

March 2, 2023

The Honorable Lina Khan
Chair
Federal Trade Commission
600 Pennsylvania Ave., NW
Suite CC-5610 (Annex C)
Washington, DC 20580

Submitted electronically to www.regulations.gov

Re: Notice of Proposed Rulemaking; Non-Compete Clause Rule, Matter No. P201200 [RIN3084-AB74]

Dear Chairperson Khan,

The American Nurses Association (ANA) appreciates the opportunity to provide comment on the Federal Trade Commission's (FTC) Notice of Proposed Rulemaking, Non-Compete Clause Rule. The association applauds the agency's focus on non-compete clauses and their anti-competitive nature in healthcare markets. Our comments will focus on these elements and the effect they have on nurses nationwide.

ANA strongly supports the FTC's proposal to ban most non-compete agreements, especially involving nurses. However, ANA does not take a position on FTC's ownership interest exceptions to banning non-compete clauses.

Banning Non-Compete Clauses is a Bi-Partisan Issue

Use of non-compete clauses has been broadly condemned. Use of these clauses has already been banned in politically diverse states including, California, North Dakota, and Oklahoma. Additionally, in the past few years, members of Congress on both sides of the aisle have introduced legislation that would ban the use of non-compete clauses nationwide, without passage.

Non-compete agreements undermine competition and close parts of the market to some classes of workers, including nurses in many cases. This harms the employees as they are unable to work in their field without paying expensive penalties to their original employer. It may also harm employers as it severely limits the pool of possible employees.

Nurses Do Not Have Trade Secrets

One rationale for non-compete clauses is that companies have trade secrets and expertise they do not want transferred to competitors by former employees. In general, this is not an issue in healthcare delivery. It would seem that the only reason healthcare employers require nurses to sign non-compete agreements is to enhance retention and to control where any future employment occurs. Furthermore, providers routinely share information among different practices. This allows the provider to have access to the best information available and therefore deliver the best treatment options to their patients.

Additionally, most of the confidential information applicable to nurses is already covered by the Health Insurance Portability and Accountability Act (HIPAA). HIPAA broadly covers all patient information, including both physical and mental health. Any proprietary information not covered by HIPAA can be contracted in a non-disclosure agreement (NDA). NDAs can be very broad and can cover wide swaths of

corporate information. Employers can strictly enforce NDAs and use them to protect confidential information without restricting future employment. ANA does not oppose using these methods to secure any confidential or proprietary information and would encourage employees and employers to use them appropriately and judiciously.

Shortage of Providers

The nation currently faces a shortage of healthcare providers. The nursing shortage is particularly acute and expected to worsen in the coming years. The average age of nurses is rising quickly and ANA surveys show that around 45% of nurses are thinking of leaving the profession within the next few years. Although non-compete clauses are not the primary reason that nurses plan to leave the profession, they may contribute to the loss of practitioners. Banning the use of non-compete agreements will help alleviate the shortage as it will allow providers to practice at locations where they are needed and to choose employment settings that meet their professional expectations.

Non-compete agreements may also contribute to the shortage of providers in particular areas. The agreements generally do not allow providers to practice health care within their field for a certain amount of time. One nurse told ANA that her non-compete agreement banned practicing in her field, emergency medicine, for five years after leaving her employer. The only recourse is extensive retraining if providers choose to leave their place of employment. The unnecessary training keeps providers out of the employment marketplace for the time that it takes to learn a new specialty, even if they want to remain focused on their existing specialty. As a result, non-compete agreements force many high skilled professionals out of the marketplace, further exacerbating the shortage.

Non-Compete Clauses are Anti-Competitive

The use of non-compete clauses is very common in the nursing profession. We have heard from nurses who signed non-compete agreements that forbade them from doing similar work within 7,500 miles. That encompasses the distance from New York City to Hawaii and still has over 2,000 miles left over. The result of this, if enforceable, is that this nurse would not be able to work anywhere in the fifty states if they chose to leave their current position, creating a modern version of indentured servitude. Additionally, as this nurse is not based on the Eastern Seaboard this clause would include American territories including Guam and Puerto Rico. While this nurse may be able to transition to another specialty, the years of experience they have in their current position, and chosen specialty, would no longer be of benefit to patients and future employers and they would not be able to obtain a position in their chosen specialty. Such non-compete agreements would result in nurses having to start over in a new specialty every time they change employment, resulting in lower wages and lost expertise.

Distance is not the only measure used for non-compete agreements. One nurse mentioned that her non-compete clause spanned five years after leaving her employer. Time components can be even more harmful than distance requirements in forcing nurses to either stay with their employer against their will or change careers.

Conclusion

The use of non-compete clauses harms the nursing profession and the patients they serve. Therefore, ANA supports the FTC's proposal to ban their use in most cases.

ANA is the premier organization representing the interests of the nation's 4.4 million registered nurses (RNs), through its state and constituent member associations, organizational affiliates, and individual members. ANA advances the nursing profession by fostering high standards of nursing practice, promoting a safe and ethical work environment, bolstering the health and wellness of nurses, and advocating on health care issues that affect nurses and the public. ANA members also include the four advanced practice registered nurse roles (APRNs): nurse practitioners (NPs), clinical nurse specialists (CNSs), certified nurse-midwives (CNMs), and certified registered nurse anesthetists (CRNAs). RNs serve in multiple direct care, care coordination, and administration leadership roles, across the full spectrum of health care settings. RNs provide and coordinate patient care, educate patients and the public about various health conditions including essential self-care, and provide advice and emotional support to patients and their family members.

Nurses are clinicians who are critical to a robust health care system able to meet the needs of patients, and who provide quality care that leads to better health outcomes for all patients. Moreover, nurses are critical to coordinated care approaches for Medicare beneficiaries in all settings, including hospital outpatient settings. Patient-centered care coordination is a core professional standard for all RNs and is central to nurses' longtime practice of providing holistic care to patients. Nurses also typically reflect the people and communities they serve—allowing them to recognize the challenges faced by their patients and ensure that their patients receive culturally competent, equitable health care services.

ANA appreciates the opportunity to submit these comments. Please contact Tim Nanof, Vice President, Policy and Government Affairs, at (301) 628-5166 or tim.nanof@ana.org with any questions.

Sincerely,



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cc: Jennifer Mensik Kennedy PhD, MBA, RN, NEA-BC, FAAN, ANA President
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