

Benesch Healthcare+ Nephrology & Dialysis Conference Panel Key Take Aways – Noncompete Update and Case Study

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The future of non-competition agreements remains volatile. Recent actions by the FTC and several states threaten to limit, or even outright ban, these agreements. Such an evolving regulatory landscape requires employers to proactively review their restrictive covenants to ensure they remain enforceable.

At the Benesch Healthcare+ Fourth Annual Nephrology and Dialysis Conference, held in Chicago on June 13, 2024, we spoke to a panel of experienced attorneys on the future of non-competition agreements for healthcare employers and what steps employers should take given the current landscape of non-compete law. The panel included two Benesch partners, Charles Leuin and J. Scott Humphrey, Chair of Benesch's Trade Secrets, Restrictive Covenant and Unfair Competition Group. The panel was moderated by Jake Cilek, Benesch Healthcare+ partner.

Here are the key takeaways from the panel discussion:

Where Are We - On April 23, the Federal Trade Commission ("FTC") announced a rule banning noncompete agreements nationwide. The ban applies broadly to any contractual term that prevents a worker from accepting employment with another firm, partnership, corporation or company. The ruling's broad definition of "non-compete clause" can arguably cover not just traditional non-competes, but also non-solicits, severance agreements, non-disclosure agreements and contracts that require the repayment of education costs. The definition of a "Non-Compete Clause" reads:

"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."

The FTC ruling does provide three notable carve outs from the blanket ban on non-competes. First, the ban does not apply to agreements involving the sale of a business. Second, the ban does not apply to non-profit organizations. Given that 58% of US hospitals are tax exempt organizations, FTC Chairwoman Kahn has mentioned that the commission is considering ways to still cover hospitals and doctors. Third, the ban does not apply to *existing* non-compete agreements for senior executives who (i) make over \$150,000 a year and (ii) have "policy making authority." After the rule goes into effect, newly entered non-competes for senior executives are subject to the ban.

What's Next

- The FTC's ban is scheduled to go into effect on September 4, 2024. Several lawsuits, including one from the U.S. Chamber of Commerce, threaten to block the ruling before it goes into effect. The Texas judge overseeing the case announced that she will decide by July 3.

The panelists predict that the court will enjoin the ban and prevent it from taking effect. Regardless, the decision will be appealed and eventually end up before the Supreme Court. Scott says, it is "highly unlikely" that the Court will allow this ban. Instead, the conservative majority is expected to strike down the FTC's ruling under the "Non-Delegation" or "Major Questions Doctrine," which states that the FTC needs clear congressional authority before enacting a nationwide ban on non-competes. Alternatively, if a Republican president were to take office in 2024, then the make-up of the Commissioners on the FTC would shift, and the rule would no longer be pursued.

State Law Updates - In addition to the FTC's rule, 37 states have made changes to their restrictive covenant statutes in the last seven years and 17 states have made changes in the last two years alone. Among these changes, Minnesota became the first state in over 100 years to ban all non-competes. California enacted a law that voids restrictive covenants that were signed by an employee outside of the state but who moves to or seeks employment in California. Lastly, New York lawmakers passed a bill banning non-competes, but Governor Hochul vetoed the bill and requested a modified version.

How Should Employers Respond - The panelists advise employers to be proactive and review their restrictive covenants now. Even if the FTC's ban does not take effect, most states have recently enacted changes to their restrictive covenant laws. Employers should ensure that their covenants protect within a reasonable geographic area and for a reasonable period of time.

The Benesch Healthcare+ team monitors developments in this area of the law and may provide additional updates as they become available. Please contact the authors of this article for additional information or if you have any questions.

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