



A New Frontier? How President Biden's Recent Executive Order May Affect Healthcare Providers

Insights

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Earlier this summer, President Biden signed the much-anticipated “Executive Order on Promoting Competition in the American Economy.” The Order includes 72 initiatives, spanning a plethora of topics from over-the-counter hearing aids to vigorous enforcement of antitrust laws. The Order targets the healthcare industry by focusing on lowering the cost of prescription drugs and hearing aids, revising hospital merger guidelines, and standardizing health insurance. Perhaps most significantly for healthcare employers, the Order aims to significantly limit the use of non-compete causes in employment contracts while also revamping occupational licensing requirements. What does the healthcare community need to know about this development?

Land of Restrictive Covenants

Two legal principles are often at odds when it comes to non-compete agreements: the freedom to work and the freedom to contract, which is why most courts narrowly construe them. The use of non-competes in physician contracts can be both controversial and challenging. A study performed in 2018 found that over 45% of primary care doctors are bound by a non-compete. Opponents claim that physician restrictive covenants hinder a patient’s ability to seek medical care from their chosen provider. However, where permitted, states require non-compete clauses to be strictly limited in time and geographic scope and reasonably necessary to protect an employer’s legitimate business interests.

Nurses may also be subject to restrictive covenants. While the Treasury Department reported in 2016 that 14% of workers earning below \$40,000 per year had executed non-competes, many states in recent years have adopted legislation prohibiting the use of non-competes with lower-wage earners, like many LPNs and CNAs. Indeed, the Supreme Court of Wyoming recently held that non-competes binding LPNs and other nurses will be, in most cases, considered an unreasonable restraint on trade.

President Biden is not alone in his quest to restrict the use of non-competition agreements. Many lawmakers have tried to pass federal legislation over the years, but none have yet succeeded. While the Fact Sheet issued by the Biden administration entreats the FTC to consider a “ban” on non-competes, the Order only calls for a prohibition on “the *unfair use* of non-compete clauses.” In the aftermath of the Order, the Biden administration has issued statements which tend to embrace

precluding the use of non-competes with lower wage-earners. Thus, in the future, non-competes in some nursing contracts may end up being prohibited.

Loosening the Reigns of Licensing Requirements

President Biden's Executive Order also included occupational licensing and certification requirements in its cross-hairs. Nearly all healthcare professionals require a license of some sort – whether a nurse (RN, LPN), technician, technologist, therapist, physician, or other professional providing patient care. Around 14.3 million healthcare providers are subject to licensing, which accounts for over 28% of the entire licensed workforce. Because of the asymmetry in information between some providers and individual practitioners, regulation in healthcare may be required.

Public policy favors provisions that ensure medical professionals are qualified, competent, and in good standing. However, licensure and certification requirements, which vary by state, can be a ball of confusion, resulting in a shortage of downstream providers such as nurses, nurse practitioners, and physicians' assistants (despite a steady increase in demand for their services). At the same time, an overarching concern for patient safety and consistent quality of care will be integral to any changes.

President Biden's Order charges the FTC to address "unfair occupational licensing restrictions." Specifically, the White House feels "overly restrictive occupational licensing requirements can impede workers' ability to find jobs and to move between States." Though the Order is vague, the FTC is likely to debate the following possibilities:

1. *Creating National Portability Standards*

Most healthcare providers, including physicians and registered nurses, take exams based on national certification standards – although meeting a national standard does not automatically grant state licensure. Legislators, think tanks, and government agencies have created policies to help alleviate the taxing and intricate web of varying state licensure requirements.

For example, 30 states have adopted the Interstate Medical Licensure Compact since 2017, which is an agreement to allow physicians licensed in one state to practice in any participating state. In September 2018, the FTC's Economic Liberty Task Force issued a report which lauded such model laws and interstate compacts that provide for the portability of occupational licenses. The report warned that multistate "licensure requirements can prevent qualified service providers from addressing time-sensitive emergency situations across a nearby state line or block qualified health care providers from providing telehealth services to consumers in rural and underserved locations." During the pandemic, the Department of Health and Human Services recognized this issue and announced it would temporarily refrain from enforcing its requirement that "physicians or other health care professionals hold licenses in the State in which they provide services, [so long as] they have an equivalent license from another State." Under the

Biden administration, the relaxation of state specific licensure requirements will likely continue, and the FTC may use its rulemaking authority to create national requirements.

2. ***Expanding Scope of Practice***

States have a wide array of scope of practice rules, which govern what activities health care workers are authorized to perform. During the pandemic, several states relaxed nursing limitations. By way of illustration, Alabama granted full practice authority to nurse practitioners and expanded their ability to prescribe medications. Similarly, Louisiana allowed Advanced Practice Registered Nurses and Certified Registered Nurse Anesthetists to practice without direction and supervision of a doctor licensed to practice in the state. Proponents of increasing the scope of practice for certain types of nurses believe it will lead to higher levels of employment and lower costs for services. In the past, the FTC supported the Veterans' Administration proposal to grant "full practice authority" to Advanced Practice Registered Nurses. Thus, under the Biden administration, we may see a push to expand the scope of practice for downstream providers by removing supervisory practice requirements and minimum physician to non-physician ratios and extending prescription authority.

Conclusion

Undoubtedly, the process of reforming non-competes and occupation licensure will be the subject of intense scrutiny and debate over the course of months, if not years. There is also the lingering question of how much power the FTC has to regulate traditionally state-legislated issues. Regardless, at least some level of change now appears to be on the horizon for healthcare employers.

We will monitor these developments and provide updates as warranted, so make sure that you are subscribed to Fisher Phillips' Insights to get the most up-to-date information direct to your inbox. If you have further questions, contact your Fisher Phillips attorney, the author of this Insight, or any attorney in our Healthcare Industry Practice Group.

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