



The past, present & future of noncompetes

There are major changes in the works for noncompete clauses.

BRUCE ARMON

THERE HAS BEEN CONSIDERABLE ATTENTION to noncompete clauses since the Federal Trade Commission published its final rule to ban most of them. The final rule was not drafted specifically for physicians, but it will impact physicians if the final rule is not delayed or rescinded by the federal courts.

As of the date of writing this article, there are several lawsuits which have been filed to stop the adoption of the final rule. The Federal Trade Commission ban is scheduled take effect on September 4, 2024.

What does the final rule state?

The final rule rescinds existing noncompetes for most workers who are not “senior executives.” Additionally, if it takes effect, it bans noncompete clauses from being signed on or after the effective date for all employees,

including senior executives, in businesses under FTC jurisdiction.

The FTC defines a “senior executive” as satisfying two conditions: they must be in a “policy-making position,” and the individual must have a total annual compensation of at least \$151,164 in the preceding year (or annualized if the individual was only employed by the entity for a portion of the preceding year).

With the exception of employers in states that already ban noncompete provisions, the clauses are considered a normal part of a physician’s employment agreement. Similarly, for physicians beginning their careers or considering new employment, the noncompete clause—and the geographic scope and the length for which it applies—is often one of the key negotiating points to consider before signing a contract.

To better understand the important factors

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Nicole Loeb



Contracts without noncompete clauses may help early-career physicians feel more comfortable putting down roots in a community, says **Kiera Kingston, M.D.**

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behind noncompete clauses, we have considered four different perspectives: a private practice employer, a physician finishing training, an academic medical center employer and an established physician.

The private practice perspective

Most physician private practices face increased staffing costs, changing relationships with nearby hospitals, call coverage fatigue, flat or small increases in government and commercial carrier reimbursements and maintaining physician continuity.

It can be very disruptive for a private medical practice—no matter the size—to lose a physician, particularly if the physician goes to a competitor in the community.

According to Michael Piskun, M.D., president of Jersey Urology Group, P.A., based in southern New Jersey, “the lack of a restrictive covenant in an employment agreement has the potential to create seismic changes in health care employment patterns.”

Jersey Urology Group is the largest private practice urology group in the communities it serves. That is an advantage because physicians can own a stake in the practice and maintain some level of control of their professional destiny.

Jersey Urology Group remains aware that community hospitals are increasingly recognizing the importance of having additional urologists. If Jersey Urology Group did not or could not have a noncompete clause in their physician employment agreements, Piskun envisions a scenario “where doctors can become ‘free agents’ who move

from hospital system to hospital system for the highest bidder.”

Piskun is not sure if banning noncompete clauses will “harm hospital employers or private practices more, but it will negatively affect both,” he says.

Piskun also believes the inclusion of a restrictive covenant in a physician’s employment agreement has “a protective effect for practices and encourages the employer and each employee to work out their differences as you would try to do in a marriage.” Without one, he says, employers and physicians may spend more time and energy working on transition steps instead of keeping the relationship intact.

The “new” physician perspective

After training, physicians often have choices for their career paths far beyond what’s presented by the training institution. Kiera Kingston, M.D., is double boarded in sports medicine and foot and ankle orthopedics.

“There is a lot of stress and anxiety finding your first job out of training,” she says. “Ultimately, it’s a big decision not just for me but my family as well.” After completing her fellowship in Massachusetts, there was a lot Kingston considered before accepting a job in the Midwest. “I had to consider many factors including location, professional opportunity for both me and my spouse, proximity to family, salary, amongst many other factors,” she says.

During contract negotiations, Kingston was very aware that the FTC’s ban regarding noncompetes had just been published. Like many

physicians who complete their training, she hoped to find a dream job where she could spend her entire professional career. Kingston understands, however, “the reality is that many physicians will leave their first job after a few years, which is why the noncompete language is so important.”

As part of her job search, it was important for Kingston to find a stable professional home. With respect to the noncompete, she was acutely aware that, “if something doesn’t work out, having the ability to find another position within the same region without having to uproot and relocate my family was very important to me after three moves in three years.”

In addition, physicians would like the opportunity to establish professional and personal roots in the communities they choose to serve. Signing a contract that does not include a noncompete provision, she says, “will help to alleviate some of the stress of signing your first contract knowing that if the job doesn’t work out as planned, you will have more opportunity to remain within the community and home you started your career.”

The academic medical center perspective

Academic medical centers have a dual role: training the next generation of physicians and providing excellent clinical care to every patient they treat. One of the most effective ways of training residents and fellows is to have great attendings and faculty who are committed to the institution.

Robert Wax, Esq., is the senior vice president and general counsel

for St. Luke's University Health Network with hospitals and offices in Pennsylvania and New Jersey. Wax notes that "a prohibition on restrictive covenants for health care providers would be highly problematic for several reasons." As a first example, Wax says, "hospitals invest significant time and resources recruiting and retaining providers. Contracts, including covenants, allow hospitals to ensure the continuum of care for our patients."

Wax is concerned about the potential impact of the FTC ruling. "If covenants are invalidated, hospitals and others will begin bidding wars for physicians, which will lead to severe instability in the market and increased health care costs. These costs will be passed along to consumers."

Continuity in the health care delivery system is critically important. In addition to the potential economic battle that could unfold if hospitals compete directly against one another for physician talent in an environment without the ability to enforce noncompete clauses, Wax also notes the role of private equity firms and their ability to impact the supply and demand balance critical to ensuring a healthy physician infrastructure in a community.

From Wax' vantage point, "the current system works." In Pennsylvania, where St. Luke's has the majority of its business and clinical commitments, the laws relating to restrictive covenants require the provision to be reasonable in length and geographic scope, and "if a covenant extends beyond a reasonable timeframe or defines the restricted area too broadly, it is



"Restrictive covenants remain a contentious component of most hospitalists' contract negotiations," notes Nicole Purcell, D.O.

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unenforceable."

The established physician perspective

Of the four perspectives, if the noncompete ban does not hold up in court, the experienced physician who is considering a job switch likely has the most to gain or lose depending on whether a noncompete is part of their

current employment agreement.

Nicole Purcell, D.O., is a neurohospitalist with almost two decades of experience as a practicing physician. From Purcell's perspective, "physicians spend many years indebted to education, training and enormous financial strain to be faced with restrictive covenants that seemingly only benefit the employer. This is at the

expense of limiting the physician's freedom to choose the location and environment that permits autonomy to practice medicine, should they find themselves in an unfavorable set of working circumstances."

Experienced physicians are not widgets that can be easily replaced. Patients want continuity of care from their trusted provider. A physician is a critical element to the caregiver team.

Most physicians don't want to move to take on a new job, given the inevitable disruptions a move causes to the physician's personal life.

Suggested next steps

New and established physicians and private practice employers and academic medical centers should keep abreast of the status of court challenges to the FTC's final rule. Closely monitor developments in the state where you provide services.

Established physicians and employers should review their current noncompete clause provisions and confirm applicability if the FTC ban takes effect or the state creates a similar statute relating to noncompete provisions. They may also think ahead and consider changes that should be made to their agreements and the noncompete clauses if or when a revision becomes necessary.

Physicians who are finishing training should consider the applicability of noncompete provisions in the locations where they are considering practice opportunities and prioritize their choices accordingly. Most physicians want to have maximum flexibility as they begin their professional careers.

Established physicians who have not been in their current practice setting for an extended period of time and or have not yet established deep professional and personal roots in their community should carefully consider their options if they need to or want to make a professional move.

Where permitted, noncompete clauses have always been an important component of the employment contract for employers and physicians. It is critical to understand the impact of these provisions and, until the FTC ban goes in effect, whether they are enforceable in the states where you practice. •

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