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Big Changes Loom With FTC Rule on Noncompetes, Six HHS Proposals

By Nina Youngstrom

If the Federal Trade Commission (FTC) has its way, noncompete clauses for workers will become a thing of the past. But the regulation proposed by the FTC on Jan. 19 doesn't apply only to future noncompetes.^[1] It would require health care and other employers to cancel noncompete clauses that are currently in effect, one of several aspects of the proposed rule that could prove challenging to comply with.

"The FTC is requiring employers to rescind existing noncompetes for current and former workers," said Martie Ross, a consulting principal at PYA. Employers must inform them in writing within 45 days of the effective date of the final regulation, and FTC has provided a model notice for that purpose. "You are deemed in compliance if you use it," she noted.

The proposed rule on noncompete clauses, "which sent shock waves through the business community," is one of six pending rules with significant implications for health care organizations, along with new developments in the No Surprises Act, Ross said at a Feb. 8 webinar held by PYA. The proposed rules address Part 2 confidentiality of substance use disorder records, Medicare Advantage plans, the rights of conscience and other areas. Since these proposed rules came down in December and January, another was proposed affecting skilled nursing facilities.

'The FTC Went as Big as it Could'

According to the FTC, employers are engaging in an "unfair method of competition" in violation of Section 5 of the FTC Act by entering into or trying to enter into or maintain a noncompete clause with a worker. The proposed rule would ban noncompetes "categorically" with a limited exception for noncompetes between the buyer and seller of a business.

Although the FTC's jurisdiction is limited to the for-profit world, nonprofits aren't exactly off the hook. If a hospital employs physicians through a for-profit subsidiary or is part of a joint venture that's organized as a for-profit entity, "the FTC has taken the position they can go after you," Ross said.

There's also a twist with buyouts of noncompetes. Suppose a physician employed by a multispecialty practice wants to accept a job with a hospital. The physician's contract with the practice may have a liquidated damages clause, which allows the physician to buy themselves out of the noncompete for a specified amount. "If the hospital wants to employ the physician, it may agree to fund the buyout, structuring it as a forgivable loan," Ross explained. That's where the FTC's proposed rule comes in again. It not only would prohibit a noncompete clause, it arguably would erase the loan obligation stemming from it, she said.

"The FTC went as big as it could in the proposed rule," Ross noted. It solicited comments and will make modifications in the final rule. The question is how it will ultimately be reined in, she said.

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