

'This Final Rule Is A Double Whammy': What Home-Based Care Providers Should Know About FTC's Non-Compete Ban

By **Robert Holly** | April 25, 2024

On April 23, the Federal Trade Commission (FTC) voted 3-2 to finalize a new rule largely prohibiting employers from enforcing non-competes against workers.

While the regulatory timeline on the non-compete ban is fairly immediate, the rule will face intense legal pressure from a variety of groups, mainly of which will come from health care. Regardless of what the courts eventually decide, home-based care employers need to understand the significance and ripple effects of Tuesday's vote.

Chip Kahn, president and CEO of the Federation of American Hospitals, captured the ban's impact on health care in a statement released shortly after the FTC voted. His remarks focus on hospitals, but the sentiments could apply to the home health, home care and hospice markets as well.

"This final rule is a double whammy," Kahn said. "The ban makes it more difficult to recruit and retain caregivers, 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."

Some home-based care employers use non-compete agreements to discourage former executives from sharing company secrets or starting a new business of their own. Non-competes can be particularly important components in the M&A process, too, offering a certain level of competitive protection for the buyer.

Non-solicitations – another type of agreement used in home-based care preventing clients from hiring caregivers directly – are more frequently leveraged by provider employers. They’re not the same as non-competes, but FTC’s ban [could create confusion](#) around how they’re used.

“In our industry, you see non-solicitation agreements, which are designed to protect the business of the provider, but not to restrict the caregiver,” Angelo Spinola, the home health, home care and hospice chair at the law firm Polsinelli, previously told Home Health Care News. “They work where they want to work; it’s just about not taking an agency’s clients with them, because the only reason they know them is because of the agency. I think that’s a fair position to take.”

In this week’s exclusive, members-only HHCN+ Update, I highlight key provisions from FTC’s final rule and discuss what’s likely to happen next.

Unpacking the non-compete ban

From when the FTC proposed its non-compete ban through the end of that proposal’s comment window, it received more than 26,000 comments. About 25,000 of those comments were in support of the ban, with a majority of that feedback coming from people in health care, according to the commission.

FTC’s non-compete ban takes effect 120 days from the rule’s publication in the Federal Register. At that point, employers will need to stop enforcing existing non-compete agreements with certain workers while also letting employees know they’re no longer obligated to uphold previous commitments.

One point home-based care employers should be aware of is that their top executives may be exempt from the rule if an existing agreement is in place. Specifically, the final rule says senior executives making more

than \$151,164 and who are in a “policymaking position” aren’t covered by the ban.

Employers will be banned from entering into or attempting to enforce any new non-competes, even if they involve senior executives, however.

Less than 1% of workers are estimated to be senior executives under the final rule, [according to an FTC fact sheet](#).

Another critical point in FTC’s rule is how it handles nonprofit employers, of which there are many across home health, home care and hospice.

Broadly, there’s a belief that the FTC’s jurisdiction does not capture entities claiming tax-exempt status as a nonprofit. In the [570-page final rule](#), the commission makes it clear that’s not always the case.

“Merely claiming tax-exempt status in tax filings is not dispositive,” the final rule clarifies.

If a nonprofit organization engages in business on behalf of for-profit members, for instance, it could still be held to the standards in the non-compete ban.

Another key exemption

Although home health, home care and hospice transaction activity has dropped recently, deals are still getting done.

And when it comes to M&A, FTC’s non-compete ban will include exemptions between the buyer and seller of a business. In other words, sellers won’t be able to cash in on their business, then turn around and open up a competing provider in the same market, perhaps even taking key employees in the process.

What's more, the exemptions appear fairly broad and comprehensive.

Originally, FTC proposed to restrict non-compete agreements between buyers and sellers only when sellers had at least 25% ownership interest in the entity being sold. That language wasn't included in the final rule, partly due to commenters successfully arguing against it.

“Most of the commenters who supported some form of exception for non-competes between the seller and the buyer of a business contended that they are necessary to protect the value of the sale by ensuring the effective transfer of the business's goodwill,” the final rule states.

“According to these commenters, a buyer will be less willing to pay for a business if they cannot obtain assurance that they will be protected from future competition by the seller, and so a failure to exempt related non-competes may chill acquisitions.”

FTC likewise declined to include provisions where a non-compete ban would only kick in at a certain valuation or dollar amount.

There were at least 12 home-based care deals that took place during 2024's first quarter, [according to data](#) provided by M&A firm Mertz Taggart.

What about non-solicitation agreements?

During the public comment window on the proposed rule, many commenters asked FTC to revise its rulemaking to expressly cover non-solicitation agreements that prohibit workers from doing business with “prospective or actual customers” to an extent that would effectively preclude them from continuing to work in the same field.

Other comments also sought FTC to include language preventing workers from doing business with their former employers' clients directly. In home care, this means clients “poaching” caregivers from their agency.

In its final rule, FTC clarified that it does not see non-competes as the same as non-solicitation agreements, leaving room for the latter.

“Non-solicitation agreements are generally not non-compete clauses under the final rule because, while they restrict who a worker may contact after they leave their job, they do not by their terms or necessarily in their effect prevent a worker from seeking or accepting other work or starting a business,” the commission wrote.

But non-solicitation agreements will remain somewhat of a gray area because, under the right conditions, they could function more like a non-compete.

“Whether a non-solicitation agreement – or a no-hire agreement or a no-business agreement, both of which were referenced by commenters, as discussed previously – meets this threshold is a fact-specific inquiry,” FTC noted.

Tuesday’s final rule does not impact trade secret laws and non-disclosure agreements (NDAs).

Other considerations, what’s next

The FTC’s non-compete ban arguably has the greatest impact on the health care sector.

As health care has consolidated, those consolidators have worked to gain more control over the clinicians that power the business. To illustrate that notion: Previous research has found that up to 45% of U.S. doctors are subject to non-competes.

In fact, in coming up with its proposal, the FTC considered [a 2016 paper](#) published in Management Science, titled “Screening Spinouts,” which evaluated the economic effects of health care non-competes.

By cutting non-competes out of health care, FTC estimates that health care costs may shrink by upwards of \$194 billion over the next decade.

Looking at the total economic picture, the FTC estimates that its final rule will lead to new business growth of 2.7% per year, resulting in more than 8,500 additional new businesses annually.

Moving forward, the FTC ban is going to be challenged in court.

The U.S. Chamber of Commerce already announced its intention to sue.

“The Federal Trade Commission’s decision to ban employer non-compete agreements across the economy is not only unlawful but also a blatant power grab that will undermine American businesses’ ability to remain competitive,” Suzanne P. Clark, the organization’s president and CEO, said in a statement.

Even so, many states and cities already have non-compete bans of their own, with many focused on health care. FTC’s final rule could empower more states and cities to follow suit.