

ILLINOIS STATE MEDICAL SOCIETY

**Resolution 03.2023-02
(A-24)**

Introduced by: Rockford Yapp, MD, ISMS Member

Subject: Opposition to Restrictive Covenants and Non-Compete Clauses

Referred to: Medical Legal Council

1 Whereas, in January 2023, the Federal Trade Commission [proposed](#) a rule that
2 would keep employees free from non-compete contracts. The rule would apply to full-
3 time employees and independent contractors, both paid and unpaid. The non-compete
4 rule, which the FTC accepted public comments on until March 10, 2023, would impact
5 nearly every job position in the U.S., including physicians and medical staff; and
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7 Whereas, the FTC proposed rule is based on a preliminary finding that non-
8 compete clauses constitute an unfair method of competition and therefore violate
9 provisions of the Federal Trade Commission Act; and
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11 Whereas, the vast majority of physicians are subject to employment contracts;
12 nearly three-quarters of physicians are employed by hospitals, health systems or other
13 entities, a [trend](#) which was greatly accelerated by the COVID-19 pandemic; and
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15 Whereas, [Massachusetts](#) and [New Hampshire](#) explicitly prohibit the use of non-
16 compete contract provisions for physicians; and
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18 Whereas, [Rhode Island](#) prohibits the use of non-compete contract provisions for
19 physicians, except in cases specifically related to the sale and purchase of a physician’s
20 practice; and
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22 Whereas, [South Dakota](#) prohibits the use of non-compete contracts for
23 physicians, physician assistants and nurses, except in cases specifically related to the
24 sale and purchase of a practice; and
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26 Whereas, ISMS policy already supports abolishing restrictive covenants or post-
27 employment non-compete clauses from any contract of a hospital or hospital affiliate;
28 and

29 Whereas, physician employment by health systems and other corporate entities,
30 including private equity groups continues to increase, along with employment by
31 hospitals; and

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33 Whereas, this practice of enforcing restrictive covenants has a negative impact
34 on patient care, and risks further loss of physicians in Illinois, therefore, be it

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36 RESOLVED, that ISMS amend existing policy regarding the abolition of
37 restrictive covenants or post-employment non-compete clauses to apply to any physician
38 employment contract; and be it further

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40 RESOLVED, that ISMS work with the Illinois State Legislature, to enact
41 legislation to abolish restrictive covenants or post-employment non-compete clauses in
42 the state of Illinois; and be it further

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44 RESOLVED, that ISMS work with the AMA to support a national ban on
45 restrictive covenants or post-employment non-compete clauses in the United States.

References:

FTC Position Paper:

This 60+ page document details the Commission's rationale for ending NCs:
www.govinfo.gov/content/pkg/FR-2023-01-19/pdf/2023-00414.pdf

Language from Massachusetts:

Section 12X. Any contract or agreement which creates or establishes the terms of a partnership, employment, or any other form of professional relationship with a physician registered to practice medicine pursuant to section two, which includes any restriction of the right of such physician to practice medicine in any geographic area for any period of time after the termination of such partnership, employment or professional relationship shall be void and unenforceable with respect to said restriction; provided, however, that nothing herein shall render void or unenforceable the remaining provisions of any such contract or agreement.

Fiscal Note:

None

Existing ISMS policy related to this issue:

ISMS supports abolishing restrictive covenants or post-employment non-compete clauses from any contract of a hospital or hospital affiliate as defined by the Illinois Hospital Licensing Act. (HOD 2018)

It is the policy of ISMS to champion the development of an “Employed Physician’s Bill of Rights;” which calls for the following:... 7) that restrictive covenants should be limited to only physicians with partnership stakes in the organization and should not apply to salary-based physicians;... (HOD 2017)

It is the policy of ISMS that physicians, singly and in organized groups, should not be a party to or participate in a corporate, partnership, or employment agreement with another physician, organization or health care entity that solely restricts the right of the physician to practice medicine after termination of a relationship created by the agreement. Mandatory restrictions on the right to practice medicine, or on professional autonomy, or on patient access are unethical. It is not unethical for physician, singly and in organized groups, to be a party to an agreement with a restrictive covenant that, to the exclusion of others, allows the restricted physician or group of physicians to choose between making a reasonable liquidated damage payment or restricting practice. (HOD 2000; BOT 2000-OCT; Reaffirmed 2015; Last BOT Review 2014)

ISMS supports abolishing employment, partnership, or corporate agreements that restrict the right of physicians to practice medicine, and advocates the use of liquidated damages or other contractual means in lieu of these provisions. (HOD 1996; Amended 2010; Reaffirmed 2015; Last BOT Review 2014)

Existing AMA policy related to this issue:

Code of Medical Ethics 11.2.3.1 Restrictive Covenants

Competition among physicians is ethically justifiable when it is based on such factors as quality of services, skill, experience, conveniences offered to patients, fees, or credit terms.

Covenants-not-to-compete restrict competition, can disrupt continuity of care, and may limit access to care.

Physicians should not enter into covenants that:

(a) Unreasonably restrict the right of a physician to practice medicine for a specified period of time or in a specified geographic area on termination of a contractual relationship; and

(b) Do not make reasonable accommodation for patients' choice of physician.

Physicians in training should not be asked to sign covenants not to compete as a condition of entry into any residency or fellowship program.

AMA Principles of Medical Ethics: III, IV, VI, VII

The Opinions in this chapter are offered as ethics guidance for physicians and are not intended to establish standards of clinical practice or rules of law.