting patient access to care.

Additionally, some academic medical programs have been known to subject junior faculty, directly out of training, to noncompete arrangements at a time when graduating trainees may not fully understand complex contractual agreements. Trainees may feel intimidated or uncomfortable negotiating such agreements with mentors who they respect and trust. Contractual-restrictive covenants are applied more frequently to women and minorities, who may also feel that they are not in a position to negotiate (3). Research has suggested that banning noncompete clauses nationally may help to close gender and racial wage gaps by 3.6% to 9.1% (4).

Following interest from numerous ASN members, the society's Quality Committee—formerly titled the Quality, Patient Safety, and Clinical Practice Committee—reviewed the FTC proposed rule on behalf of ASN members. The ASN Quality Committee aids the policy and advocacy effort of the society with a focus on the regulatory aspects of

public policy. The end-product of this effort, along with subsequent review by the ASN Council, was a letter sent by ASN President Michelle A. Josephson, MD, FASN, to the FTC (5). In the letter, ASN highlighted its full support for the proposed rule, focusing on two key issues summarized below.

The unique role of doctors and medical professionals for patients and the community

At the forefront of ASN's response to the FTC proposed rule was a desire, above all else, to preserve the patient-doctor relationship. Nephrologists and other highly trained kidney care professionals provide some of the most complex, long-term, longitudinal care for patients in all of health care. Noncompete arrangements have the potential to disrupt these relationships when health care professionals are forced to relocate due to restrictive covenants.

Recent shifts from independent practice to large group-employed practice and health care consolidation have exposed more physicians to contractual obligations that have the potential to disrupt the patient-physician relationship even further into the future. Noncompete clauses can infringe on the right of the patient to select the physician who they choose. When employment arrangements do not work out as planned, health care professionals deserve the freedom to practice unimpeded in the location that is best for their patients, themselves, and their families. These fundamental, individual rights should outweigh any health care system or business interest.

Unresolved questions for nonprofits

The question of how the proposed rule will apply to nonprofit health care employers is uncertain. There is a suggestion in the proposed rule that nonprofit organizations will be exempt from it. In its letter, ASN points out that a majority of hospitals in the United States are not-for-profit organizations, and dialysis providers are a mix of for-profit and not-for-profit organizations (5). If the proposed rule is applied as suggested—exempting nonprofit organizations—concern exists that an unfair distortion in the labor market may occur, particularly for physicians and other health care workers.

ASN asked the FTC to clarify this issue and expand the proposed rule by including nonprofit health care employers, prohibiting them from binding their employees to noncompete agreements. This approach would level the playing field for all health care employers, including nephrologists.

Differing opinions

The FTC asserts that its authority to regulate noncompete clauses exists under section 5 of the Federal Trade Act, which prohibits unfair methods of competition. Opponents to the proposed rule argue about regulatory overreach by the FTC and assert that such matters should be handled in a more direct fashion by Congress through legislation or remain in the domain of state law. At the time of drafting this article, business and industry seem to be lining up in opposition and are likely to launch efforts to lobby Congress and challenge the final rule in court. It is also unclear if (or how) the FTC will revise the proposed rule based on the feedback it received from ASN and other stakeholders.

Unfortunately, many other advocacy groups that represent physicians and health professionals have articulated

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mixed responses, been silent, or opposed the FTC rule as proposed. For example, the American Medical Association opposed the proposed rule, citing concerns about the impact it will have on physicians who own and operate medical practices. Whereas concern about the impact the rule may have on small practices and independent nephrologists exists, it may be overstated, as the costs that a small practice would incur in legal fees to enforce a noncompete agreement would likely outweigh any benefit obtained.

In conclusion, the future of the proposed rule is quite uncertain. Even so, ASN members can take pride in the fact that their professional organization stood with them to support their individual rights and liberties, advocating for the interests of patients and their physicians above those of business entities. ■

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References

1. Federal Trade Commission. Fact sheet: FTC proposes rule to ban noncompete clauses, which hurt workers and harm competition. https://www.ftc.gov/system/files/ftc_gov/pdf/noncompete_nprm_fact_sheet.pdf
2. Federal Trade Commission. FTC imposes strict limits on DaVita, Inc.'s future mergers following proposed acquisition of Utah dialysis clinics. October 25, 2021. <https://www.ftc.gov/news-events/news/press-releases/2021/10/ftc-imposes-strict-limits-davita-incs-future-mergers-following-proposed-acquisition-utah-dialysis>
3. Marx M. Employee non-compete agreements, gender, and entrepreneurship. *Organ Sci* 2021; 33:1756–1772. <https://pubsonline.informs.org/doi/full/10.1287/orsc.2021.1506>
4. Johnson MS, et al. The labor market effects of legal restrictions on worker mobility. Social Science Research Network. June 6, 2020. <https://ssrn.com/abstract=3455381>
5. Josephson MA; American Society of Nephrology. Letter to Lina M. Kahn, Chair, Federal Trade Commission. April 18, 2023. <https://www.asn-online.org/policy/webdocs/04.18.23ASNFTCNon-Compete-BanCommentLetterFINAL.pdf>