



## The FTC's Rule on Noncompetes Is a Double-Edged Sword

**M**y father, an ophthalmologist, faced a challenging breakup with a partner in 1990 that triggered a 5-year, 60-mile noncompete clause, requiring him to start a new practice 2 hours away. Our family did not move, resulting in countless lost hours together during that time. The situation put a significant strain on us, and I vowed never to enter into a noncompete agreement.

Over time, however, I realized these agreements can benefit both the practice and the provider. As my ophthalmic business grew, I brought on new partners to expand the practice. I quickly learned the necessity of non-compete agreements. How could I expect a new partner to invest a significant amount of money into the practice if I could leave shortly afterward and start another? Similarly, noncompete agreements allowed the practice to invest significant marketing dollars into growing the personal brands of new doctors without fearing they might leave. It typically takes years for a practice to regain its investment in a new provider, and without a noncompete in place, a practice might hesitate to add physicians.

In April, the Federal Trade Commission (FTC) issued a final rule banning noncompete agreements.<sup>1</sup> Many physicians welcomed the news. There may, however, be unforeseen consequences to the change. In my experience, large hospital systems do not use noncompete agreements with their providers; instead, they operate under the assumption that patients choose the hospital rather than a specific provider. Hospital systems, therefore, focus their efforts on marketing their name rather than individual physicians. Smaller practices, in contrast, promote providers, which is mutually beneficial. This symbiosis in smaller practices may be threatened without the security of noncompete agreements.

One might assume that the new rule could entice providers to leave their current practices. Starting a new practice where a provider may struggle to retain key employees in an environment free of noncompete agreements, however, could stifle the growth of new practices and providers.

Another consideration is that a noncompete agreement is a valuable asset when a provider sells their practice to another group or private equity firm. The inability to enforce such a clause could decrease the value of physician practices.

The rule could also negatively affect industry innovation in eye care, much of which is driven by small startup companies. The failure rate in this area is high and could be made worse if the ban on noncompete agreements leads to greater turnover and loss of trade secrets.

The new FTC rule was championed partly because a chain of sandwich shops enforced noncompete agreements on low-wage workers. I agree that such a predatory practice should not be allowed.

A few years ago, my practice tried to hire an ophthalmic technician from a local laser chain, and the technician was about to join our team at a higher wage. They ultimately refused the offer, however, because they were threatened with a lawsuit for breaking their noncompete. Our HR counsel advised them that it would not be enforceable and noncompetes in Ohio do not apply to that level of wage earner. The threat of legal action, however, was too much to bear for this technician.

It is clear there are advantages and good reasons for the FTC rule, but it may have ramifications for ophthalmic businesses and providers in other ways. Higher-wage earners such as eye care providers and administrators present different considerations than lower-wage workers.

If the FTC rule goes into effect in September, as planned, it will bring significant changes to how we build business and practice relationships. There will be benefits, but there will also be challenges we should all understand and prepare for. Looking back at my father's situation, I now see some value in his noncompete agreement. He was able to sell his shares to his partner for a significant amount. The agreement allowed both providers to continue practicing and build their businesses without devaluing their investments. As hard as it was for our family, he would agree that the arrangement was fair and reasonable. ■

1. Rugaber C. Federal Trade Commission bars 'noncompete' agreements for US employees. *Federal Times*. April 23, 2024. Accessed June 25, 2024. <https://www.federaltimes.com/fedlife/2024/04/23/federal-trade-commission-bars-noncompete-agreements-for-us-employees/>

A handwritten signature in black ink that reads "William F. Wiley, M.D." with a horizontal line underneath.