



March 27, 2023

Honorable April Tabor
Secretary
Federal Trade Commission
600 Pennsylvania Avenue NW
Suite CC-5610 (Annex C)
Washington, DC 20580

RE: Non-Compete Clause Rule-Notice of Proposed Rulemaking (NPRM)

Dear Secretary Tabor:

On behalf of the Heart Rhythm Society (HRS), we appreciate the opportunity to comment on the Federal Trade Commission's (FTC's) proposed rule on non-compete clauses. ***HRS supports the FTC's efforts to ban non-compete clauses for all workers in order to strengthen patient access to care by ensuring that all workers, including physicians, maintain the ability to move positions as necessary and as dictated by patient care needs and demand.***

The HRS is the international leader in science, education and advocacy for cardiac arrhythmia professionals and patients, and the primary information resource on heart rhythm disorders. Its mission is to improve the care of patients by promoting research, education, and optimal health care policies and standards. HRS represents more than 7,600 members in cardiac pacing and electrophysiology, consisting of physicians, scientists, and allied health care professionals. Electrophysiology is a distinct specialty of cardiology, with certification in cardiology, as well as eligibility for board certification in clinical cardiac electrophysiology through the American Board of Internal Medicine (ABIM).

The HRS supports the proposal to ban non-compete clauses. The rule, as proposed, would address clauses used as contractual terms between "employers" and "workers." As such, our comments are generally directed at the scope the FTC intends to set on the entities and individuals to whom the final rule would apply.

Employer

In the proposed rule, the FTC defines an employer as "a person that hires or contracts with a worker to work for the person."¹ As currently defined in statute, a person is "any natural person, partnership, corporation, association, or other legal entity, including any person acting under color or authority of state law."² However, the FTC reviews the limitations placed on it by the FTC Act

¹ 88 Fed. Reg. 3510 (January 19, 2023).

² 15 U.S.C. 57b-1(a)(6).



and thus acknowledges that the FTC itself cannot ban non-compete clauses for “certain banks, savings and loan institutions, federal credit unions, common carriers, air carriers and foreign air carriers, and persons subject to the Packers and Stockyards Act of 1921, as well as an entity that is not ‘organized to carry on business for its own profit or that of its members.’”³

We are concerned about the vulnerability in the health care system that will be created by continuing to allow not-for-profit hospitals and health care systems to continue to use these coercive, non-competitive contract clauses. While we acknowledge the FTC’s limited enforcement authority over not-for-profit organizations under statute, ***HRS requests that the FTC utilize its antitrust and referral authority to aggressively monitor these organizations for antitrust and other anti-competitive violations. HRS also requests that the FTC work to provide incentives and guidance to States, which can enact measures to ensure that the ban on non-compete clauses is implemented comprehensively across different corporate structure types to which the FTC may not have the reach, including not-for-profit hospitals and health systems.***

Worker

As articulated in the proposed rule, “A non-compete clause is a contractual term between an employer and a worker that typically blocks the worker from working for a competing employer, or starting a competing business, within a certain geographic area and period of time after the worker’s employment ends. Non-compete clauses limit competition by their express terms.”⁴ ***HRS supports the FTC’s efforts to support competition by eliminating the use of these clauses.***

For purposes of the non-compete rule, the FTC proposes to define a worker as “a natural person who works, whether paid or unpaid, for an employer” and further specifies that the term includes “an employee, individual classified as an independent contractor, extern, intern, volunteer, apprentice, or sole proprietor who provides a service to a client or customer.”⁵ ***HRS applauds the FTC’s broad definition of worker ensuring that physicians are included as part of the policy.***

While some state restrictions on non-compete clauses are more limited in scope, we believe that a broad, federal ban on such clauses will support the ability of the health care system to adapt to current workforce shortages by enhancing flexibility among physicians and practitioners to practice where need is the greatest or where care delivery models better support patient care rather than contract clauses locking physicians into positions without having to move great distances to escape the reach of non-compete clauses.

The Association of American Medical Colleges (AAMC) projects that by 2034, the United States will experience an overall physician workforce shortage of 37,800 to 124,000 professionals, including a medical specialty shortage of between 3,800 and 13,400 which includes electrophysiologists.⁶ While this project shortfall calls for a renewed investment in graduate medical education (GME) in the United States, ***HRS believes that a federal policy that supports the ability of the physicians***

³ 88 Fed. Reg. 3510 (January 19, 2023) (*footnote omitted*).

⁴ 88 Fed. Reg. 3482 (January 19, 2023); *See also*, Id. 3509.

⁵ 88 Fed. Reg. 3511 (January 19, 2023).

⁶ Association of American Medical Colleges (AAMC), *The Complexities of Physician Supply and Demand: Projections From 2019 to 2034*, 5; 10 (June 2021).



and health care practitioners who are available to provide services in the areas of most need will be critical to our nation's ability to meet this looming workforce challenge. Suppressing electrophysiologist (EP) mobility through non-compete clauses will only exacerbate the workforce shortages projected by the AAMC. As highlighted by these projections, this is not only a competition and labor market issue but also one of patient access to care. While the FTC requests input on whether it implement a more narrow scope of the ban,⁷ ***HRS opposes the implementation of any final rule provision that would serve to differentiate between workers rather than finalizing a rule that applies uniformly to all workers.***"

The impact of a ban on non-competes will also help address community need for those physician specialties most likely to be employed by a health care system or hospital. Particularly, EPs who perform most clinical services in a hospital inpatient or outpatient setting, making the specialty a natural fit for employment by those facilities.

In the U.S., approximately 2000 certified EPs perform atrial fibrillation (AF) ablations, a procedure that both improves and saves lives for a segment of the six million Americans with AF, allowing them to live without the devastating symptoms and consequences of this arrhythmia. Moreover, the population with AF is growing rapidly, with 12.1 million cases expected in the U.S. by 2030⁸. To provide needed care, it is vital that EPs be able to treat AF patients without the constraints of non-compete clauses.

Thus, the proposed rule could have a direct impact on patient access to this life-saving service given the propensity of EPs to be in an employer-based contract. As cardiac electrophysiology services move towards the ambulatory care setting, EPs will have increasing opportunities to work for clinics, ambulatory surgery centers, group practices or in private practice.

HRS believes that by narrowing the ban on non-compete clauses, providing an exclusion for sale of a business,⁹ acknowledging that nothing in these rules prevents the use of non-disclosure agreements (NDAs) and client or customer non-solicitation agreements¹⁰ that the FTC has struck the appropriate balance to ensure that the distribution of the labor force is dictated by consumer need and demand rather than restrictive contract provisions, while preserving employer protection of proprietary information. HRS also believes that the federal rule is important to providing clarity to all workers of their rights and ability to move positions. The proposed rule states, "*Starr, Prescott, and Bishara also found, in states where non-compete clauses are unenforceable, workers are covered by non-compete clauses at approximately the same rate as workers in other states. This suggests employers maintain non-compete clauses even where they likely cannot enforce them.*"¹¹

By creating a national clarity of policy around the use of non-compete clauses, the FTC will have helped educate employees and independent contractors of their rights, thereby empowering a

⁷ 88 Fed. Reg. 3519 (January 19, 2023).

⁸ Colilla S, Crow A, Petkun W, Singer DE, Simon T, Liu X. Estimates of current and future incidence and prevalence of atrial fibrillation in the U.S. adult population. *Am J Cardiol.* 2013;112:1142–1147. doi: 10.1016/j.amjcard.2013.05.063.

⁹ 88 Fed. Reg. 3514 (January 19, 2023).

¹⁰ 88 Fed. Reg. 3482 (January 19, 2023).

¹¹ 88 Fed. Reg. 3485 (January 19, 2023)(*footnote omitted*).



competitive, functioning labor market that benefits all consumers and patients as well as other employers including, in the health care market, facilities looking to staff newly available services.¹² In closing, the ***HRS reiterates support for the proposed rule, and urges the FTC to implement a federal ban on the use of non-compete clauses in employment contracts to enable EPs and other physicians to continue working without delay or restriction in the same geographic area, or for a competitor, after a hospital contract expires.*** If you have any questions, please contact Lisa Miller, MS, Senior Director of Health Policy and Reimbursement at LMiller@hrsonline.org or (202) 464-3413.

Sincerely,

A handwritten signature in black ink, appearing to read "AKrahn".

Andrew D. Krahn, MD, FHRS
President, Heart Rhythm Society

¹² 88 Fed. Reg. 3512 (January 19, 2023).