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FTC Takes Aim at Noncompete Agreements in the Health Care Sector

WRITTEN BY

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The Federal Trade Commission (FTC) announced on September 10 that it issued several warning letters to large health care employers and staffing firms regarding potentially anticompetitive conduct in the health care sector, specifically inappropriate employee restrictive covenants. The letters urged their recipients to "conduct a comprehensive review of [their] employment agreements—including any noncompetes or other restrictive covenants—to ensure that they comply with applicable laws and are appropriately tailored to the circumstances." The FTC's announcement did not name the companies that received the letters.

This move comes on the heels of an agency vote to drop its defense of the agency's 2024 nationwide noncompete ban, which was enjoined on constitutional grounds. Despite that withdrawal, FTC Commissioner Ferguson stated that the agency will continue "enforcing the antitrust laws aggressively against noncompete agreements" by "patrolling our markets for specific anticompetitive conduct that hurts American consumers and workers, and taking bad actors to court." In short, the FTC will continue to police noncompete agreements on a case-by-case basis.

In its September 4 request to the public for information on noncompetes, the FTC stated that it had reviewed evidence suggesting that these types of restraints may "unjustifiably prevent workers from moving to better jobs, impede new business formation, prevent the shift of labor from over-served to under-served markets, and harm rival employers' ability to compete." The request to the public included two requests specifically focused on harm in the health care services sector:

- Have any noncompete agreements covering workers in the health care sector affected wages, labor mobility, or the availability, quality, or cost of health care services in particular? If so, how?
- Have any noncompete agreements made it more difficult for providers of health care services to hire physicians, nurses, or other professionals? If so, how?
    - Has the provision of or the competition within any specific health care service in a geographic area been substantially affected by noncompete agreements? Can you provide examples?

In the letters, the FTC noted that noncompete agreements used by health care employers and staffing companies can have "particularly harmful effects in healthcare markets where they can restrict patients' choices of who

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provides their medical care—including, critically, in rural areas where medical services are already stretched thin."

In addition to encouraging the recipients of the letters to review their employment agreements, the agency urged any company that currently uses unfair or anticompetitive noncompetes "to discontinue them immediately and to notify relevant employees of the discontinuance." According to the FTC, noncompetes may run afoul of Section 5 of the FTC Act if they are "overbroad in duration or geographic scope." The FTC also noted that they "may be inappropriate for certain roles entirely." On the other hand, based on the agency's recent enforcement action, the use of noncompete agreements for directors, officers, and senior managers tied to the grant of equity or equity-based awards, and noncompetes entered into in connection with the sale of a business by the preexisting equity holders, are unlikely to raise concern.

Any company that receives such a letter and that requires some or all of its employees to agree to restrictive covenants should consult with counsel and take action to avoid further agency scrutiny. Similarly, if the letter recipients are or might be in litigation against employees over noncompete or nonsolicitation agreements, the letter and the manner in which the employer responded to the letter are likely to be raised. More generally, the agency's recent actions are a clear sign that the FTC will continue to enforce the law against what it views as overly restrictive noncompete agreements. To mitigate the FTC Act risks, employers should, at a minimum:

- Document the justifications for their noncompetes;
- Limit their use to employees with job responsibilities relevant to those justifications;
- Narrow the restrictions in terms of geography, timeframe, and types of later employment;
- Consider the use of less restrictive options, such as nondisclosure and nonsolicitation agreements and, where possible, use less restrictive alternatives; and
- Where less restrictive alternatives are not sufficient, document why they are not adequate.

It is also important for companies to ensure compliance with the many and evolving state laws governing employee restrictive covenants.

Troutman Pepper Locke's Health Care, Antitrust, and Labor + Employment teams will continue to monitor the activity in this evolving area.

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