



Wisconsin Medical Society

DATE: April 19, 2023

TO: The Honorable Lina M. Kahn
Chair, Federal Trade Commission

RE: Non-Compete Clause Rulemaking, Matter No. P201200

Thank you for this opportunity for the Wisconsin Medical Society (WisMed) to share our opinions on the Federal Trade Commission's proposed rule related to noncompete clauses in employment contracts. As the state of Wisconsin's largest physician organization, WisMed's members are dedicated to the best interests of their patients. Current utilization of noncompete clauses in physician employment contracts often interferes with a patient's ability to access care from the physician of their choice. As more targeted contracting provisions protecting employers are available, WisMed supports the proposed rule.

Non-Compete Restrictions Are the Broadest Forms of Restrictive Covenants

Compared to other types of restrictive covenants in employment contracts, a noncompete provision is the broadest. As has been pointed out in pending Congressional legislation (S.220 – Workforce Mobility Act of 2023), employment contracts containing duration and distance noncompete clauses “are blunt instruments that crudely protect employer interests” at the expense of productivity and worker mobility.

As more physicians move from being self-employed to working for hospitals, health systems, or corporate entities, the typical balance of power inherent to contractual relationships has been skewed. Individual physicians may have little bargaining power to object to noncompete clauses when employment contracts are offered; our members have reported that some hospitals/health care systems often portray the clauses as non-negotiable. The clauses are therefore indeed “blunt instruments.”

This imbalance of bargaining power is especially true for physicians seeking their first jobs. Emerging from medical school with hundreds of thousands of dollars in debt and having spent years focusing almost exclusively on learning their medical skills, new physicians can find the prospect of hiring legal representation to counter a well-established team of hospital/health system attorneys too daunting. Grateful to finally embark on their active medical career, physicians sign contracts loaded with restrictive provisions that can lie dormant for years, emerging only after important patient-physician relationships have been established. Noncompete clauses are often fatal to continuing that relationship – if a physician wishes to work elsewhere, time and distance restrictions in noncompete clauses can make it impossible for the patient to follow the physician to whom they have entrusted their care.

That is, if the patient even discovers that their physician is no longer employed by a hospital or health system. Too often we hear anecdotes about a patient calling to make an appointment with their physician, only to be told that the physician no longer works at the hospital or clinic. Sometimes no notice is given to a patient about their physician's departure, with the physician told that they cannot contact their patients to let them know how to continue the relationship. This scenario is a prime example of how the health care consumer is often harmed due to these restrictive employment contract clauses.

Employer Protections Can Be Warranted, But More Targeted Contract Provisions Should Be Used

While employers should not use “blunt instruments” to protect their interests when hiring a physician, there are situations where those interests can be protected by more targeted contract provisions – making that contract much more balanced between the parties. Looking again to the Workforce Mobility Act of 2023, that legislation rightly points out other contracting provisions that can “protect legitimate interests and property,” such as trade secret protections, intellectual property protections, and nondisclosure agreements.

Another protection can include liquidated damages if a physician leaves employment before the employer recoups costs associated with recruiting a physician. An agreement specifying the amount a physician would reimburse an employer upon a departure earlier than agreed to in the contract is a much more balanced arrangement on its face than a broad, never-expiring set of time and distance provisions.

Many health care employers default to using noncompete clauses in their contracts when hiring any physician – not just those that have been specially targeted for recruitment. Perhaps this is not surprising, considering current incentives. Wisconsin is one of the many states allowing these clauses in contracts, even though the breadth and length of their effect can be considered one-sided. It is therefore much simpler for the employer to establish the use of these clauses as a standard business practice rather than tailoring a contract for a specific physician they wish to hire.

Simply put: they do it because they can. A fully implemented rule will properly remove this incentive.

The Rule Proposal Can Help Support WisMed’s Mission

The Wisconsin Medical Society’s mission is to improve the health of the people of Wisconsin by supporting and strengthening physicians’ ability to practice high quality patient care in a changing environment. The FTC’s proposal to eliminate noncompete provisions in most employment contracts will help preserve important patient-physician relationships and help alleviate what is often a very imbalanced employee-employer relationship – especially early in a physician’s career. We support implementation.

Thank you for the opportunity to provide input on this important rule proposal. Please contact Wisconsin Medical Society Chief Policy and Advocacy Officer Mark Grapentine, JD with any questions.