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April 19, 2023

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VIA ELECTRONIC SUBMISSION

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The Honorable Lina Khan
Chair
Federal Trade Commission
600 Pennsylvania Avenue, NW
Washington, DC 20580

VICE PRESIDENT

Greg D. Cohen, DO, FACOFP *dist.*

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

SECRETARY/TREASURER

Gautam J. Desai, DO, FACOFP *dist.*

Dear Chair Khan:

IMMEDIATE PAST PRESIDENT

Bruce R. Williams, DO, FACOFP *dist.*

On behalf of the American College of Osteopathic Family Physicians (ACOFP), we appreciate the opportunity to comment on the proposed rule issued by the Federal Trade Commission (FTC) entitled, *Non-Compete Clause Rule*, 88 Fed. Reg. 3482 (Jan. 19, 2023).

PAST PRESIDENT

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ACOFP is the professional organization representing more than 25,000 practicing osteopathic family physicians, residents and students throughout the United States who are deeply committed to advancing our nation's healthcare system by improving healthcare delivery and outcomes and ensuring that patients have access to high-quality care.

RESIDENT GOVERNOR

Heather M. McGuire, DO

We strongly urge the FTC to finalize the rule as proposed. Our comments focus on how non-compete clauses exacerbate physician burnout, accelerate the physician shortage crisis, and harm patient care. Our full comments are detailed on the following page.

STUDENT GOVERNOR

George Tong Yang, OMS 11

Thank you for the opportunity to share our feedback with you. Should you need any additional information or if you have any questions, please feel free to contact ACOFP at advocacy@acofp.org or (847) 952-5100.

SPEAKER, CONGRESS OF DELEGATES

Elizabeth A. Palmarozzi, DO, FACOFP

Sincerely,

VICE SPEAKER, CONGRESS OF DELEGATES

Antonios J. Tsompanidis, DO, FACOFP



EXECUTIVE DIRECTOR

Bob Moore, MA, MS, CAE

David Park, DO, FAAFP, FACOFP *dist.*
ACOFP President

Comments

ACOFP supports the proposals in the FTC's proposed rule and urges the agency to finalize the rule as proposed. Our members share the FTC's concerns about the impact that non-compete clauses have on physicians and the care that they provide.

Physicians in the United States report high dissatisfaction with their profession as they face burdensome administrative demands, lower reimbursement, and long working hours. Physician burnout is the highest it has ever been,¹ and family medicine physicians suffer one of the highest rates (57 percent) of burnout among the medical specialties.² Contributing to physician burnout, among various factors, is the perceived lack of control and autonomy over their lives.³ Undoubtedly, the use of non-compete clauses in physician employment contracts factor into this perception.

Non-compete clauses applied against physicians are widespread; one recent study from economists at Cornell University and the Ohio State University estimated that 45 percent of primary care physicians are subject to non-compete clauses.⁴ In some states, like Pennsylvania, an estimated 60 percent of primary care physicians are subject to non-compete clauses.⁵ Non-compete clauses applied against physicians can be onerous, as they can span years and vast geographical distances. One of many examples in the press about harsh physician non-compete clauses is the story of a provider who worked in a *federally qualified health center* who was bound by a non-compete clause from practicing family medicine in the *same county* for *two years*.⁶ Also, even if a physician wanted to challenge a non-compete clause, even a legally unenforceable one, he or she would have to spend tens of thousands of dollars in legal fees.

Non-compete clauses are harmful to physicians. Many physicians face low professional satisfaction, and these clauses force physicians to either stay at a job where they are unsatisfied or move to practice their profession in a different geographic area. Also, non-compete clauses only serve to contribute to burnout and stress among physicians. Even more concerning is how non-compete clauses harm patient care.

First, non-compete clauses limit the supply of physicians in a given community and reduce access to care. The U.S. is in the midst a physician shortage. The Association of American Medical Colleges predicts that there will be a shortage of between 17,800 to 48,000 primary care physicians by 2034,⁷ and compounding the effects of this shortage are the growing medical needs of the aging Baby Boomer generation. The confluence of these factors requires that policymakers do all they can to ensure all Americans have robust access to primary care, which has

¹ Sara Berg, *Pandemic pushes U.S. doctor burnout to all-time high of 63%*, Am. Med. Assoc. (Sept. 15, 2022), <https://www.ama-assn.org/practice-management/physician-health/pandemic-pushes-us-doctor-burnout-all-time-high-63>.

² *'I Cry but No One Cares': Physician Burnout & Depression Report 2023*, Medscape (Jan. 27, 2023), <https://www.medscape.com/slideshow/2023-lifestyle-burnout-6016058#3>.

³ *Id.*

⁴ Kurt Lavetti, et. al., *The Impacts of Restricting Mobility of Skilled Service Workers: Evidence from Physicians*, J. Human Resources (Feb. 7, 2019), <https://jhr.uwpress.org/content/early/2019/02/04/jhr.55.3.0617-8840R5>.

⁵ *Id.*

⁶ *Lose-Lose: Noncompete Agreements Hurt Doctors and Patients*, Am. Acad. Family Physicians (Mar. 3, 2021), <https://www.aafp.org/news/blogs/freshperspectives/entry/20210303fp-noncompete.html>.

⁷ *The Complexities of Physician Supply and Demand: Projections From 2019 to 2034*, Ass'n Am. Med. Coll. (June 2021), <https://www.aamc.org/media/54681/download?attachment>.

been shown to improve health outcomes while also reducing costs to the health care system.⁸ However, non-compete clauses can force physicians to leave the workforce early or to move from underserved areas. Further, employers do not hesitate to attempt to enforce a non-compete clause, even if the clause would create a shortage of physicians in a given community.⁹ This not only reduces access to care, but severely reduces patient choice in finding a primary care physician, which may lead to poor patient-physician compatibility and adversely impact health outcomes and overall health status.

Second, non-compete clauses directly harm patient care. Onerous non-compete clauses prevent physicians from speaking up about unsafe practices or unethical behavior, and there are stories abound of physicians being fired, or threatened with termination, when they speak up about these issues.¹⁰ Non-compete clauses therefore stifle physician speech, especially when they are faced with the prospect of losing their livelihood.

Third, non-compete clauses break longstanding relationships between patients and physicians, to the detriment of patient care. The strength of patient-doctor relationships is critical for positive health outcomes as studies have shown that improved patient-doctor relationships improve patients' functional health.¹¹ Additionally, continuity in the patient-doctor relationship is associated with greater patient satisfaction, increased medication adherence, reduced hospital utilization, and even reduced mortality.¹² However, patient-doctor relationships can only be solidified with time since they are built on patients having open and candid conversations with their physicians, and the physicians understanding the patients' ailments, communication style, and emotional state. Because of the prevalence of non-compete clauses, patients are frequently forced to find new physicians as a result of their existing physicians' changing geographic locations and are therefore forced to find new providers and rebuild these relationships, all to the detriment to their care.

Finally, ACOFP notes that the primary rationale for non-compete clauses is for a company to protect its trade secrets or intellectual property;¹³ however, practicing physicians almost never have this information. Instead, non-compete clauses in physician employment contracts reduces the healthcare workforce and harms patient care.

⁸ David Glass, et. al., *The Impact of Improving Access to Primary Care*, 23 J. Evaluation in Clinical Practice 1451 (2017), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5765488/#jep12821-bib-0007>.

⁹ See, e.g., *New Castle Orthopedic Associations v. Burns*, 392 A.2d 1383 (Pa. 1978) (an employer attempting to enforce a non-compete against an orthopedic specialist when there is a severe shortage of orthopedic specialists in the community).

¹⁰ See, e.g., *Heckman v. UMPC Wellsboro*, 2021 WL 2826716 (M.D. Pa. July 7, 2021) (a rural physician alleging that he was fired because he raised concerns about his employer terminating medical services and violating federal regulations, and after he was fired, his former employer tried to enforce his non-compete clause).

¹¹ R. Henry Olaisen, et. al., *Assessing the Longitudinal Impact of Physician-Patient Relationship on Functional Health*, 18 Annals of Family Med. 422 (2020), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7489969/>.

¹² Denis Pereira Gray, et. al., *Continuity of care with doctors – a matter of life and death? A systematic review of continuity of care and mortality*, BMJ Open (June 28, 2018), <https://bmjopen.bmj.com/content/8/6/e021161>.

¹³ *Non-compete Contracts: Economic Effects and Policy Implications*, U.S. Dep't of the Treasury (Mar. 2016), https://home.treasury.gov/system/files/226/Non_Compete_Contracts_Economic_Effects_and_Policy_Implications_MA_R2016.pdf ("The conventional picture of a workplace characterized by non-compete agreements is one that features trade secrets, including sophisticated technical information and business practices that firms have a strong interest in protecting.").