Indiana Hospital Association

January 11, 2023

To: Chief Executive Officers

From: Bill Berlin, Dana Stutzman and John Williams III
Hall, Render, Killian, Heath & Lyman, P.C.
IHA Counsel

Re: **FTC Seeks to Make Non-Compete Clauses for Workers Illegal in Proposed Rule / Non-Profits Not Covered as Drafted**

Executive Summary

On January 5, 2023, in a move that would likely have a monumental impact for employers across the country, the Federal Trade Commission ("FTC") issued a Notice of Proposed Rulemaking (the "Proposed Rule") that seeks to make it illegal for employers to enter into non-compete clauses with workers. The FTC's Factsheet and the Proposed Rule can be found **here**.

An overview of the background, the Proposed Rule's key components, and how this might play out in terms of potential changes, challenges and timing is provided below. As an immediate next step, companies in all industries, including health care, need to understand how this Proposed Rule would impact their work force and should consider submitting comments to the FTC.

Background

Over the last 18 months, the Biden Administration and FTC have scrutinized the use of non-compete clauses in the workforce, leading up to issuing the Proposed Rule.

- On July 9, 2021, President Biden issued an **Executive Order** related to promoting competition in the American economy. In the Executive Order, he specifically called on the FTC to review and use its rulemaking authority to curtail the unfair use of non-compete clauses that may unfairly limit worker mobility.

- On March 7, 2022, the Treasury Department issued a report on "**The State of Labor Market Competition**" in response to President Biden's Executive Order. In this report, the Treasury Department noted the current labor market has several

characteristics, including the widespread use of non-compete clauses, which demonstrate there is insufficient labor market competition, leading to lower wages, reduced benefits and bad working conditions for workers.

- On January 4, 2023, the FTC took **legal action** against three companies (Prudential Security, O-I Glass, Inc. and Ardagh Group), requiring the companies to stop using non-compete clauses for thousands of workers ranging from low-wage security guards to manufacturing workers to engineers. According to the FTC, this was the first time the FTC sued to halt the use of unlawful non-compete clauses for workers.

- On January 5, 2023, the FTC issued a **Factsheet** and the **Proposed Rule** that would ban employers from imposing non-compete clauses on workers.

- The Proposed Rule was issued after a 3-1 vote at the FTC along party lines. The lone Republican Commissioner, Christine Wilson, dissented and issued a **dissenting statement**.

What is the Proposed Rule?

- The Proposed Rule would make it ***illegal*** for an employer to:
    - ***Enter into or attempt to enter into a non-compete with a worker***;
    - Maintain a non-compete with a worker; and
    - Represent to a worker that the worker is subject to a non-compete.

- The Proposed Rule would require employers to ***rescind existing non-competes*** and actively inform workers that they are no longer in effect.

- The Proposed Rule's use of the term "worker" means that the FTC intends for its non-compete ban to apply as broadly as possible—for example employees, independent contractors and physician owners in private practice.

- The Proposed Rule is wide-ranging, applying to all industries and all categories of workers (from low-wage workers to CEOs).

- The Proposed Rule includes ***de facto non-compete clauses***. A *de facto* non-compete clause is any provision that "has the effect of prohibiting the worker from seeking or accepting employment with a person or operating a business after the conclusion of the worker's employment . . . ." Examples include, (i) NDAs that are written so broadly that it effectively prevents the worker from working in the same field, or (ii) training-repayment agreements that require a worker to repay training costs within a specific time period if that payment is not reasonably related to the costs the employer actually incurred. Other provisions may also be considered *de facto* non-compete clauses, including certain non-solicitation agreements, no-recruit agreements or liquidated damages provisions.

- The Proposed Rule includes ***one limited exception*** for ***transaction non-compete clauses***. These are non-compete clauses that restrict a seller who is a "substantial" owner of a business from competing with the buyer upon the sale of a business.

- The Proposed Rule ***does not include*** a ***private right of action***, meaning only the FTC can enforce rule violations.

Why did the FTC issue the Proposed Rule?

- According to the FTC, about one in five American workers are bound by non-compete clauses—this represents 30 million people.

- According to the FTC, non-compete clauses: (i) significantly reduce workers' wages; (ii) stifle new business and new ideas; and (iii) exploit workers and hinder economic liberty.

- The FTC estimates that the Proposed Rule could increase workers' earnings by $250 billion and $295 billion per year.

Is the health care industry impacted by this?

- The Proposed Rule would make it illegal for for-profit health systems and for-profit health care organizations to enter into non-compete clauses and *de facto* non-compete clauses with providers, executives or any other category of worker.

- The FTC has limited jurisdiction over non-profit entities under the law used to promulgate the Proposed Rule, so the Proposed Rule should not apply to non-profit health systems and hospitals. That being said, in the past there has been bipartisan support to remove the non-profit limitation. Coupled with the FTC more recently taking an aggressive stance towards enforcement, there could be a push to make the Proposed Rule applicable to non-profit entities.

- While the Proposed Rule may not be applicable to providers employed by non-profit health systems and hospitals, the FTC is clearly concerned about the impact non-compete provisions have on providers overall. In a statement issued along with the Proposed Rule, two of the FTC Commissioners specifically noted that they have heard stories from family physicians that non-compete clauses strike fear in the physicians and make the physicians anxious about their livelihoods.

- In addition, throughout the supplementary information of the Proposed Rule, the FTC discusses physicians specifically as a category of workers. The FTC notes several academic studies that suggest non-compete clauses decrease physicians' earnings.

What is the timing and when might this take effect?

- The FTC has asked for comments from interested parties within the next 60 days.
- There will likely be thousands of comments submitted given the far-ranging impact of this Proposed Rule.
- Once the comment period ends, the FTC will review the comments and may make changes in a Final Rule. It will likely take a long time for the FTC to review all of the comments and issue a Final Rule.
- Once the Final Rule is issued, it is very possible (maybe even likely) that litigation will ensue and a judge may enjoin the effective date of the Final Rule until the litigation concludes. This means the Final Rule will likely not take effect for a long time.
- Compliance is required 180 days after the date of publication of the Final Rule in the *Federal Register*.

What can health systems and hospitals do?

- Submit a comment to the FTC.
- The comment period is open for 60 days and the FTC has asked for comments related to the Proposed Rule, including comments related to whether there should be additional exceptions or different standards for different categories of workers.
- Consider the need for any prepared response to workers, medical staff members, leadership and local media should questions arise as to the organization's position on the Proposed Rule.

Will anything change between the Proposed Rule and the Final Rule?

- It's very possible. The FTC has specifically asked for comments on possible alternatives to this Proposed Rule, including whether there should be additional exceptions or different standards for different categories of workers based on job function, occupation, earnings or other factors.
- Given there will likely be thousands of comments proposing various alternatives, the FTC may ultimately decide the Final Rule should allow non-compete clauses for certain high-wage or executive workers while continuing to make them illegal for everyone else.
- In Commissioner Wilson's dissent, she noted that the Proposed Rule represents "a radical departure from hundreds of years of legal precedent that employs a fact-specific inquiry into whether a non-compete clause is unreasonable in duration

and scope, given the business justification for the restriction." Depending on the number and nature of comments, it's possible that some of Commissioner Wilson's dissenting points will be taken into account and implemented in the Final Rule.

Should you have any questions, please do not hesitate to contact your local counsel or the following attorneys at Hall, Render, Killian, Heath & Lyman, P.C.: Bill Berlin (wberlin@hallrender.com), Dana Stutzman (dstutzman@hallrender.com) or John Williams III (jwilliams@hallrender.com).