CAN THEY REALLY DO THAT?

FTC Proposes Ban of Noncompetes

James D. Wall, Esq
Co-Managing Partner
Waldrep Wall Babcock & Bailey PLLC

As has been widely reported, the Federal Trade Commission (FTC) recently proposed a new rule that would prohibit employers from imposing noncompetes on their workers. This ban would materially and dramatically affect the healthcare industry, especially in North Carolina, where noncompetes are generally enforceable. Many providers have executed employment agreements that contain restrictions on competition with their employers. Additionally, the FTC estimates that approximately 30 million workers have agreed to a noncompete.

Purposes for the Proposed Rule.
The FTC's chair, Lina M. Kahn, stated when releasing the proposed rule that the freedom to change jobs "is clear to economic liberty and to a competitive, thriving economy." The FTC has indicated that the noncompetes prevent workers from switching jobs freely and deprives them of higher wages and better working conditions. Interestingly, the FTC specifically pointed out the burden on "doctors" (among others) in its release announcing the proposed ban. The FTC estimated that banning noncompetes would increase workers' earnings by nearly $300 billion, save consumers up to $148 billion on health costs each year and double the number of companies in the same industry that would be founded by a former worker. The FTC also estimates that 18% of US workers are covered by noncompetes. Anecdotally, with respect to healthcare workers in this State, it would seem that the number would exceed 90%. Our office has drafted and reviewed hundreds of provider employment agreements, and well over 90% of those agreements contain restrictions on competition.

In some states, noncompetes are disallowed. In North Carolina, noncompetes are permitted and enforced if they meet certain criteria. They must be in writing, protect a legitimate business interest of the employer, be reasonable as to activity restricted, and not be against public policy. Often, physicians who are contemplating leaving their existing employer are faced with the choice of moving their families, taking temporary locums jobs outside the geographic scope of the noncompete, staying with their existing employer, or hiring an attorney to fight the noncompete. Some physicians find none of these options appealing.

What the Rule Prohibits.
The FTC's proposed rule would prohibit employers from using noncompete clauses with limited exceptions. That is, employers could not:

- enter into or attempt to enter into a noncompete with a worker;
- maintain a noncompete with a worker; or
- represent to a worker, under certain circumstances, that the worker is subject to a noncompete.

The proposed rule would apply to independent contractors as well as employees and would require employers to rescind existing noncompetes and affirmatively inform workers that they are no longer in effect. This, of course, could create chaos in the healthcare industry in our State, where many providers are employed by health systems and large providers who often exact restrictive covenants from their employees. Would physicians bound by restrictive covenants flee their employers? The ban on noncompetes would not extend to other similar types of employer restrictions like nondisclosure agreements.

Statutory Predicate for the Ban.
The FTC cannot pass legislation; only Congress can do that. The FTC, however, can implement existing legislation when Congress has given it rule-making authority. The FTC is relying on Section 5 of the FTC Act, which bans unfair methods of competition. The FTC has pointed out that its current proposed ban is not unprecedented. It has taken action against a Michigan based security guard company and its key executives for using coercive noncompetes with respect to low wage employees. The FTC has also recently ordered two of the largest US glass container manufacturers to stop imposing noncompetes on their workers because they obstruct competition and impede new companies from hiring.

Inevitable Challenges.
As could be expected, organizations that tend to side with the causes of employers have not so subtly hinted that the FTC is overstepping its bounds. The US Chamber of Commerce, for example, has indicated that it plans to take the FTC to court over its proposed rule. The Chamber CEO has stated in a Wall Street Journal op-ed that the Chamber will oppose the proposed regulation "with all tools at our disposal, including litigation." The Chamber and other groups have indicated that allowing the FTC to vitiate provisions in hundreds of thousands of contracts is effectively diving down a steep, slippery slope that would have no contractual provision off limits to the FTC. These opponents also assert that there is a long history of regulation of noncompetes at the State level. That is, each State legislature decides what is best for its citizens.

What's Next?
When the FTC proposes a rule, it allows the public to comment on the proposed rule. (If you doubt the impact of noncompetes on the healthcare industry, I would suggest that you spend fifteen minutes reading the public comments, many of which are from providers who feel trapped in jobs they believe they cannot leave). After the comment period expires, the FTC will decide whether to adopt the rule. If it adopts the rule, there will inevitably be litigation, and it is hard to imagine that litigation stopping short of a trip to the US Supreme Court.

Even if the rule is not adopted or is successfully challenged, this exercise has brought noncompetes to the front burner. Both parties have draft bills in Congress addressing noncompetes. If the rule is not passed, one would anticipate other avenues to curtail the use of noncompetes either by congressional action or, with respect to healthcare, some other agency prohibiting noncompetes to participate in government contracting or government programs.