



*Bringing physicians together
for a healthier Ohio*

April 19, 2023

The Honorable April Tabor
Office of the Secretary
600 Pennsylvania Avenue NW
Suite CC-5610 (Annex C)
Washington, DC 20580

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

On behalf of the Ohio State Medical Association (OSMA), the state's oldest and largest professional organization representing Ohio physicians, medical residents, and medical students, I am pleased to submit comments on the Federal Trade Commission rule concerning the Non-Compete Clause published in the Federal Register on January 19, 2023 (88 FR 3482).

While OSMA does appreciate the FTC's attempt to address fairness in non-compete employment agreements, OSMA cannot support the rule in its current form and urges the FTC to engage physician organizations in meaningful discussion to find a workable rule that addresses the complex positions of all physicians engaged in restrictive employment covenants. The rule as promulgated leaves a lot of legal ambiguity as to whether certain agreements are even subject to the FTC's jurisdiction, and thus whether those agreements would be affected by the rule. For example, the rule has been promulgated pursuant to Section 5 of FTC's enabling statute, which has authority over corporations defined as "organized to carry on business for its own profit or that of its members." (FTC Act Sec. 4, 15 U.S.C. Sec. 44). Many hospitals and health systems are organized as "non-profits" pursuant to 501(c) of the Internal Revenue Code, and are arguably not subject to the enforcement of the FTC, leaving many physicians subject to their employment agreements. Further, private equity organizations have entered the health system ownership space over the past few years and have quickly acquired swath of the healthcare space. There is uncertainty surrounding FTC authority over these organizations with complex and fast moving merger deals, and how the FTC would enforce such measures. OSMA urges the FTC to evaluate these crucial questions and engage in dialogue with physician organizations as to how this rule will be applied in these situations before moving forward with any finalized rule.

OSMA has a diverse membership - ranging from physician owned practices to health systems and hospital employed physicians. All of our members have different perspectives on restrictive covenants, but there is one attribute our members agree on—and that is that restrictive covenants on employment must be reasonable given all of the facts and circumstances of that employment relationship. OSMA Policy 09-2016 states that the "OSMA opposes the use of restrictive covenants in physician contracts that *are not consistent with the AMA principles of physician employment agreements.*"

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The AMA Principles generally discourage physicians from entering into an employment agreements that restrict employment based on a specified time employed or distance from the employer. Ultimately, the question as to whether the agreement is reasonable depends on the circumstances of each employer employee relationship.

The OSMA represents many physicians that own practices in areas of Ohio that have a dearth of medical professionals. In these areas, it is paramount to ensure that patients of these practices have quality continuity of care. Reasonable employment agreements ensure consistency in these areas with less access to care. Conversely, OSMA members also practice in population dense areas of the state with a high concentration of medical professionals, and are employed by non-profit hospitals (which are arguably not subject to this rule). These practitioners have very little negotiating leverage and end up feeling compelled to sign very restrictive non-compete agreements. The agreements stifle those practitioners ability to broaden their own practice, and also do not serve a purpose for patients – with care readily available in very close geographic proximity. These examples serve to demonstrate that the complex issues involved in these employment agreements deserve a very in-depth dialogue between physician stakeholders and the FTC. Any regulatory solution here must protect quality patient care while also allowing physicians to enter into reasonable employment agreements that allows them to further their professional career.

OSMA believes, based on these comments and those of the American Medical Association, that the FTC should postpone the advancement of this rule and have a robust discussion with physician and medical organizations to find a workable solution to restrictive covenants in medicine.

Again, thank you for the opportunity to comment on this very important rule. Please do not hesitate to contact OSMA with additional questions or information.

Sincerely,



Todd Baker
CEO