

Health worker for a nonprofit? The new ban on noncompete contracts may not help you

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Many physicians and nurses are happy about the Federal Trade Commission's new rule banning the use of noncompete agreements in employment contracts. But they are disappointed that it may not protect

those who work for nonprofit hospitals and health care facilities, which provide most of the nation's care and employ the largest number of medical professionals.

In April, in a 3-2 vote, the FTC approved a final rule prohibiting contracts that prevent an employee from taking a job with a competitor. Calling the noncompete agreements "a widespread and often exploitative practice," an agency announcement described them as an unfair method of competition that depresses wages and hinders new business formation.

The rule bars employers in most industries, including health care, from using contract clauses that block employees from leaving for other jobs or starting a competing business in the same geographic area for a fixed period of time.

But that doesn't help many [health professionals](#), because the FTC Act gives the agency authority over companies organized to operate for profit but not over nonprofit, charitable organizations, which are also tax-exempt.

Still, the agency noted some nonprofits could be bound by the rule if they do not operate as true charities. The rule establishes a two-part test to determine if the FTC has jurisdiction over a nonprofit—whether the organization is carrying on business for only charitable purposes, and whether its income goes to public rather than private interests.

"Our rulemaking record includes powerful stories from [health care workers](#) who are employed by nonprofits about how noncompetes hurt patients and providers," said FTC Commissioner Rebecca Kelly Slaughter, one of three Democratic commissioners, in comments before the April 23 vote. "I do not think there is a good justification for them to be excluded from this rule."

Noncompete contract terms have become increasingly common for physicians, [nurse practitioners](#), and other medical professionals in hospitals and various [health care facilities](#). Some providers say these agreements have forced them to leave their communities and patients behind if they wanted to exit unethical or unsafe workplace conditions.

Nearly 64% of U.S. community hospitals are nonprofits or government-owned, and they employ many of the nation's medical professionals. As of 2022, nearly three-quarters of U.S. physicians were employed by [hospital](#) systems or other companies, both nonprofit and for-profit.

Based on their designation as charities that don't have to pay income or [property taxes](#), U.S. nonprofit hospitals received a total estimated tax exemption of \$28 billion in 2020, according to KFF, a nonpartisan research organization.

That exceeded the estimated \$16 billion they spent on charity care for patients unable to afford their medical bills, KFF said.

Physician and nursing groups say it makes no sense to treat nonprofit hospitals differently because they are just as money-driven as for-profit hospitals. Patients, they say, will benefit if providers are free to call out unsafe conditions and change jobs. "Giving physicians freedom of movement will force hospitals to compete to improve working conditions," said Jonathan Jones, immediate past president of the American Academy of Emergency Medicine.

Chad Golder, general counsel and secretary of the American Hospital Association, which represents mostly nonprofit hospitals, said the rule would increase health care costs and reduce patient access by triggering hospital bidding wars for physicians. He predicted the FTC would try to apply the rule to both nonprofit and for-profit hospitals.

"They aren't saying exactly what they'll do, but it's a pretty significant move for them to say we'll apply our own test to determine if we can regulate a nonprofit," Golder said. "Nonprofit entities now will need to be extra careful."

In addition, some nonprofit hospitals have joint ventures with for-profit hospitals and medical groups. That could create complicated questions about whether their employee contracts come under the rule, said Chip Kahn, president and CEO of the Federation of American Hospitals, which represents for-profits.

The new rule arose from President Joe Biden's 2021 executive order instructing the FTC to curb the unfair use of noncompete agreements, part of his broader mandate to boost U.S. economic competition and worker mobility.

The FTC argued that banning noncompetes, which it said cover one in five American workers, would lower health care costs by up to \$194 billion over the next decade. It will ensure Americans "freedom to pursue a new job, start a new business, or bring a new idea to market," FTC Chair Lina Khan said.

The rule also prohibits contract terms that function like noncompetes to stop employees from leaving to work for competing companies or start their own businesses. These might include overbroad nondisclosure agreements, training repayment provisions, and nonsolicitation clauses.

"No one should be trapped in an unsafe job by onerous contracts that prevent them from taking another job," said Brynne O'Neal, a regulatory policy specialist at National Nurses United, the profession's largest dedicated labor union in the U.S. Hospitals, she said, use training repayment agreement provisions that require nurses to pay as much as \$30,000 in training costs if they leave, essentially locking them in their

jobs.

California, Minnesota, North Dakota, and Oklahoma already ban enforcement of noncompete clauses for all employees of both nonprofits and for-profits, while about nine other states prohibit noncompetes for physicians. Even in states without bans, judges have invalidated noncompetes when they have found them to be overbroad or unreasonable.

Hospital executives argue that the noncompete rule will force them to compete against each other to hire physicians and other providers and ultimately cost them more, and that it advantages nonprofits over for-profits. "All it would do is increase the price of labor in a field that already has labor shortages and thin margins," Golder said.

"The nonprofit hospital across the street could pursue our employees, while their employees would be protected, and that's a basic fairness issue," Kahn said.

But Clifford Atlas, an employment attorney with Jackson Lewis in New York, said that argument against the noncompete rule "won't fly" in court because preventing competition for the services of physicians or other workers is not a business interest that's protected by law or public policy.

The rule is set to take effect in September, though business groups have filed two federal lawsuits against it in Texas and one in Pennsylvania. Many [legal experts](#) predict that conservative judges will strike down the rule on the grounds that it exceeds the FTC's statutory authority.

Physician and nurses' groups hope the FTC rule, whatever its fate in the courts, helps persuade hospitals and other health care employers to stop using noncompetes and spurs more states to prohibit them.

"We're telling our members it could be struck down, but we're asking them to renegotiate their contracts," said Jones of the American Academy of Emergency Medicine. "They should be asking their employers, 'Wouldn't you like to be on the right side and not to be seen as fighting against physicians and patients?'"

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