FTC Warns Healthcare Employers and Staffing Firms Over Noncompetes: 5 Takeaways + 5 Action Steps

Insights
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Healthcare employers and the staffing firms who serve them should take note: federal authorities recently announced they will specifically target the use of noncompetes and other restrictive covenants in the healthcare space. The Federal Trade Commission announced on September 10 that it issued warning letters to several large healthcare employers and staffing firms, urging them to review their noncompete agreements and other restrictive covenants to ensure they are legally sound and don't infringe on workers' rights. What are the five biggest takeaways from this latest threat, and what are the five actions steps you should consider to avoid legal complications?

Quick Backstory

FTC Chairman Andrew N. Ferguson explained in his September 10 announcement that the letters "urge recipients to conduct a comprehensive review of their employment agreements – including any noncompetes or other restrictive covenants – to ensure they are appropriately tailored and comply with the law." While the agency recently abandoned its attempt to enforce a blanket noncompete ban, this announcement comes just days after the FTC took steps to signal that it will now go after employers in individual enforcement actions. And this new enforcement strategy is clearly targeting healthcare facilities and the staffing firms that serve them.

The FTC's Authority

In its template warning letter, the FTC reminded employers that it has authority under Section 5 of the FTC Act "to investigate unfair methods of competition, including noncompete agreements that are unjustified, overbroad, or otherwise unfair or anticompetitive." The Commission emphasized that recipients who fail to address problematic provisions risk "civil investigative demands or other enforcement actions."

In short, while the FTC abandoned its broad rulemaking effort, the agency is now using its case-by-case Section 5 authority to police noncompetes in industries – like healthcare staffing – that directly impact access to essential services.

5 Biggest Takeaways for Healthcare Employers and Staffing Firms

Here are the five biggest takeaways you should note about this development.

1. FTC is focusing on healthcare staffing firms and healthcare employers.

The agency said it sent the letters to "several large healthcare employers and staffing firms," and warned that "noncompete agreements may unreasonably limit employment options for vital roles like nurses, physicians, and other medical professionals." The FTC expressed concern that these restrictions can be particularly harmful in rural areas "where medical services are already stretched thin." The FTC also noted that some healthcare roles may not warrant noncompetes in any capacity.

2. Overbroad agreements are most vulnerable.

According to the FTC's template letter, "narrowly tailored noncompetes can serve valid purposes in certain circumstances." But the agency warned that "in practice many employers impose noncompetes without due consideration to whether they are necessary and appropriate under the circumstances, including whether less restrictive alternative contract terms may sufficiently achieve the same procompetitive purposes." The agency specifically flagged agreements with "overly broad geographic scope or duration" as problematic.

3. Other restrictive covenants are also under scrutiny.

The FTC emphasized that it is not only reviewing noncompetes, but also "other restrictive covenants" that may limit worker mobility. This includes provisions common in Client Services Agreements, such as "no-hire" or "nonsolicitation" clauses between a healthcare employer and staffing firm.

4. Healthcare staffing firms are uniquely exposed.

Healthcare staffing firms face dual risks: restrictions in contracts with healthcare worker employees themselves, and restrictions embedded in their Client Services Agreements with healthcare facilities. Both types of agreements are under the microscope, and both can invite scrutiny if they unnecessarily limit employment options or unreasonably suppress competition for talent.

5. All employers – not just letter recipients – should act now.

As Chairman Ferguson cautioned: "We strongly encourage all employers – not just those receiving letters today – to review their contracts closely, to ensure that any restrictions on employee mobility are in full compliance with the law."

5 Steps Healthcare Employers and Staffing Firms Should Consider

1. Inventory all noncompetes, no-hire, and nonsolicitation clauses (collectively restrictive covenants) in both employment and facility contracts. Work with counsel to determine whether the restrictive covenants comply with applicable law.

2. Consider whether **less restrictive alternatives** would suffice.

3. Determine whether the restrictive covenants are **self-imposed or required** by a third party.

4. If there is a problematic restrictive covenant required by a third party**, review indemnification requirements** and determine whether it is possible to work together to rectify the matter.

5. Prepare for enforcement. These letters are a first step; the FTC warned that ignoring them could lead to formal investigations and enforcement actions.

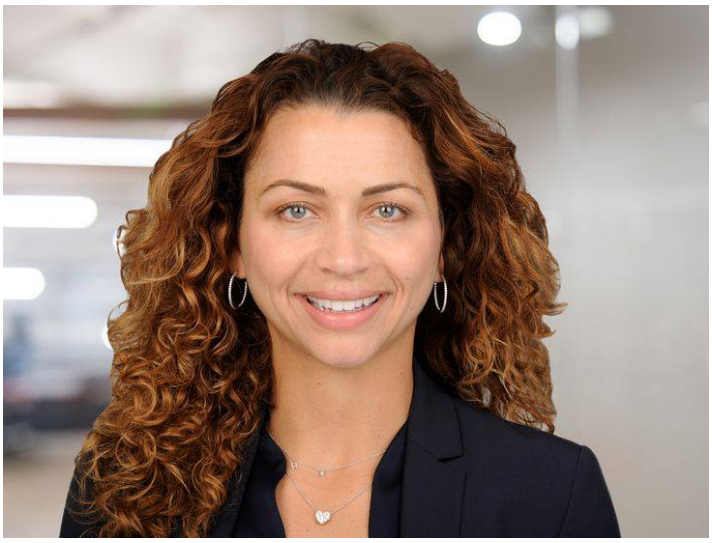
Conclusion

We will continue to monitor developments and provide updates, so make sure you are subscribed to Fisher Phillips' Insight System to get the most up-to-date information directly to your inbox. For more information, contact your Fisher Phillips attorney, the authors of this Insight, or any attorney on our Staffing Industry Team or our Healthcare Industry Team.

Related People

Rebecca Bovinet
Associate
954.847.4720
Email

Jonathan Crook
Partner
704.334.9313
Email



Hannah Sweiss
Partner
818.230.4255
Email

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