

Winners and losers of the FTC's noncompete ban

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THE FEDERAL TRADE COMMISSION (FTC) HAS VOTED TO formally ban most noncompete agreements in all industries. As proposed, the FTC's action would ban future associate agreements in dentistry and retroactively rescind existing associate agreements.¹

The FTC has stated that the proposed ban on noncompete agreements will reduce patient spending by "up to \$148 billion annually on health-care costs and double the number of companies founded by a former worker in the same industry."² This could mean reduced income and increased competition in dentistry.

HOW THE BAN WILL AFFECT DIFFERENT GROUPS

Associates

Associates will have greater freedom to accept new employment opportunities and new practice purchase opportunities. Associates who have been restricted from practice ownership by onerous noncompete agreements that included large noncompete areas and long time periods, will no longer face such hurdles.

Currently, it seems reasonable that associates could defeat contracts with overly restrictive terms, but comparatively few associates have been willing to take on owners' attorneys in court, especially attorney groups of large corporations. In addition to this, it's common for associates' attorneys to recommend against their clients violating noncompete terms in their existing employment contracts.

Consider how the ban will give leverage to associate practice buyers. Imagine for example, a two-doctor practice having one owner and one associate with a noncompete agreement, where each sees half the patients. Once the existing noncompete is rescinded, the associate could start up a

new practice or buy another practice across the street and take half the patients of the current employer. In this example, when one considers the leverage that associates will have once the ban goes into effect, owners without other protections in place could be pressured to accept lower sale prices or risk losing part of their goodwill with no remuneration whatsoever.

Allocation of practice sale price to goodwill frequently exceeds 65% with most sales.³ Practice owner real estate sale prices and postclosing seller employment compensation rates could also fall due to increased buyer leverage.

Individual private practice owners

According to the ADA Health Policy Institute, distribution of dentists by practice size, only 36% of all dentists are individual practitioners in one location.⁴ In the short run, practice owners in this group will likely be unaffected by the noncompete ban. But in the long run, the FTC's plan to reduce patient health-care spending and increase competition will reduce practice value.

Practice sellers

It's tough to predict the ban's impact on increasing the pool of practice buyers who are now associates. Theoretically, more buyers mean more buyer competition, making an even stronger seller's market for good practices, and increasing practice sale prices. Conversely, the ban would negatively impact the legitimate

business interests of practice owners in some scenarios.

The FTC noncompete ban excludes noncompetes with sellers with no associate dentist and those owners selling 25% or more of their practices.⁵ In these scenarios, goodwill can be successfully transferred to buyers. Translated, this means that for most private practice sales, the noncompete language found in asset purchase agreements that prevents sellers from competing against buyers once a sale is complete or closes, will still be permitted. According to an email from Randon Jensen of CTC Associates and past president of the National Association of Practice Brokers, "The ban should not affect us too much, except when we are selling practices in which there has been a long-term associate and that associate is not buying the practice. I see the ban affecting DSOs more than private practices."

DSOs and private practice owners with associates

Dental attorney Jason Wood of Wood & Morgan who serves clients nationally, stresses that for starters, "It is essential for practice owners to have associates under written contracts." Beyond that, Wood says that the balance of the US can learn from experiences of practice owners in California and Alabama where noncompete agreements are already banned. In assisting practice owners with associate contracts, Wood employs broad language defining what constitutes intellectual property/trade secrets and specific language regarding nonsolicitation of staff and patients (recorded phone call, August 31, 2023).

How would the noncompete ban affect DSOs? Dr. Alex A. Giannini, founder and CEO of several dental groups and DSOs, shared that, “A risk factor for any group or DSO is high concentration of a payer or provider. If there is a high producing associate doctor without a noncompete, that could be an issue without specific damages for taking patients and employees through a nonsolicitation agreement or clause in their contract. Although I am not supportive of this ban, overall and in general, with exceptions, the impact of not having a noncompete for an associate doctor would be minimal for most DSOs.” (email, August 30, 2023)

WHAT HAPPENS NEXT?

The sole dissenting commissioner vote against the proposed noncompete rule was FTC Commissioner Christine S. Wilson. According to Wilson, since the administration appointed Lina Khan as the FTC chair, the committee has been significantly

politicized. Wilson has since resigned.^{6,7} Turmoil in the FTC can't be helpful in seeking resolution on the proposed non-compete rule.

The FTC first voted to publish the notice of proposed rulemaking for the noncompete ban in January of 2023.⁸ Since then, many law firms and business organizations have stepped up to oppose the proposed rule and instead defer action on noncompetes to the states. As a result, the commission received approximately 27,000 comments.⁹ According to regulations.gov, the public comment period on the noncompete rule has ended. The final version of the proposal is scheduled for a vote in April of 2024.¹⁰ The FTC's rule provisions in 2023 should be a good guide to what the FTC plans to adopt in 2024, but no one knows for sure what the final rule will look like.

If and when the noncompete ruling is approved, it will not become effective until 60 days after publication in the National

Register. From the publication date, employers will have 180 days to implement compliance.^{11,12} However, according to former FTC Commissioner Wilson, “The proposed noncompete clause rule will trigger numerous and likely successful legal challenges regarding the commission's authority to issue the rule.”¹³ So, stay tuned!

Editor's note: View the references list at dentaleconomics.com/ftc. **DE**



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