STRATEGIC MANAGEMENT SERVICES

Federal Trade Commission Moves to Ban Non-Compete Agreements

Richard P. Kusserow | November 2023

Key Points:

- **Nearly half of primary care doctors in group practices are under such agreements**
- **Many states have enacted laws prohibiting non-compete agreements**
- **Compliance Officers should be prepared to ensure compliance with the rule changes**

Non-compete agreements, also called restrictive covenants, are a common requirement for employment in health care. They may appear as separate non-compete contracts or contract clauses preventing physicians from joining or operating a competing practice within a certain distance or timeframe. The Federal Trade Commission (FTC) is proposing a rule that would ban non-compete clauses in employment contracts. This would have a major impact on the healthcare sector, which relies on restrictive covenants to retain physicians and the patients they treat. The new rule would prohibit (a) employers from using non-competes in contracts with employees, (b) void existing such clauses and agreements, and (c) require informing workers they are no longer in effect. This would free them to work for a competitor, undermining the status quo in physician-employer relationships that keep physicians from working for a competing practice and taking patients with them. Hospitals argue that non-competes help to stabilize patient care by limiting physicians from leaving the system. They note the non-competes protect the heavy investment in physicians' education, training, and recruitment. However, hundreds of physicians have filed comments with the FTC supporting the rule, with stories of how they were locked into jobs they didn't want to be at anymore and were unable to move to a competitor within the same city, county, or even state for a certain amount of time after their departure.

Current Status of Non-Compete Agreements

Under the Federal rule-making process, the FTC provided 60 days for public comment on their proposed rule. Upon making a new rule, it would not take effect for 180 days, wherein all current and past employment contracts would be forced to comply with the rule changes at that point.

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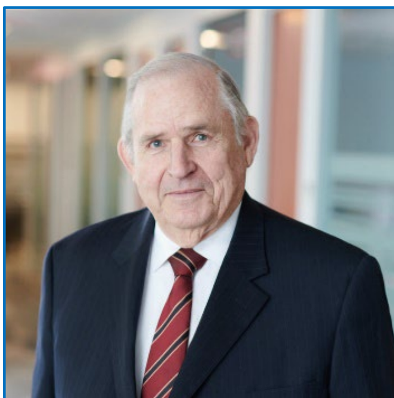
However, the FTC has reportedly delayed its vote on the ban until 2024. It should be noted that many states have already enacted laws restricting non-compete agreements. Major legal battles can be expected by any new rule led by the American Hospital Association and large health care systems. An interesting side note is that the FTC authority does not apply to “an entity that is not organized to carry on business for its own profit or that of its members” (non-profits), which would mean that all hospitals would not be treated the same.

What Should Compliance Officers Do?

If these new rules go into effect, Compliance Officers, working with Legal Counsel, should (1) inform management of the changes; (2) review all existing non-compete agreements on file and determine if they comply with the new regulations and state laws; (3) determine the effect of the requirement for employees to reimburse their employer for training if they leave their jobs; and (4) develop and deliver training programs for leadership on what is and isn’t permissible.



About the Author

Richard P. Kusserow established Strategic Management Services, LLC, after retiring from being the DHHS Inspector General, and has assisted over 2,000 health care organizations and entities in developing, implementing and assessing compliance programs.

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