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April 18, 2023

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

Submitted electronically via www.regulations.gov

Re: Proposed Non-Compete Clause Rule, 88 Fed. Reg. 3482, RIN 3084-AB74, Matter No., P201200

Dear Chair Khan:

On behalf of our more than 135 member hospitals and integrated health systems, the Wisconsin Hospital Association (WHA) appreciates the opportunity to provide comments on the Federal Trade Commission's proposed Non-Compete Clause Rule. WHA was established in 1920 and is a voluntary membership association. Our members include small-, mid- and large-sized hospitals, including many Critical Access Hospitals and several large academic medical centers. We represent hospitals in every part of the state—from very rural locations to larger, urban centers like Milwaukee.

The Wisconsin Hospital Association joins the significant concerns expressed by the American Hospital Association, U.S. Chamber of Commerce, Wisconsin Manufacturers & Commerce, and numerous other organizations across the U.S. economy, regarding the Federal Trade Commission's (FTC) proposed Non-Compete Clause Rule, and we similarly join in their opposition to the proposed rule.

As stated by other commenters, the proposed regulation errs by seeking to create a one-size-fits-all rule for all employees, especially because Congress has not granted the FTC the authority to issue rules that would invalidate both existing and future non-compete agreements across the entire United States economy.

Further, the proposed rule's one-size-fits-all approach deviates from the decades of federal and state court precedent in which courts examine contracts between parties *in the context of the entirety of agreement between the parties* utilizing a rule of reason approach to determine whether the contract is an illegal, unreasonable restraint of trade.

A blanket declaration that all non-compete related terms are unreasonable and illegal not only substitutes the will of the consenting, contracting parties and their assessment of the reasonableness and adequacy of the entirety of the bargain between each other, but also replaces our state and federal courts' appropriate approach to determining what is an unreasonable and illegal restraint of trade through an individualized examination of the context of the consenting parties to the contract, the benefits of the agreement flowing to both contracting parties, and the breadth or narrowness of an alleged unreasonable non-compete related term.

The proposed rule also substitutes Wisconsin's policy choice to allow some, but not all, non-compete clauses. Like many other states, Wisconsin's legislature has enacted a statute that renders non-compete agreements "illegal, void and unenforceable" unless the restriction is "reasonably necessary for the protection of the employer or principle." Wisconsin's legislative choice has further been interpreted, clarified, and supported by substantial case law in both state and federal courts. The entirety of s. 103.465, Wis. Stats., reads:

"103.465 **Restrictive covenants in employment contracts.** A covenant by an assistant, servant or agent not to compete with his or her employer or principal during the term of the employment or agency, or after the termination of that employment or agency, within a specified territory and during a specified time is lawful and enforceable only if the restrictions imposed are reasonably necessary for the protection of the

employer or principal. Any covenant, described in this section, imposing an unreasonable restraint is illegal, void and unenforceable even as to any part of the covenant or performance that would be a reasonable restraint.”

Wisconsin Manufacturers & Commerce in its comment letter to the FTC opposing this proposed rule highlighted how Wisconsin’s current no-compete law is beneficial to Wisconsin’s economy:

“Allowing for appropriate non-compete clauses helps Wisconsin’s economy, employers and employees. Having a blanket ban on non-compete clauses will harm both employers and employees. One way that non-compete clauses are beneficial to employers and employees is that the clauses encourage investment in employees. As the FTC acknowledges, two studies have found that “non-compete clauses increase employee training and other forms of investment.””

WHA also echoes the concerns raised by Wisconsin Manufacturers & Commerce (WMC) regarding the proposed FTC rule’s impact in Wisconsin on employer investment in employee education, training and development, as well as the impact on communications between employers and employees regarding business strategy, business plans, and other information sharing and intellectual property in Wisconsin.

“Under this rule, WMC members are concerned that employer-paid training and education, such as skills-based training, graduate tuition reimbursement and post-graduate tuition reimbursement, would be severely curtailed as the employer could no longer expect the employee to stay with the company for any duration. Put another way, the rule would give the employer no recourse if the employee was poached by another employer upon completing their training or receiving their tuition reimbursement. The investment in training and education would no longer provide reasonable returns, and employers will simply end the programs. Employees would have fewer training and educational opportunities as a result.

Additionally, Wisconsin’s employers use non-compete clauses to protect their intellectual property. Without the availability of non-compete clauses, employers will be forced to take significant efforts to restrict employee knowledge, including strict limitations on information sharing, restriction of computer access and devising business structures in order to protect trade secrets and client lists.”

These points of opposition to the proposed rule raised by WMC in the context of Wisconsin’s overall economy undergird Wisconsin’s current balanced statutory approach to non-compete clauses and apply equally if not more so to the delivery of health care in Wisconsin.

Wisconsin hospitals and health systems make significant investments educating, training and supporting its health care workforce; a blanket prohibition on non-competes creates new questions regarding these investments at the very time the nation and Wisconsin is experiencing critical, long-term health care staffing challenges. Further, non-compete clauses can encourage the sharing of proprietary information such as business plans, strategies and research within hospitals and health systems, including with both clinicians and non-clinicians, to achieve outcomes mutually beneficial to the employer and its employees. Blanketly prohibiting non-compete agreements that are reasonably necessary to protect such investments and communications will have negative impacts on health care delivery that are ignored by the proposed rule.

WHA joins with the American Hospital Association, U.S. Chamber of Commerce, Wisconsin Manufacturers & Commerce, and numerous other organizations across the U.S. economy in asking the FTC to withdraw the proposed rule. Thank you for your consideration of these comments.

Sincerely,

/s/

Eric Borgerding
President and CEO