

March 7, 2023

Lina M. Khan  
Chair  
U.S. Federal Trade Commission  
600 Pennsylvania Avenue, NW  
Washington, DC 20580

**P201200**

**Re: Non-Compete Clause Rulemaking, Matter No. P201200**

Dear Chairwoman Khan:

On behalf of the nearly 40,000 members of the American College of Emergency Physicians (ACEP), we appreciate the opportunity to comment on the “Non-Compete Clause Rulemaking, Matter No. P201200” proposed rule. ACEP is the national medical society representing emergency medicine. Through continuing education, research, public education, and advocacy, ACEP advances emergency care on behalf of its members and the more than 150 million patients they treat on an annual basis.

The Federal Trade Commission (henceforth referred to as “the Commission”) is proposing to ban non-compete clauses in employee contracts. The proposed rule would define the term “non-compete clause” as a contractual term between an employer and a worker that prevents the worker from seeking or accepting employment with a person, or operating a business, after the conclusion of the worker’s employment with the employer and clarify that a non-compete clause is dependent on how the clause actually functions rather than what it is called. The definition of non-compete clause proposed would not generally include other types of “restrictive employment covenants” like non-disclosure agreements. In addition to prohibiting employers from entering into non-compete clauses with workers starting on the rule’s compliance date, the proposed rule would require employers to rescind existing non-compete clauses no later than the rule’s compliance date.

*“My non-compete is geographically quite broad, and basically means that if I leave my current employer I will have to move my special needs kids out of the school system we moved here for. I feel trapped, and worry every shift that this non-compete limits my ability to advocate for my patients--since a core part of the job of a good emergency doctor is advocating for patients even when it causes work for more ‘powerful’ specialists within the hospital.”*

ACEP carefully monitors the emergency medicine labor market in pursuit of our overall goal to support emergency physicians and ensure that they are treated fairly by their employer and practice in an environment where they can best care for their patients. Therefore, **ACEP supports the Commission’s proposal to categorially ban non-compete clauses and we urge it to finalize the regulation as proposed to help address the current anti-competitive conditions faced by many emergency physicians that limit their right to freely practice medicine in their communities.** We also believe that the Commission should monitor the effect that a ban on non-compete clauses has on the ability to recruit and maintain a stable workforce in rural and underserved areas and should examine the potential impacts should non-profit health systems be exempt from a ban.

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## **Background**

While non-compete clauses are included in contracts across employment sectors, it is important for the Commission to understand the unique qualities of the emergency medicine (EM) market. Emergency physicians serve the essential role of strengthening the health care safety net for our communities. They treat all patients who come through our doors, regardless of their insurance status or ability to pay. Over the years, certain laws have been put into place to help enforce and protect patients and the emergency health care safety net, including the Emergency Medical Treatment and Labor Act (EMTALA), which requires hospitals to provide a medical screening examination to every individual who “comes to the emergency department” seeking examination or treatment. Given the vital responsibility that EM plays in our health care system, ensuring that emergency departments (EDs) across the country are appropriately staffed so they can provide care 24 hours a day, 7 days a week, 365 days a year is essential. Hospitals and emergency medicine groups have tried to achieve this goal in different ways through different employment contracting models in which non-compete clauses have played a role, as described below.

Emergency physicians work in a variety of employment models. While some are employed directly by hospitals, many hospitals instead choose to contract with independent entities (often referred to as “groups”) that themselves employ emergency physicians to provide 24/7 ED coverage. These independent entities range from small, independent democratic (i.e., owned by the physicians) groups that serve only one or two local hospitals, to larger groups that can staff hundreds of EDs (and sometimes service lines of other specialties) nationwide. In recent years, physician practices, including independent EM practices, have been acquired by hospitals, health systems, and corporate entities (such as private equity and health insurance companies) at a relatively high rate. The pressures of staying financially viable during the COVID-19 pandemic seems to have accelerated this trend even further. According to a [report from the Physicians Advocacy Institute \(PAI\)](#), there was a sharp rise in the number of physician practices being acquired by hospitals and corporate entities throughout 2019 and 2020—especially in the first half of 2020 as the pandemic began. Now, PAI reports that 70 percent of physicians are employed by corporate entities or hospitals—meaning that only 30 percent of physicians practice independently. However, the acceptance of non-compete clauses in employment contracts is required have been by both smaller, independent democratic groups and larger corporate entities alike.

Amidst growing health care consolidation, a decrease in the number of prospective employers means that physicians often must accept the non-compete as part of their contract due to the limited amount of employment options available.

With that context and framing in mind, our comments on the proposed rule are found below.

## **Impacts of Non-Compete Clauses on Emergency Physicians**

To help guide our response to this proposed rule, and to gain specific and up-to-date information on how non-compete clauses impact emergency physicians in particular, ACEP asked our members a series of structured and open-ended questions about their experiences with non-compete clauses. Specifically, we posed a series of questions for both members who have had and have not had a non-compete clause in their contract in the past five years; for members who identified themselves as either employees/independent contractors, employers/leaders of a group practice, or both; and for members whose practices do and do not include non-compete clauses in contracts. We asked members about how non-compete clauses impact their job search process, the limitations of their clause, and the effects of non-compete clauses on local job market competition. For respondents who identified themselves as

employers/leaders of a group practice, we asked their opinions on the alternatives upon which Commission seeks comment. We also asked all respondents for their general views about the labor-related impacts of non-compete clauses in emergency medicine. We received over 75 responses to this questionnaire. The questionnaire results, including both quantitative analyses and actual anecdotal quotes directly from emergency physician respondents (all italicized), are embedded in our response to the Commission’s proposals and requests for comment.

Emergency medicine’s unique nature can make non-compete agreements particularly ill-suited to the specialty. Unlike many other specialties, emergency physicians do not have a “book of business” of existing patients with whom they have established and ongoing relationships. If they leave to go to another group or hospital, no patients will follow them to their new practice, so their departure does not lose their previous employer any business. A number of ACEP respondents remarked on this in their comments, such as:

*“It makes it much harder to change jobs. Which is quite frankly ridiculous. No one chooses an Emergency Room in an emergency based on which whether a certain doctor is working. Emergency Medicine doctors do not build a patient following with patients who consider us “their doctor”. We do not have an office-based practice where patients specifically choose us.”*

*“I feel limited and trapped by this clause. And it doesn’t make sense. Patients don’t come to the ED for me in particular. They will not follow me to a different ED and I will not ask them to do so. I can’t affect where the patients decide to access an emergency room.”*

*“There is zero reason for a non-compete for emergency physicians since, unlike tech employees we don't carry specialized knowledge that competitors might benefit from, and unlike surgeons we can't take our patients with us. It's simply a means to anti-competitively suppress competition in the labor market for physicians, and it helps hospitals take a bigger cut of the fees they charge patients while paying physicians less and less and discouraging them from speaking out about quality of care concerns.”*

### **Applicability to Non-Profit Organizations**

The proposed regulation notes that some employers, including most non-profits, would be exempt from the proposed rule.<sup>1</sup> Given that a large number of hospitals are non-profit entities, if the rule is finalized and the ban only applies to for-profit hospitals, we have concerns about the unlevel playing field this would create and the potential for unintended consequences. ACEP respondents shared this concern:

*“My understanding is it wouldn’t apply to non-profits which is a big problem. This could lead to siphoning physicians from small groups to big hospital chains.”*

*“This would be fabulous as long as it includes non-profit organizations”*

*“Make sure it applies to all types of practices— small groups, not for profit, big groups, corporate practices, academics etc”*

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<sup>1</sup> The rule states “Some entities that would otherwise be employers may not be subject to the Rule to the extent that they are exempted from coverage under the FTC Act. These entities include certain banks, savings and loan institutions, federal credit unions, common carriers, air carriers and foreign air carriers, and persons subject to the Packers and Stockyards Act of 1921, as well as an entity that is not “organized to carry on business for its own profit or that of its members.” Where an employer is exempt from coverage under the FTC Act, the employer would not be subject to the Rule.” Fed Reg. Vol. 88. 3510. (January 19, 2023).

While a ban, if finalized, that exempts non-profits could still bring significant scrutiny to non-competes and new pressures for their elimination, we remain concerned about an unlevel playing field and request the Commission to further explore such potential ramifications and provide guidance, where possible, to address it.

### **Non-Compete Clauses as an Unfair Method of Competition**

In the proposed rule, the Commission determines that an employer's requirement that an employee agree to inclusion of a non-compete clause in their contract is an unfair method of competition. The Commission cites three independent ways in which non-compete clauses are "unfair": 1) non-compete clauses are restrictive conduct that negatively affects competitive conditions; 2) non-compete clauses are exploitative and coercive at the time of contracting while burdening a not insignificant volume of commerce; and 3) non-compete clauses are exploitative and coercive at the time of the worker's potential departure from the employer while burdening a not insignificant volume of commerce.

The Commission also seeks comment on whether its "unfairness" analysis should apply to highly paid or highly skilled workers who are not senior executives and asks how this category of workers should be defined, and if they should be subject to different regulatory standards.

### **Negative Effects on Competitive Conditions**

The Commission posits that non-compete clauses negatively affect competitive conditions in labor markets regardless of the worker's income or job function because they block the worker from switching to a job in which they would be better paid and more productive, thereby restricting that worker's opportunities and the opportunities of other workers in their labor market. Of all respondents to our questionnaire, 90 percent said that non-compete clauses make it harder for emergency physicians to switch employers. Several commented that they both "decrease competition and suppress wages" as emergency physicians are bound by their restrictive contracts and unable to pursue a job with a potentially higher wage, lest they relocate. This particularly harms patients in rural or underserved areas, as emergency physicians who work in them and wish to switch employers must move away from the area, thereby exacerbating the existing shortage of health care workers in underserved areas.

*"In rural america where doctor shortages are a daily event this further restricts supply if doctor must relocate outside region."*

*"It penalizes underserved areas for which a doctor might stay if able to make a lateral move to a hospital in the same area, but will leave because of the penalty in the non-compete clause."*

*"I have found noncompete clauses make it much more difficult to not only find a job but to change jobs as needed. It stifles competition and worsens access to care for many rural patients. Physicians that could do shifts in underserved areas are restricted due to noncompete clauses."*

In addition, 52 percent of all respondents said that non-compete clauses made it more difficult for emergency physicians to find a job; 44 percent of respondents that identified themselves as solely employers/leaders of a group agreed; 44 percent of respondents that identified themselves solely as employees/individual contractors agreed; and 78 percent of respondents who identified themselves as both an employer and an employee agreed. Thus, many emergency physicians are stuck in positions where they may be unhappy but are unable to switch employers, thereby occupying a job that may be better suited for another employee that is barred from applying. Said one respondent:

*“[Non-competes make it] significantly harder to find jobs in same area and forces physicians to stay in jobs in which they are unhappy.”*

Non-compete clauses also bar emergency physicians from “moonlighting” at other facilities, an opportunity which can enhance job flexibility, allow physicians to expand their skills, and help them earn additional income. Thus, if they are restricted by a non-compete clause that suppresses their wages, they are unable to supplement this financial strain. Of respondents who have had a non-compete clause in their contract in the past five years, 12 percent felt limited by their inability to moonlight:

*“I changed from a local/regional independent practice to an academic position in another state. I work for a state institution, and am prohibited from working at outside hospitals without a “kickback/Dean’s tax”. While I’m at a level 1 trauma institution, I’ve lost my peds/rural experience. And yet our residents are required to rotate in both. My moonlighting in the past has been only 5-10% of my total income, so it’s not the money. It’s the independence, and skill level that I value.”*

*“As a fellow in my late 30’s and the only physician in my family, I have been the one to provide when my family needs money. Not being able to leverage a contract or even moonlight at a nearby facility over a holiday weekend forces me into continued financial strain. No one should get to say what I do or where I work in my free, unscheduled time.”*

Employers/leaders of a group feel the effects of non-compete clauses on their practices as well. Seventy-five percent of respondents who identified themselves as employers or leaders of a group used non-compete clauses in their hiring. Of these respondents, 37 percent said that non-compete clauses make it more difficult to hire and/or that they have had candidates decline employment because of the non-compete clause. Many of these employers do not have the choice to exclude the non-compete clause, as 73 percent of respondents who use non-compete clauses cited corporate mandates (including by a contracting hospital system) as the reason for usage.

*“It has caused physicians in my group to have prospective employees decline to work with us as their non-compete clause from a previous job prevents them from working in our sites, or to have new employees limited in which sites they can cover due to distance from previous jobs.”*

Of the employers who use a non-compete clause, 79 percent said that a categorical ban would either have a positive or minimal impact on their group, whereas 10 percent said that it would have a negative impact on their group. Among all employers, 90 percent said that a categorical ban would either have a positive or minimal impact on their group. Of those who said that a categorical ban would have a negative impact on their group, they cited fears of insecurity of contract with their contracting hospital and potential for a mass exodus of employees to another hospital. However, those employers who were in favor of the categorical ban welcomed the possibility of increased competition and the larger pool of candidates that would occur due to the elimination of geographic limitations.

Emergency physicians are highly skilled workers. They go through many years of specialized medical training and are certified (or eligible to be certified) by the American Board of Emergency Medicine (ABEM) or the American Osteopathic Board of Emergency Medicine (AOBEM) or an equivalent international certifying body recognized by ABEM or AOBEM in Emergency Medicine or Pediatric Emergency Medicine. **It is clear from our questionnaire results that emergency physicians, as highly skilled workers, are negatively impacted by non-compete clauses, and therefore ACEP strongly encourages the Commission to apply the SAME “unfairness” analysis to highly paid or highly skilled workers.**

## Non-Compete Clauses Are Exploitative and Coercive

The Commission finds that non-compete clauses are exploitative and coercive at both the time of contracting and at the time of the worker's potential departure from the employer because they force a worker to either stay in a job they want to leave or choose an alternative that likely impacts their livelihood, thereby limiting their autonomy. Of respondents who identified themselves as employees/independent contractors who have had a non-compete clause in their contract in the past five years, 67.3 percent said that the non-compete clause has had a general negative impact on their employment, with 58.6 percent saying they would seek a different job locally had they not been subject to the clause. Many described feeling "trapped" by the clause:

*"I recently moved away from my hometown and my wives family due to noncompete clause. This was a very trying time for my family and my children. I had to tear them away from their school, friends, and sports. After the move my children experienced bullying at school, lack of sports options and one child developed severe anxiety requiring treatment. I then lost significant income and equity selling my house and moving back to my original location but had to accept a less desirable job due to noncompete clauses."*

*"I now am stuck in a job where I am unhappy because if I want to leave the company, I will either need to move my family or drive an hour to other facilities. I feel trapped. This has without a doubt caused an impact on fair market value of our compensation as we have not received a raise in over 5 years and because leaving the company would cause all of the emergency physicians a hardship of moving, we all accept the bad conditions under which we are working."*

*"I have a noncompete clause in my contract. As I am working in an area of the country that is in dire need of emergency physicians, if I leave my current job, I would be depriving this high need area of a physician, as I would be forced to find work outside this area. Moreover, this area would be losing someone who has been actively putting down roots and becoming a member of the community, with a knowledge base of the local resources and culture."*

Geographic restrictions in non-compete clauses coerce employees into remaining in exploitative contracts that may, as one respondent noted, "censor physicians from standing up for patient care and/or leaving a facility they feel is not meeting the needs of their patients properly, without uprooting their entire family." 26 percent of respondents ultimately relocated and/or traveled over an hour for other employment due to the limitations of their non-compete clause, which can have a significant financial impact, cause familial or marriage problems, or cause their entire families to readjust to a new location:

*"The non compete forces me to only look for jobs that require I move my family to a new town. In essence, unless I upend my whole life and the life of my whole family I am chained to a single employer."*

*"I recently moved away from my hometown and my wife's family due to noncompete clause. This was a very trying time for my family and my children. I had to tear them away from their school, friends, and sports. After the move my children experienced bullying at school, lack of sports options and one child developed severe anxiety requiring treatment. I then lost significant income and equity selling my house and moving back to my original location but had to accept a less desirable job due to noncompete clauses."*

*"It has been exhausting to work in a different city than my family lives in and puts extra strain on my family. We have decreased the number of activities we do as a family and minimized vacations, because I am gone so much that when I am not working, we just want to spend a little time together at home."*

## **Impact of Consolidation**

Some employers who are not mandated to use non-compete clauses say they choose to use them because they offer a sense of stability and workforce security. As consolidation throughout health care continues to grow, they note that a non-compete can offer a means of protection against hostile takeover of an independent ED practice wherein a contracting hospital terminates the contract but retains some members of the group:

*“The non-compete is an attempt to protect our group from being terminated by the hospital or to at least force an acquiring competitor to negotiate with us if it desires to employ some or all of our physicians and APPs.”*

*“Unfortunately, there are many variations of non-competes, many of which are more restrictive than ours. I do understand the negatives of non-competes but believe that having a limited non-compete that helps protect the owners of a group from being summarily shoved out the door without any recourse is proper. The FTC needs to understand that the hospital that contracts with the ED group has significantly more power regarding the future for those physicians than does the group itself.”*

Conversely, a larger number of respondents to ACEP’s questionnaire felt that health care consolidation increased the negative impact of non-compete clauses:

*“One of the major problems with non-compete clauses is that they increase the cost of leaving your job. Employers are then able to change contracts, schedules, and working conditions knowing that it’s more difficult to leave the current one. A group took over my local ER. They hired all the physicians and had non-compete clauses. Within 6 months the physician coverage was halved, and we were each covering up to 4 PAs at a time. Leaving the group meant leaving the area and most of us were unwilling to do that. The few who left were impossible to replace because of the working conditions. Administration took this as a “growing pain” with the new group. The group considered this a process working as intended. And the patient’s suffered with physicians unable to protect them.”*

*“Currently, my employment contract has a non-compete clause. It states that I cannot work for other hospitals within 5 miles of the many hospitals that my employer has contracts with. In addition, I also cannot be employed by the very same hospitals that my employer has contracts with so that I cannot switch employer and work at the same hospitals. That practically eliminates many local jobs if I stop working for the current contracting group.”*

*“Job I was considering included geographic noncompete that prohibited any ED that “shares more than 20% patient population.” Group staffs multiple EDs in this corner of the state, so non-compete effectively excludes ANY work in northwest Ohio or southeast Michigan if leave the group.”*

## **Alternatives to the Proposed Rule**

Although the Commission is proposing a total ban on non-compete clauses, it seeks comment on some alternatives that it could finalize in place of a complete ban. First, instead of a categorical ban, the Commission could adopt a “rebuttable presumption” of unlawfulness. Under this approach, it would be presumptively unlawful for an employer to use a non-compete clause, but the use of a non-compete clause would be permitted if the employer could meet a certain evidentiary burden, based on a standard that would be articulated in the rule. Instead of applying to all workers uniformly, the rebuttable presumption could include exemptions or different standards for different categories of workers. These exemptions or different standards could be based on a worker’s job functions, earnings, a different factor, or some combination of factors. Another potential alternative to a categorical ban, as suggested by the

Commission, is a “disclosure requirement” in which an employer must disclose to a worker, prior to making the employment offer, that the worker will be subject to a non-compete clause.

### Rebuttable Presumption

With respect to the first alternative, the rebuttable presumption, the Commission poses the question of what the test for rebutting the presumption would be. In these situations, the employer would have to show convincingly that the clause is either 1) unlikely to harm competition, OR 2) the clause provides a competitive benefit that plausibly outweighs the apparent or anticipated harm to competition. Though the Commission recognizes possible advantages of a rebuttable presumption approach, it preliminarily believes that a categorical ban would advance the proposed rule’s objectives more than the rebuttable presumption approach. The Commission seeks comment on whether a rebuttable presumption should be adopted rather than a categorical ban.

Of respondents to ACEP’s poll who commented on the rebuttable presumption, 88 percent were in stark opposition, with most commenting that they would prefer a categorical ban to this alternative. Respondents expressed that this approach would “still cause fear of legal liability to a physician” and “protects the company rather than the worker equally.” One respondent commented that this alternative would actually exacerbate current issues:

*“[The rebuttable presumption approach] would be worse than doing nothing. I think the worst offenders would find a way around it with good legal teams leading to an unfair playing field.”*

The 12 percent who did not express opposition instead commented on the complexity that it would add to the hiring process and the burden that the presumption would place on the employer asking for the restriction.

### Disclosure Rule

On the second alternative, the Commission recognizes that research suggests many workers often are not informed about non-compete clauses until after they have accepted an employment offer. It believes this concern could be addressed by requiring an employer to disclose to a worker that the worker will be subject to a non-compete clause prior to making the employment offer. The employer could also potentially be required to explain the terms of the non-compete clause and how the worker would be affected by its acceptance. However, the Commission does not believe that this alternative would achieve the objectives of the proposed rule. The Commission seeks comment on potentially adopting this alternative instead of, or in addition to, the proposed rule.

Fifty-eight percent of ACEP respondents said that disclosure requirements would not alter the current usage of non-compete clauses in any significant way. This is due to the prevalence of non-compete clauses in emergency medicine:

*“Many times it’s known that you will [be subject to a non-compete clause] but you don’t have much choice, in some regions they’re ubiquitous. The problem is oppressive and unreasonable non competes.”*

Thus, though a prospective employee would be made privy to the non-compete clause prior to the contract stage, the employee may not have another choice in employers due to existing market conditions and therefore sign a contract with a non-compete clause anyway. Those who opposed the disclosure requirements preferred the categorical ban to this alternative. However, 15 percent of respondents acknowledged that the disclosure requirement may mitigate the negative impacts of the current non-compete clauses on market conditions or cause them to be used less frequently.



## Conclusions and Recommendation

The personal anecdotes shared in this letter reflect the real effects of non-compete clauses on emergency physicians and emergency medicine. All in all, with the exception of serving as a protective measure against insecurity with a contracting hospital, it appears that the current prevalence of non-compete clauses in EM detrimentally affects physicians' interests and well-being, which may in turn impact their ability to serve their patients. ***Therefore, ACEP urges the Commission to finalize the regulation as proposed to help address the current anti-competitive conditions in the emergency medicine labor market.*** However, we believe that the Commission should monitor the effect a categorical ban on non-competes has on the ability to recruit and maintain a stable workforce in rural and underserved areas and should examine the potential impacts should non-profit health systems be exempt from a ban.

We appreciate the opportunity to share our comments. We would also be more than happy to meet with the Commission to discuss our findings and our comments in greater detail and share the raw results of our questionnaire.

Thank you again for the opportunity to share our comments. If you have any questions, please contact Laura Wooster, ACEP's SVP of Advocacy and Practice Affairs, at [lwooster@acep.org](mailto:lwooster@acep.org).

Sincerely,

A handwritten signature in black ink, appearing to read "Christopher S. Kang". The signature is fluid and cursive, with a large, stylized initial "C" and "K".

Christopher S. Kang, MD, FACEP  
ACEP President