

WHA Joins AHA, U.S. Chamber of Commerce, WMC in Opposition to FTC Non-Compete Rule

WHA submitted a [comment letter](#) to the Federal Trade Commission (FTC) on April 18 calling for the FTC to withdraw its proposed rule that would invalidate existing and future non-compete agreements across the United States economy.

WHA joined the American Hospital Association (AHA), U.S. Chamber of Commerce, Wisconsin Manufacturers & Commerce (WMC), and numerous other organizations across the U.S. that have submitted comment letters to the FTC expressing significant concerns with and opposition to the blanket rule.

“A blanket declaration that all non-compete related terms are unreasonable and illegal not only substitutes the will of the consenting, contracting parties and their assessment of the reasonableness and adequacy of the entirety of the bargain between each other, but also replaces our state and federal courts’ appropriate approach to determining what is an unreasonable and illegal restraint of trade through an individualized examination of the context of the consenting parties to the contract, the benefits of the agreement flowing to both contracting parties, and the breadth or narrowness of an alleged unreasonable non-compete related term,” wrote WHA.

The letter referenced Wisconsin’s existing non-compete statute, s. 103.465, Wis. Stats., and its accompanying case law, as an appropriate and balanced approach to non-compete clauses that would be usurped by the FTC rule.

“The proposed rule also substitutes Wisconsin’s policy choice to allow some, but not all, non-compete clauses. Like many other states, Wisconsin’s Legislature has enacted a statute that renders non-compete agreements ‘illegal, void and unenforceable’ unless the restriction is ‘reasonably necessary for the protection of the employer or principle,’” wrote WHA. “Wisconsin’s legislative choice has further been interpreted, clarified, and supported by substantial case law in both state and federal courts.”

WMC in its comment letter to the FTC opposing the proposed rule similarly highlighted how Wisconsin’s current non-compete law is beneficial to Wisconsin’s economy.

“Allowing for appropriate non-compete clauses helps Wisconsin’s economy, employers and employees,” wrote WMC. “Having a blanket ban on non-compete clauses will harm both employers and employees. One way that non-compete clauses are beneficial to employers and employees is that the clauses encourage investment in employees. As the FTC acknowledges, two studies have found that ‘non-compete clauses increase employee training and other forms of investment.’”

“Without the availability of non-compete clauses, employers will be forced to take significant efforts to restrict employee knowledge, including strict limitations on information sharing, restrictions of computer access and devising business structures in order to protect trade secrets and client lists,” said WMC in its comment letter to the FTC.

WHA echoed WMC’s concerns that the blanket FTC rule would negatively impact employer investment in employee education, training and development, as well as communication and information sharing between employers and employees, not only in the overall economy but in health care especially.

“Wisconsin hospitals and health systems make significant investments educating, training and supporting its health care workforce; a blanket prohibition on non-competes creates new questions regarding these investments at the very time the nation and Wisconsin is experiencing critical, long-term health care staffing challenges,” wrote WHA. “Further, non-compete clauses can encourage the sharing of proprietary information such as business plans, strategies and research within hospitals and health systems, including with both clinicians and non-clinicians, to achieve outcomes mutually beneficial to the employer and its employees. Blanketly prohibiting non-compete agreements that are reasonably necessary to protect such investments and

communications will have negative impacts on health care delivery that are ignored by the proposed rule.”

The FTC’s non-compete rule is currently a proposed rule. The FTC cannot take action to make the rule final any earlier than mid-October. In January, the U.S. Chamber of Commerce called the proposed rule “blatantly unlawful” and signaled that it is prepared to sue to invalidate the rule following promulgation of a final rule.

WHA’s comment letter can be found [here](#). AHA’s comment letter can be found [here](#). WMC’s comment letter can be found [here](#).

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