



FTC Finalizes Ban on Noncompete Agreements

On April 23, 2024, the Federal Trade Commission (FTC) issued a final rule that would ban employers from imposing non-competes on their employees. The FTC asserts that this exploitative practice keeps wages low, and suppresses new ideas.¹ Notably, while the final rule will affect all industries, not just healthcare, this proposal comes at a time when healthcare employers across the U.S. are struggling with staffing shortages.² This Health Capital Topics article will discuss the final rule, reactions from healthcare industry stakeholders, and potential implications for healthcare valuations (both business and compensation valuations).

Non-compete agreements are defined as “employment provisions that ban workers at one company from going to work for, or starting, a competing business within a certain period of time after leaving a job.”³ About 30 million Americans are restricted from pursuing other employment opportunities, as they are bound by non-compete clauses.⁴ Further, a 2020 study found that approximately 18% of the labor force is bound by non-competes, with 38% agreeing to a non-compete in the past.⁵ Regardless of the timing of non-competes, the study also found lower wages associated with areas where non-compete enforcement is easier.⁶

Under the final rule, existing noncompetes for the majority of workers will not be enforceable after the rule goes into effect.⁷ Noncompetes for senior executives can remain in force under the new ruling, but employers may not enter in or attempt to enforce any new noncompetes, even if that includes a senior executive.⁸ Notably, the Commission also recognizes that they have no jurisdiction over not-for-profit entities, however they reserve the right to evaluate any entity’s non-profit status.⁹ The agency noted that some “entities that claim tax-exempt nonprofit status may in fact fall under the Commission’s jurisdiction.”¹⁰ The FTC specifically stated that “some portion of the 58% of hospitals that claim tax-exempt status as nonprofits and the 19% of hospitals that are identified as State or local government hospitals in the data cited by AHA likely fall under the Commission’s jurisdiction and the final rule’s purview.”¹¹

In healthcare, the medical profession has grown from small practices comprised of just a few physicians to mega-practices totaling a few hundred physicians, especially in urban settings. Non-competes in healthcare have traditionally been utilized as a tool to limit the harm

that a physician may inflict upon departing a practice. While these large practices need to protect their investments, non-compete clauses may make it hard for a departing physician to seek employment within the same geographic area.¹² Non-compete clauses in specialty practices further complicate the ability for physicians to seek employment, as specialists only serve a subset of the population (i.e., there may be fewer outside opportunities for specialists).¹³

Multiple states have provisions that flat out ban or place a limit on an employer seeking to restrict the activity of a physician or other healthcare professional post-employment.¹⁴ States that ban such clauses include Alabama, Arkansas, Colorado, Delaware, Massachusetts, New Hampshire, New Mexico, Rhode Island, and South Dakota.¹⁵ Some states, such as Arkansas, allow non-competes, but have exceptions carved out for medical professionals.¹⁶ Other states, such as Florida, impose limitations on healthcare non-competes, banning agreements for physicians specialists in a county when all those within the specialty are employed by a single entity.¹⁷

This final rule is the latest step in the federal government’s push (across two presidential administrations) to increase competition in the healthcare industry. In 2018, the Department of Health and Human Services (HHS), the Department of the Treasury, and the Department of Labor issued a 119-page report comprising over 50 recommendations to increase quality, decrease cost, and promote competition in healthcare.¹⁸ In 2021, President Biden issued an executive order to promote competition in the American economy.¹⁹ The executive order was designed to address issues the administration identified as contributing to harmful trends associated with decreased competition and corporate consolidation, which are ultimately harming American consumers.²⁰ The executive order, which set forth 72 initiatives for multiple federal agencies, did not immediately establish requirements, but rather directed federal agencies to review issues and implement policies to reflect the administration’s goals.²¹ Pursuant to the executive order, federal agencies have taken action over the past couple of years to lower healthcare and prescription drug costs for consumers as well as increase competition and safety in healthcare facilities.²² Some of these actions include:

- HHS and the Centers for Medicare & Medicaid Services (CMS) is currently collecting feedback on how the agencies can promote competition, increase transparency, and identify the effects of vertical integration in Medicare Advantage (MA) markets.
- The FTC, Department of Justice (DOJ), and HHS published a Request for Information (RFI) to receive feedback and examine the role of corporate influence and private equity in the healthcare industry.
- CMS released ownership data for Federally Qualified Health Centers (FQHCs) in an effort to promote competition and increase transparency.
- HHS published Medicare-certified nursing home ownership data, increasing transparency of and the ability to identify common owners and those that had a history of poor performance.
- HHS announced steps to crack down on nursing homes that put resident safety at risk, including a proposed rule that set minimum staffing levels to ensure a higher quality of life for residents.
- The Food and Drug Administration (FDA) and the U.S. Patent and Trademark Office (USPTO) announced increased scrutiny of pharmaceutical patents that resulted in higher prescription drug costs. The FDA and USPTO also began collaborating on ways to improve the patent system in order to increase access to affordable and safe prescription drugs.
- HHS enacted a rule cracking down on hospitals that failed to disclose their prices pursuant to Hospital Price Transparency requirements, including increasing nearly twentyfold the fine for hospitals that failed to report their prices.²³

In response to the final rule, Chad Golder, general counsel for the American Hospital Association (AHA), stated that the “FTC’s final rule banning non-compete agreements for all employees across all sectors of the economy is bad law, bad policy, and a clear sign of an agency run amok.”²⁴ The agency’s stubborn insistence on issuing this sweeping rule — despite mountains of contrary legal precedent and evidence about its adverse impacts on the health care markets — is further proof that the agency has little regard for its place in our constitutional order.²⁵ Golder also said that “Three unelected officials should not be permitted to regulate the entire United States economy and stretch their authority far beyond what Congress granted it—including by claiming the power to regulate certain tax-exempt, non-profit organizations.”²⁶ In addition, the Federation of American Hospitals’ (FAH) Chief Executive Officer Chip Kahn stated that “this final rule is a double whammy.”²⁷ The ban makes it more difficult to recruit and retain caregivers to care for patients, while at the same time creating an anti-competitive, unlevel playing field between tax-paying and tax-exempt hospitals — a result the FTC rule precisely intended to prevent.”²⁸ Kahn also said that “in a time of constant health care workforce

shortages, the FTC’s vote today threatens access to high-quality care for millions of patients.”²⁹

While many trade groups have criticized this ruling, most healthcare employees and workers, including physicians, believe that the noncompete ruling is long overdue and that noncompetes “impede patient access to care, limit physicians’ ability to choose their employer, contribute to burnout and stifle competition.”³⁰ The American Academy of Family Physicians (AAFP), the American College of Physicians (ACP), and the American Medical Association (AMA) all have policies that oppose restrictive covenants for physicians as they could reduce the access to care for patients.³¹

FTC Chair Lina Khan stated that “noncompete clauses keep wages low, suppress new ideas, and rob the American economy of dynamism, including from the more than 8,500 new startups that would be created a year once noncompetes are banned.”³² Khan also stated that “the FTC’s final rule to ban noncompetes will ensure Americans have the freedom to pursue a new job, start a new business, or bring a new idea to market.”³³ By halting the practice of imposing non-competes, the FTC aims to lower healthcare costs by upwards of \$194 billion over the next decade and expand career opportunities for approximately 30 million Americans.³⁴

The presence, or absence, of noncompete agreements can impact the value of a business by:

- (1) Restricting the ability of owners or workers to leave and start a competing business or work for a competitor;
- (2) Impeding a potential buyer’s ability to employ key personnel or enter specific markets; and/or,
- (3) Providing the business a competitive advantage and prevents essential employees from leaving.

If noncompete agreements are too restrictive, it could also lower the value of a business by limiting their ability to retain and attract new employees, and by reducing the ability for the business to develop and expand.³⁵ It is important to note that the rule does not apply to noncompetes entered into by a person pursuant to a “bona fide” sale of a business entity, of the person’s ownership interest in a business entity, or of all or substantially all of a business entity’s operating assets. Further, the FTC also found evidence that noncompetes increase consumer prices for medical care, and estimates that banning noncompetes will result in \$74-\$194 billion in reduced spending on physician services over the next decade.³⁶

Not only does the final rule have implications on the revenue stream of healthcare services, by banning noncompetes, physicians would be able to move between jobs with more freedom, and compensation could potentially increase.³⁷ This may impact the expense structure of healthcare entities and necessitate further contemplation by compensation valuation professionals when considering historical market compensation data that were subject to noncompetes for the purposes of analyzing prospective arrangements that are not subject to noncompetes.

Less than a day after the noncompete final rule was issued, the Business Roundtable and the US Chamber of Commerce filed a lawsuit against the FTC in federal court.³⁸ Two other businesses filed separate legal challenges, seeking to block the rule.³⁹ The business trade groups requested that courts issue a preliminary injunction to prohibit FTC enforcement of this rule, and

that they issue a stay that would stop the rule from going into effect.⁴⁰ While the FTC rule is set to go into effect on September 4, 2024, the effective date may be delayed due to ongoing litigation.⁴¹ If the rule is put on a hold until litigation is finished, the rule’s effective date may be pushed out if it isn’t struck down completely.⁴²

- 1 “FTC Announces Rule Banning Noncompetes” Federal Trade Commission, April 23, 2024, <https://www.ftc.gov/news-events/news/press-releases/2024/04/ftc-announces-rule-banning-noncompetes> (Accessed 4/24/24).
- 2 ““Healthcare Closely Watching FTC’s Proposed Ban on Non-Competes” Jennifer Henderson, MedPage Today, January 12, 2023, <https://www.medpagetoday.com/special-reports/exclusives/102618> (Accessed 4/24/24).
- 3 “Noncompete Agreements” By Alexander Colvin and Heidi Shierholz, Economic Policy Institute, December 10, 2019, <https://www.epi.org/publication/noncompete-agreements/> (Accessed 4/24/24).
- 4 Federal Trade Commission, April 23, 2024.
- 5 “Noncompetes in the U.S. Labor Force” By Evan Starr, J.J. Prescott, and Norman Bishara, Journal of Law and Economics, July 3, 2015, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2625714 (Accessed 4/24/24).
- 6 *Ibid.*
- 7 Federal Trade Commission, April 23, 2024.
- 8 *Ibid.*
- 9 “16 CFR Part 910” Federal Trade Commission, April 23, 2024, https://www.ftc.gov/system/files/ftc_gov/pdf/noncompete-rule.pdf (Accessed 4/24/24).
- 10 *Ibid.*
- 11 *Ibid.*
- 12 “The Current State of the Enforceability of Restrictive Covenants in the Medical Profession” By Robert H. Schwartz, Phil Korovesis, and Mostafa Shanta, American Bar Association, December 28, 2022, https://www.americanbar.org/groups/health_law/publications/aba_health_resource/2022-2023/december-2022/the-current-state-of-the-enforceability-of-restrictive-covenants-in-the-medical-profession/ (Accessed 4/24/24).
- 13 *Ibid.*
- 14 *Ibid.*
- 15 *Ibid.*
- 16 *Ibid.*
- 17 *Ibid.*
- 18 “HHS Unveils Plans to Increase Healthcare Competition, Choice” By Jacqueline LaPointe, RevCycle Intelligence, December 5, 2018, <https://revcycleintelligence.com/news/hhs-unveils-plans-to-increase-healthcare-competition-choice> (Accessed 4/24/24).
- 19 “Executive Order on Promoting Competition in the American Economy” White House Press Release, July 9, 2021, <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/07/09/executive-order-on-promoting-competition-in-the-american-economy/> (Accessed 4/24/24).
- 20 “Unprecedented Executive Order 14036 “Promoting Competition in the American Economy” – a call to action” By Christopher Brennan, Selina Coleman, Brad Funari, and Michelle Mantine, July 15, 2021, <https://www.reedsmith.com/en/perspectives/2021/07/unprecedented-executive-order-14036> (Accessed 4/24/24).
- 21 *Ibid.*
- 22 “White House Competition Council” White House, 2024, <https://www.whitehouse.gov/competition/> (Accessed 4/24/24).
- 23 *Ibid.*
- 24 “FTC issues final rule banning most noncompete clauses in employer agreements” American Hospital Association, April 23, 2024, <https://www.aha.org/news/headline/2024-04-23-ftc-issues-final-rule-banning-most-noncompete-clauses-employer-agreements> (Accessed 4/24/24).
- 25 *Ibid.*
- 26 *Ibid.*
- 27 ““Double Whammy” – FAH Leader Reacts to FTC’s Final Noncompete Rule” FAH Hospital Policy Blog, Federation of American Hospitals, April 23, 2024, <https://www.fah.org/blog/double-whammy-fah-leader-reacts-to-ftcs-final-noncompete-rule/> (Accessed 4/24/24).
- 28 *Ibid.*
- 29 *Ibid.*
- 30 “Noncompete clauses for physicians are hurting health care, AAFP says” Richard Payerchin, Medical Economics, April 11, 2023, <https://www.medicaleconomics.com/view/noncompete-clauses-for-physicians-are-hurting-health-care-aaaf-says> (Accessed 4/24/24).
- 31 *Ibid.*
- 32 Federal Trade Commission, April 23, 2024.
- 33 *Ibid.*
- 34 *Ibid.*
- 35 “FTC’s Proposed Ban on Non-Compete Agreements - Impact on Business Valuation” By Achille Ekeu, The Washington Valuation Group, March 20, 2023, <https://www.washingtonvaluation.com/post/ftc-s-proposed-ban-on-non-compete-agreements-impact-on-business-valuation> (Accessed 5/14/24).
- 36 “Noncompete Rule” Federal Trade Commission, <https://www.ftc.gov/legal-library/browse/rules/noncompete-rule> (Accessed 5/20/24).
- 37 “FTC votes to ban noncompetes, with far-reaching effects on doctors” By Rebecca Pifer, Healthcare Dive, April 23, 2024, <https://www.healthcaredive.com/news/ftc-noncompete-ban-healthcare-doctor-effects/713846/#:~:text=The%20latest%20labor%20trends%20in%20healthcare,-Disputes%20between%20hospitals&text=Zeroing%20out%20noncompetes%20equalizes%20the,also%20cause%20wages%20to%20rise.> (Accessed 5/14/24).
- 38 “FTC is sued by business groups over its ban on noncompete agreements, which may delay enforcement” By Jeanne Sahadi, CNN Business, April 26, 2024, <https://www.cnn.com/2024/04/25/success/ftc-noncompete-ban-lawsuit/index.html> (Accessed 5/20/24).
- 39 “FTC Ban on Noncompetes Now Slated To Take Effect on September 4” By Matthew Collin et al., Skadden, Arps, Slate, Meagher & Flom LLP & Affiliates, May 8, 2024, <https://www.skadden.com/insights/publications/2024/05/ftc-ban-on-noncompetes-now-slated> (Accessed 5/20/24).
- 40 Sahadi, CNN Business, April 26, 2024.
- 41 *Ibid.*; Collin et al., Skadden, Arps, Slate, Meagher & Flom LLP & Affiliates, May 8, 2024.
- 42 Sahadi, CNN Business, April 26, 2024.



LEADERSHIP

(800) FYI -VALU

Providing Solutions in an Era of Healthcare Reform

- Firm Profile
- HCC Services
- HCC Leadership
- Clients & Projects
- HCC News
- Upcoming Events
- Contact Us
- Email Us

- Valuation Consulting
- Commercial Reasonableness Opinions
- Commercial Payor Reimbursement Benchmarking
- Litigation Support & Expert Witness
- Financial Feasibility Analysis & Modeling
- Intermediary Services
- Certificate of Need
- ACO Value Metrics & Capital Formation
- Strategic Planning
- Industry Research



Todd A. Zigrang, MBA, MHA, FACHE, CVA, ASA, ABV, is the President of **HEALTH CAPITAL CONSULTANTS (HCC)**, where he focuses on the areas of valuation and financial analysis for hospitals, physician practices, and other healthcare enterprises. Mr. Zigrang has over 28 years of experience providing valuation, financial, transaction and strategic advisory services nationwide in over 2,000 transactions and joint ventures. Mr. Zigrang is also considered an expert in the field of healthcare compensation for physicians, executives and other professionals.



Mr. Zigrang is the co-author of *"The Adviser's Guide to Healthcare - 2nd Edition"* [AICPA - 2015], numerous chapters in legal treatises and anthologies, and peer-reviewed and industry articles such as: *The Guide to Valuing Physician Compensation and Healthcare Service Arrangements* (BVR/AHLA); *The Accountant's Business Manual* (AICPA); *Valuing Professional Practices and Licenses* (Aspen Publishers); *Valuation Strategies*; *Business Appraisal Practice*; and, *NACVA QuickRead*. Additionally, Mr. Zigrang has served as faculty before professional and trade associations such as the American Society of Appraisers (ASA); the National Association of Certified Valuators and Analysts (NACVA); the American Health Lawyers Association (AHLA); the American Bar Association (ABA); the Association of International Certified Professional Accountants (AICPA); the Physician Hospitals of America (PHA); the Institute of Business Appraisers (IBA); the Healthcare Financial Management Association (HFMA); and, the CPA Leadership Institute.

Mr. Zigrang holds a Master of Science in Health Administration (MHA) and a Master of Business Administration (MBA) from the University of Missouri at Columbia. He is a Fellow of the American College of Healthcare Executives (FACHE) and holds the Certified Valuation Analyst (CVA) designation from NACVA. Mr. Zigrang also holds the Accredited Senior Appraiser (ASA) designation from the American Society of Appraisers, where he has served as President of the St. Louis Chapter. He is also a member of the America Association of Provider Compensation Professionals (AAPCP), AHLA, AICPA, NACVA, NSCHBC, and, the Society of OMS Administrators (SOMSA).



Jessica L. Bailey-Wheaton, Esq., is Senior Vice President and General Counsel of HCC. Her work focuses on the areas of Certificate of Need (CON) preparation and consulting, as well as project management and consulting services related to the impact of both federal and state regulations on healthcare transactions. In that role, Ms. Bailey-Wheaton provides research services necessary to support certified opinions of value related to the Fair Market Value and Commercial Reasonableness of transactions related to healthcare enterprises, assets, and services.



Additionally, Ms. Bailey-Wheaton heads HCC's CON and regulatory consulting service line. In this role, she prepares CON applications, including providing services such as: health planning; researching, developing, documenting, and reporting the market utilization demand and "need" for the proposed services in the subject market service area(s); researching and assisting legal counsel in meeting regulatory requirements relating to licensing and CON application development; and, providing any requested support services required in litigation challenging rules or decisions promulgated by a state agency. Ms. Bailey-Wheaton has also been engaged by both state government agencies and CON applicants to conduct an independent review of one or more CON applications and provide opinions on a variety of areas related to healthcare planning. She has been certified as an expert in healthcare planning in the State of Alabama.

Ms. Bailey-Wheaton is the co-author of numerous peer-reviewed and industry articles in publications such as: *The Health Lawyer* (American Bar Association); *Physician Leadership Journal* (American Association for Physician Leadership); *The Journal of Vascular Surgery*; *St. Louis Metropolitan Medicine*; *Chicago Medicine*; *The Value Examiner* (NACVA); and *QuickRead* (NACVA). She has previously presented before the American Bar Association (ABA), the American Health Law Association (AHLA), the National Association of Certified Valuators & Analysts (NACVA), the National Society of Certified Healthcare Business Consultants (NSCHBC), and the American College of Surgeons (ACS).



Janvi R. Shah, MBA, MSF, CVA, serves as Senior Financial Analyst of HCC. Mrs. Shah holds a M.S. in Finance from Washington University Saint Louis and the Certified Valuation Analyst (CVA) designation from NACVA. She develops fair market value and commercial reasonableness opinions related to healthcare enterprises, assets, and services. In addition she prepares, reviews and analyzes forecasted and pro forma financial statements to determine the most probable future net economic benefit related to healthcare enterprises, assets, and services and applies utilization demand and reimbursement trends to project professional medical revenue streams and ancillary services and technical component (ASTC) revenue streams.



For more information please visit:

www.healthcapital.com