

National Association for Behavioral Healthcare



Access. Care. Recovery.

17 March 2023

The Honorable Lina M. Khan, Chair
Federal Trade Commission

Submitted Electronically

Re: Notice of Proposed Rulemaking, Federal Trade Commission; Non-Compete Clause Rule. RIN 3084-AB74; Matter No. P201200.

Dear Chair Khan:

On behalf of our members, the National Association for Behavioral Healthcare (NABH) requests that the Federal Trade Commission's (FTC) withdraw its [proposed rule](#) that would ban non-compete clauses.

NABH represents behavioral healthcare systems that provide the full continuum of mental health services and substance use disorder (SUD) treatment, including inpatient, residential treatment, partial hospitalization, and intensive outpatient programs, as well as other facility-based outpatient programs, and medication assisted treatment centers. Our membership includes behavioral healthcare providers in 49 states and Washington, D.C.

While the NABH acknowledges the FTC's other efforts to address issues of genuine, unequal bargaining power between certain employers and certain types of workers, this proposed rule should be withdrawn for the following reasons.

First, the rule proposes an overly simplified, one-size-fits-all approach for *all* employees across *all* industries. From a behavioral healthcare perspective, the proposed rule would profoundly alter the healthcare labor market – particularly for physicians and senior hospital executives – by instantly invalidating millions of dollars of existing contracts. The rule would affect the full array of NABH members' employees, including those who are highly trained and lower skilled; as well as both highly compensated and lower-wage employees.

Also, physicians and senior executives present specific considerations with respect to non-compete agreements. In addition, despite the scope of its impact, the rule neglects the consequences of applying its requirements only to for-profit hospitals, especially in markets where for-profit and non-profit providers compete for highly skilled employees and senior executives.

We also oppose this rule because now is not the time to upend the healthcare labor markets. The COVID-19 pandemic exacerbated tensions in the healthcare workforce, including

900 17th Street, NW, Suite 420
Washington, DC 20006-2507

Phone: 202.393.6700
Email: nabh@nabh.org
Web: www.nabh.org



heightened shortages of skilled behavioral and other healthcare workers. Data show, for example, that nearly one-quarter of healthcare workers say they are likely to leave the field soon.¹ Meanwhile, the United States will face a physician shortage of as many as 124,000 by 2034.² The U.S. Health and Human Services Department (HHS) has observed that “[s]hortages and maldistribution of healthcare workers...were a major concern even before the pandemic”³ and that the pandemic “put extreme stress on the health care workforce in the United States,” causing many providers to report “critical staffing shortages.”⁴ And looking to the future, “many of the impacts the pandemic has had on the workforce are cumulative and may not resolve quickly,” and “the longer-term workforce challenges remain.”⁵

Finally, the FTC should withdraw the rule because Congress has not given the FTC the power to promulgate it. The FTC has no statutory authority to issue a rule that would invalidate both existing and future non-compete agreements across the entire U.S. economy. Unfortunately, the proposed rule cites as its authority Sections 5 and 6(g) of the *FTC Act*, which does not actually authorize the agency to engage in rulemaking to prohibit business practices that the FTC deems an unfair method of competition.

In addition, even if the FTC had rulemaking authority under those provisions, Congress has not granted it the authority to regulate such an extensive portion of the American economy. Finally, even if the FTC had the extraordinary regulatory authority to prospectively prohibit *future* non-compete agreements, it lacks such authority to act to invalidate *existing* private contracts.

Under this rule, states would continue their existing regulation of non-compete agreements, consistent with local conditions and markets. Some states regulate non-compete agreements for low-wage workers⁶; some states exclude physicians from non-compete agreements restrictions^{1,8}; Texas allows departing physician to end non-compete agreement by

¹ Kelly Kooch, *23% of healthcare workers likely to leave healthcare soon, poll finds*, Becker's Hospital Review, February 2, 2022. <https://www.beckershospitalreview.com/workforce/23-of-healthcareworkers-likely-to-leave-healthcare-soon-poll-finds.html>.

² *The Complexities of Physician Supply and Demand: Projections from 2019 to 2034*, Association of American Medical Colleges, June 2021. <https://www.aamc.org/media/54681/download>.

³ Department of Health and Human Services, Assistant Secretary for Planning and Evaluation, *Issue Brief: Impact of the COVID-19 Pandemic on the Hospital and Outpatient Clinician Workforce* (May 3, 2022), at <https://aspe.hhs.gov/sites/default/files/documents/9cc72124abd9ea25d58a22c7692dccb6/aspecovid-workforce-report.pdf>.

⁴ *Id.*

⁵ *Id.*

⁶ *E.g.*, 820 Illinois Compiled Law 90/5; Rhode Island Gen. Laws § 28-59-2 ¹⁸ *E.g.*, District of Columbia Law 24-175; Tennessee Code § 63-1-148.

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paying a buyout⁷; New Mexico allows mid-employment non-compete agreements⁸; and some states specifically limit nurse staffing agencies from using non-compete agreements.

Thank you for considering our comments. If you have any questions, please contact me directly at shawn@nabh.org or 202-393-6700, ext. 100.

Sincerely,

Shawn Coughlin
President and CEO

⁷ Tex. Bus & Com.15.50.

⁸ NM Stat § 24-11-2 (2015)(C).

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