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Don't Panic! A Guide for Healthcare Employers to Understand the Potential Impact of FTC's Non-Compete Ban

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By Robert E. Slavkin, Danielle C. Gordet and Ameer Al-Khudari*

On April 23, 2024, the Federal Trade Commission (FTC), through a 3-2 vote, approved a final rule (the Final Rule), banning most forms of non-compete clauses with workers. A non-compete clause generally prevents a worker from getting a different job or starting a new business that competes with the employer after the conclusion of their current employment. The Final Rule was published in the Federal Register on May 7, 2024, and will become effective 120 days later, on September 4, 2024 (the Effective Date), although current and anticipated future litigation could delay or ultimately prevent its enforcement. Please refer to Akerman's HR Defense Blog for an in-depth review of the non-compete ban, including a discussion of current litigation. This blog adds to the information issued by our colleagues by providing specific guidance for healthcare employers regarding how the non-compete ban will impact them *if it becomes effective*.

Overview

Healthcare employers should understand the following basic requirements of the Final Rule to determine their strategy going forward.

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- ***The Final Rule applies to healthcare employers, but with some exceptions.*** The Final Rule's ban on non-competes, in most cases, applies to healthcare employers. There are some carve-outs, such as the exemption for certain tax-exempt nonprofits, as described below.

- ***"Workers" are covered under the Final Rule.*** The Final Rule covers full-time and part-time employees, independent contractors, externs, interns, volunteers, apprentices, and sole proprietors (collectively, Workers).

    - Senior Executives (defined as Workers who earn over $151,164 annual compensation and are in a policy-making position) are included in the definition of Workers. However, different requirements apply to them (discussed below). Please refer to Akerman's HR Defense Blog for a more detailed definition of Senior Executives.

- ***As of the Effective Date, employers cannot enter into any new non-competes with any Worker.*** However, *existing* non-competes with Senior Executives will remain enforceable, as described below.

- ***The Final Rule does not preclude restrictions on outside activities during the term of employment.*** Employers can continue to enter into and enforce restrictions on Workers that limit their activities during the term of their employment. Rather, the ban on non-compete clauses prevents employers from restricting Workers *after* the conclusion of their employment for that employer.

Carve-Outs

The Final Rule includes certain carve-outs from the requirements. The following carve-outs are particularly relevant for healthcare employers:

- ***Tax-exempt nonprofits are exempt from the non-compete ban if they are not under the FTC's jurisdiction.*** Regardless of the existence of a tax exemption, the FTC applies a two-part test to make its own determination whether a corporation is organized for profit and therefore within the FTC's jurisdiction. The FTC will analyze: (1) *the source of the income* – whether the corporation is organized for, and actually engaged in, business that is only for charitable purposes – and (2) *the destination of the income* – whether either the corporation or its members derive a profit. In the Final Rule commentary, the FTC warns entities that "merely *claiming* tax-exempt status in tax filings is not dispositive."

- ***Existing non-competes with Senior Executives will remain enforceable, but no new non-competes may be entered into.*** Employers may continue to enforce existing non-competes with Senior Executives, but, as of the Effective Date, they cannot enter into any *new* non-competes with Senior Executives or any other Workers.

- ***Employers may continue to enforce and enter into non-solicitation agreements (prohibiting the solicitation of an employer's staff, former clients, or customers) and non-disclosure agreements (NDA) with their Workers, unless they function as non-competes.*** A non-solicitation agreement or NDA may qualify as a prohibited non-compete if either uses "a term or condition that is so broad or onerous that it has the same functional effect" as a non-compete. For example, an NDA may be considered a non-compete if it prohibits a Worker from disclosing in a future job information that is "usable in" or "relates to" the industry within which they work.

- ***Non-competes between a buyer and seller of a business (or potentially the seller's share of a business) are permissible.*** It is permissible for a seller to enter into a non-compete individually if the non-compete is made pursuant to a bona fide

sale of: (1) a business entity, (2) the person's ownership interest in a business entity, or (3) all or substantially all of a business entity's operating assets. A bona fide sale is "one made in good faith as opposed to, for example, a transaction whose sole purpose is to evade the [Final Rule]." However, it is not permissible for non-competes with Workers to be entered into as part of such a sale.

Compliance With the Final Rule

As of the Effective Date, employers:

- ***May not enforce existing non-competes with any Workers, other than Senior Executives.***

- ***May not include non-competes in any new contracts with Workers (including Senior Executives), employee handbooks, or workplace policies.***

- ***Shall notify Workers with non-competes, other than Senior Executives, that their non-competes are no longer enforceable as of the Effective Date.*** Notice may be delivered by email, text message, or in paper form, by hand or mail. Model language is included in the Final Rule, but employers can draft their own notices, so long as the notices include the required information.

Actions Healthcare Employers Should Take Now

As our colleagues discuss in Akerman's HR Defense Blog, until more certainty exists, healthcare employers should take the following steps:

- ***Determine which existing non-competes are with Senior Executives.*** These non-competes will *not* be impacted by the Final Rule becoming effective.

- ***With regard to Senior Executives that are not currently subject to non-competes, consider***

strategies for entering into non-competes with these individuals, if otherwise permissible under state or local law, before the Final Rule becomes effective.

- ***Tax Exempt Entities should evaluate whether they fall within the FTC's jurisdiction, in which case the non-compete ban requirements will apply to them.*** As discussed above, the fact that an entity has claimed tax-exempt status does not mean that it will be exempt from the non-compete requirements. For example, the FTC noted that it previously determined that it could exercise jurisdiction over a physician-hospital organization that had claimed tax-exempt status as a nonprofit, but was found to be "engaged in business on behalf of for-profit physician members." Similarly, the FTC determined that it could exercise jurisdiction over an independent physician association that claimed tax-exempt status as a nonprofit because the association was "organized for the pecuniary benefit of its for-profit members."

It is important that healthcare employers understand the Final Rule and its potential impact on their businesses. Akerman's healthcare and labor and employment attorneys are monitoring the status of the Final Rule and are available to assist healthcare employers in determining how the non-compete ban may impact them, how to proceed moving forward, and the timing surrounding these actions.

**Akerman Law Clerk*

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without seeking the advice of legal counsel. Prior results do not guarantee a similar outcome.