

Pa. Health Employers Must Prep For Noncompete Restrictions

By **Erin McLaughlin, Jason Murtagh and Minji Kim** (September 6, 2024)

On Aug. 20, the U.S. District Court for the Northern District of Texas issued its long-awaited ruling on the Federal Trade Commission's national ban on noncompete covenants, effectively blocking the FTC's ban from taking effect Sept. 4 on a national scale.

While the future of the national ban remains uncertain and is still subject to appeal, several states have continued to pass legislation to limit such covenants at the state level. Most recently, Pennsylvania joined the list of approximately 20 states that limit post-employment noncompete covenants for certain health care practitioners.

On July 17, Pennsylvania Gov. Josh Shapiro signed H.B. 1633, also known as the Fair Contracting for Health Care Practitioners Act or Act 74, which will prohibit specific noncompete covenants for healthcare practitioners in Pennsylvania, effective Jan. 1, 2025.

Act 74, introduced by Rep. Dan Frankel, D-Allegheny, initially aimed to ban noncompete agreements for healthcare workers entirely. However, legislative negotiations resulted in a partial but significant restriction on these agreements.

Act 74's effects will likely intensify competition for licensed providers and pose challenges for institutional providers in rural areas, who may struggle to attract top talent due to location and salary constraints.

Thus, while the future of the FTC's national ban remains unclear, healthcare employers in Pennsylvania will need to prepare for and take steps to comply with Act 74 prior to Jan. 1, 2025.

Act 74's key provisions are as follows:

- Effective date: Act 74 takes effect on Jan. 1, 2025.
- Scope of application: Act 74 applies only to licensed medical doctors, osteopaths, nurse anesthetists, registered nurse practitioners and physician assistants. Each is considered to be a healthcare practitioner.
- Prohibition of noncompete covenants: Certain noncompete covenants entered into after Jan. 1, 2025, are deemed "contrary to public policy and [thus] void and unenforceable by an employer."



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- Definition of noncompete covenant: A "noncompete covenant" is defined as an agreement between an employer and a healthcare practitioner that impedes the healthcare practitioner's ability to continue treating patients or accepting new patients independently or with a competing employer after their employment term.
- Permissible noncompete covenants: Employers may enforce a noncompete covenant with a healthcare practitioner if it is limited to one year or less and the healthcare practitioner terminated the employment relationship. Noncompete covenants are also permissible in connection with (1) the sale of a healthcare practitioner's ownership interest in an entity; (2) a sale of all or substantially all of the assets of the business entity; (3) transactions resulting in the sale, transfer or change in control of the business entity; or (4) an ownership interest in the business entity.
- Patient notification requirement: Employers must notify certain patients within 90 days after the departure of a healthcare practitioner. These notifications must include: (1) the fact that the healthcare practitioner has departed; (2) the patient's right to choose to be assigned to a new practitioner within the existing employer; and (3) instructions on how to transfer health records if they choose to continue treating with the departing healthcare practitioner. This requirement applies to patients with whom the departing healthcare practitioner has "seen within the past year" and who has had an "ongoing outpatient relationship" for at least two years.
- Recovery of expenses from healthcare practitioner permitted: Act 74 does not prohibit employers from contracting to recover reasonable expenses from a healthcare practitioner that are: (1) directly attributable to the healthcare practitioner and accrued within three years prior to separation, unless separation is caused by dismissal of the healthcare practitioner; (2) related to relocation, training and establishment of a patient base; and (3) amortized over a period of up to five years from the date of separation by the healthcare practitioner.

Compliance Challenges for Healthcare Employees

While Act 74 is widely viewed by Pennsylvania healthcare workers as a positive development, it is not without gaps for employees.

Act 74 is not retroactive. Accordingly, if a healthcare practitioner is subject to a postemployment noncompete as of Dec. 31, it still may be enforced, even after Jan. 1, 2025. Because Act 74 is not retroactive, healthcare employers may rush to renegotiate existing contracts to add or revise a noncompete provision before Dec. 31. Furthermore, healthcare employers will be reluctant to disturb those existing contracts, which may make future contract negotiations more challenging.

Act 74 applies only to licensed medical doctors, osteopaths, nurse anesthetists, registered nurse practitioners and physician assistants, meaning it does not apply to other healthcare

professionals, such as dentists, orthodontists, endodontists, chiropractors, physical therapists, etc. Accordingly, those healthcare professionals may still be subject to valid and enforceable noncompete restrictions in Pennsylvania.

Act 74 only precludes enforcement of postemployment noncompetes for healthcare practitioners who are dismissed. The term "dismissed" is undefined and does not, on its face, include a resignation, even for good reason.

Compliance Challenges for Healthcare Employers

Act 74 poses even greater challenges for healthcare employers in Pennsylvania. Some of those challenges include the following.

Act 74 does not address patient nonsolicitation provisions or garden leave provisions. And, there are no provisions associated with enforcement or with penalties for noncompliance.

It is unclear as to whether Act 74 applies to pre-Jan. 1, 2025, employment agreements with noncompetes longer than one year that automatically renew, or any post-Jan. 1, 2025, amendments to existing employment agreements with noncompete covenants longer than one year.

Based on the definition and application of "healthcare practitioners" in Act 74, it is unclear as to whether health care employers in Pennsylvania are required to notify patients when a nurse anesthetist, registered nurse practitioner or physician assistant departs or is transferred or reassigned to a different practice or department of the employer.

It is unclear whether the patient notification is triggered regardless of the reason for the departure of the healthcare practitioner — i.e., with cause, voluntary, without cause, etc.

Practical Steps for Healthcare Employers to Mitigate Compliance Risk

In sum, regardless of what happens at the federal level, Pennsylvania healthcare employers will need to contend with Act 74. While Act 74 is certain to spur litigation and legal challenges regarding application and enforcement, healthcare employers should review and revise their noncompete covenants for healthcare practitioners in preparation for Act 74 taking effect.

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