FTC's Non-Compete Rule and the Healthcare Employer

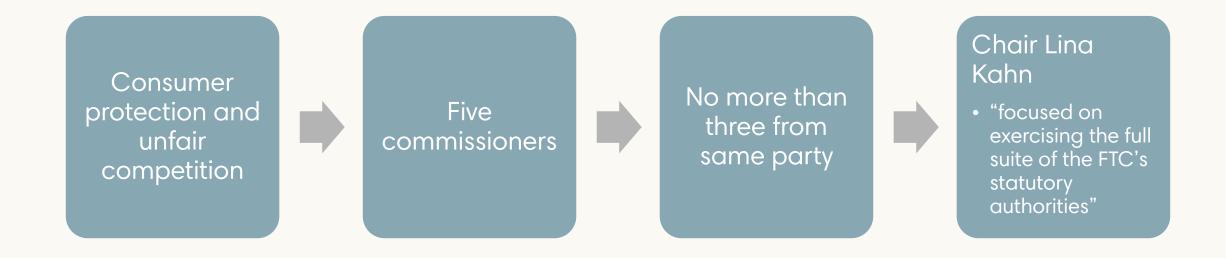
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First, some housekeeping

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Federal Trade Commission????



Non-Compete Rule Basics

Unfair method of competition to:

- enter into or attempt to enter into a noncompete clause
- enforce or attempt to enforce a noncompete clause
- represent that a worker is subject to a non-compete clause

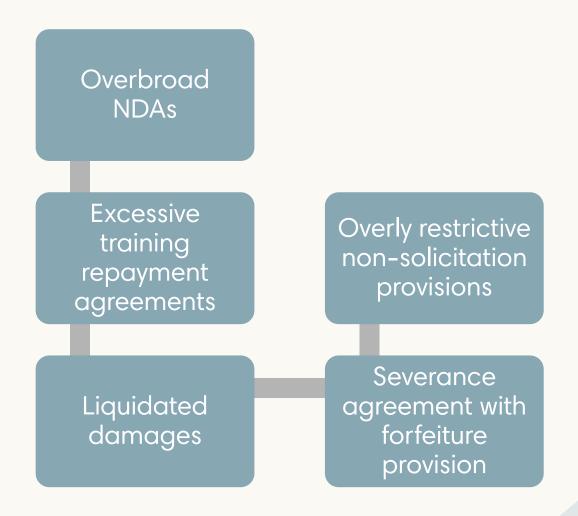
Non-Compete Rule Basics – What's a Non-Compete?

Term or condition of employment by policy or agreement

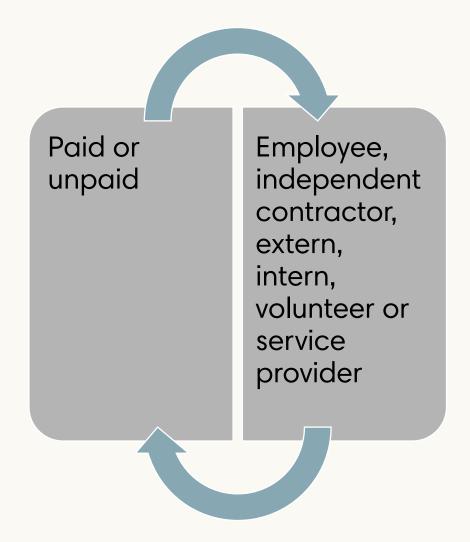
Prohibits, penalizes or functions to prevent a worker from:

- Seeking or accepting any work after employment
- Operating any business after employment

Not Just Contract Terms – Functional Non-Competes



Non-Compete Rule Basics – Covered Workers



Non-Compete Rule Basics - Notice

Current and former workers bound by non-compete

Clear and conspicuous notice that non-compete clause is unenforceable and will not be enforced

Notice given by 120 days after publication of rule

Rule provides "model" notice

Hand deliver, mail to personal street address, email, text message

Identifies the employer



Senior Executive Exception

Holds a policy-making position

Officer with final authority to make policy decisions to control significant aspects of business; not just advising or influencing policy

Not an officer of a subsidiary or affiliate of a business entity unless they have policy-making authority for the parent entity

Officer – president, VP, secretary, treasurer or principal financial officer, comptroller or principal accounting officer, or a person performing corresponding functions



Annual comp above \$151,164, not including benefits



Senior Executive Exception

Existing noncompetes remain enforceable

No new noncompetes after effective date of rule

No enforcement
of noncompetes
entered into
after effective
date

Cannot
represent the
executive is
subject to a
non-compete if
entered after
effective date

What Entities Are Covered?

Very broad (and ambiguous) definitions



"Person" – any natural person, partnership, corporation, association "or other legal entity" within FTC's jurisdiction "including any person acting under color or authority of State law."



To the extent of the jurisdiction under FTC Act

Non-Profit Coverage

Non-profits not excluded

FTC Act: corporation covered if "organized to carry on business for its own profit or that of its members" U.S. Supreme Court: FTC Act applies to non-profit association that provided "substantial economic benefits to for-profit members"

Non-Profit Coverage

Two-part test:

Nexus between organization's activities and public purpose

Proceeds be properly devoted to public, rather than private, interests

Non-Profit Coverage – Examples

- Non-profit entity consisting of hospital and 100-physician group and non-profit physician association subject to FTC Act because the non-profit entities negotiated payor contracts for the forprofit physician practices
- For-profit affiliate controls non-profit entity

Public Entity Coverage

FTC declined to clarify when public entities are subject to its jurisdiction

Contends that some public hospitals will be subject to rule

"State action doctrine" may protect public entities' ability to use non-competes

Exceptions

Sale of business entity or a person's ownership interest in entity Causes of action based on noncompetes arising prior to effective date

Good faith belief the rule does not apply to your entity

Enforcement

Penalties for Invalidation of knowingly engaging in non-competes unfair practice Judicial reformation of Administrative contracts, awards of investigation restitution or damages Commission Cease and desist orders complaint and hearing

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What next?

Pay attention to legal challenges Communicate with employees about status

Enhance confidential information policies and NDAs

Consider nonsolicitation instead of non-compete

Thank you – any questions?



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