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Court blocks FTC's non-compete ban, creating ongoing uncertainty for healthcare employers

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The Buzz This Week

On April 23, 2024, the Federal Trade Commission (FTC) announced a final rule banning non-compete agreements in most employment contexts across the US. Published in the Federal Register on May 7, the rule was set to take effect on September 4, 2024.

However, recent legal developments have delayed its implementation. On August 20, US District Judge Ada Brown of the Northern District of Texas set aside the FTC's non-compete rule, ruling that the FTC lacked the statutory authority to enforce such a sweeping ban on non-compete agreements. The court also found the rule to be "arbitrary and capricious" due to its overboard nature and lack of specific evidence justifying the ban.

As a result of this ruling, the non-compete ban will not take effect on September 4. However, the rule will likely go through appellate review, and further legal filings objecting to the rule are possible. Therefore, employers need to understand implications of the rule and be prepared for potential changes.

Non-compete agreements typically prevent an employee from working for a competitor or starting a similar business within a certain area and time period after leaving their current employer. Healthcare organizations, like many others, commonly use non-competes to protect intellectual property and prevent former employees from sharing proprietary information with competitors. The FTC's rule aimed to establish a nationwide standard for non-competes, superseding state laws that have traditionally governed these agreements.

The rule specifically targeted making non-compete agreements for non-senior executives unenforceable. For the purposes of the rule, a non-senior executive is defined as any worker who is not in a policy-making position and who received less than \$151,164 in total annual compensation in the preceding year.

Employers would have also been prohibited from implementing new non-compete agreements with non-senior executives after the rule's effective date. Non-compete agreements with senior executives entered before the effective date would have remained enforceable, but any new agreements with senior executives after that date would have been prohibited. The rule also applied to non-compete clauses in equity grants and compensation arrangements, which particularly affected private equity-backed healthcare groups and large independent physician practices that use equity as a form of compensation.

Why It Matters

If the FTC's ban on non-compete agreements does eventually go through, it could significantly impact the healthcare sector. Healthcare professionals would gain more freedom to change jobs, increasing worker mobility and heightened competition in the job market. As competition intensifies for professionals with greater mobility, market wage rates would likely rise, driving up labor costs for providers overall.

Higher turnover rates could result in temporary staffing shortages, particularly in specialized fields in which skilled workers are already in short supply, driving up recruitment costs and placing additional strain on existing clinicians. Organizations would also need to strengthen data security measures to protect proprietary information and intellectual property from competitors, increasing operational complexity.

Although the rule has been blocked, employers should remain vigilant, as evolving state-level standards could still impact restrictive covenants, and further legal challenges may arise. Many organizations had been preparing to comply with the rule by readying notices for affected employees and reviewing non-compete, non-solicit, and garden leave provisions. While these efforts may be paused for now, staying prepared will be essential should non-compete regulations change in the future.

The rule also targets equity and compensation arrangements, particularly for private equity-backed healthcare groups and large independent physician practices that use equity as a form of compensation. If the non-compete ban eventually goes into effect, these entities would need to carefully review and potentially revise their equity repurchase provisions and other related terms to ensure compliance with the rule. Additionally, healthcare transactions could become more complex as buyers and sellers adjust to the removal of non-compete clauses, which organizations have historically used to protect the value of acquisitions.

Chad Golder, General Counsel of the American Hospital Association, expressed relief at Tuesday's ruling, stating, "The rule was a breathtaking assertion of regulatory power ... made worse by the fact that the Commissioners did not attempt to understand the disruptive impact it would have on hospitals, health systems, and the patients they serve." Many healthcare organizations were concerned about the ban's potential impact on recruitment efforts and whether nonprofit organizations would be exempt.

In response to the court's ruling, the FTC expressed disappointment and stated that it would consider all options, including appealing the decision. The agency remains committed to ensuring that non-compete agreements, which it argues unfairly restrict workers' ability to switch jobs, are properly regulated.

Though the immediate threat of the FTC's non-compete ban has been stayed, at least temporarily, healthcare organizations should continue to monitor legal developments and be prepared for any future changes to non-compete regulations. Employers should also evaluate the potential consequences of not following evolving state-level regulations or any future federal rules.

Ultimately, the blocked non-compete ban could still reshape how healthcare organizations approach employment agreements, talent retention, and data security in the years to come, depending on the outcome of ongoing legal challenges. For now, staying informed and adaptable remains key for healthcare organizations navigating this ongoing regulatory uncertainty.

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