

April 19, 2023

VIA E-MAIL FILING

Federal Trade Commission
Office of the Secretary
600 Pennsylvania Avenue NW
Suite CC-5610 (Annex C)
Washington, DC 20580

RE: Non-Compete Clause Rulemaking, Matter No. P201200

The American Association of Hip and Knee Surgeons (AAHKS) appreciates the opportunity to submit comments to the Federal Trade Commission (FTC) on the proposed rule on “*Non-Compete Clause Rulemaking, Matter No. P201200*”, (the “Proposed Rule”).

AAHKS is the foremost national specialty organization of more than 4,800 physicians with expertise in total joint arthroplasty (TJA) procedures. Our members account for the majority of total hip and total knee arthroplasty procedures each year. Many of our members conduct research in this area and are experts in using evidence based medicine to better define the risks and benefits of treatments for patients suffering from lower extremity joint conditions. In all of our comments, AAHKS is guided by its three principles:

- Payment reform is most effective when physician-led;
- The burden of excessive physician reporting on metrics detracts from care; and
- Patient access, especially for high-risk patients, and physician incentives must remain a focus.

Our general comments are summarized as follows:

- AAHKS opposes the application of non-compete provisions in physician employment contracts, as they undermine the physician-patient relationship and constrain the mobility and economic opportunities of new physicians;
- The practice of medicine should be viewed like other skilled professions with fiduciary-like obligations and responsibilities (i.e., attorneys) for whom non-compete provisions are impermissible;
- The physician-patient relationship is a unique professional responsibility and any new policy addressing physician employment should protect and enhance physician

autonomy in treating patients in need, including patient freedom to use their physician of choice;

- When working to retain employed physicians, large employers of physicians should consider all tools at their disposal in incentivizing employed physicians to remain at their employed practice;
- AAHKS endorses continued development of state laws specifically addressing physician employment contracts and non-compete provisions. Such state laws are most likely to address local policy priorities and reflect specific economic and health system characteristics.

I. AAHKS Prioritizes the Physician-Patient Relationship and Physician Autonomy

We thank the FTC for its work to highlight and to attempt to address the problem of non-compete clauses, contractual terms between an employer and a worker that prevents the worker from seeking or accepting employment with a person, or operating a business, after the conclusion of the worker's employment with the employer. Our comments on non-compete clauses offer the perspective of physicians, and by connection, our patients.

First and foremost, AAHKS members stress that the impact on patients should be a primary consideration when contemplating any regulatory action (expanding or contracting) affecting the medical profession and its employment arrangements. Medicine is unique among professions in that it not only involves a special relationship of trust with our clients, but that relationship also involves the provision and recommendation of medical care, often over the most serious and personal matters. Physicians are intimately familiar with their patients, sometimes treating multiple generations within a single family.

AAHKS members treat their patients throughout the duration of the surgical process, from consulting as to whether surgery is needed or if other less invasive options may suffice, assisting patients to prepare for surgery which can include lifestyle changes, and consulting with numerous other specialists in order to reduce risks, maximize surgical outcomes, and guide the road into recovery. Our patients share countless stories that the hip or knee replacement surgeries not only give them their freedom, but that they are gifted an opportunity to live a wholly new life they never could have imagined before the surgery. Mobility is an inherent part of autonomy.

Though the medical profession and health care system are necessarily enabled by revenue, our patients are not a commodity. Because joint replacement surgery is not an instance of care but an involved process for both physician and patient, any hip or knee surgeon who transitions from one practice to another is likely still in the process of preparing some patients for surgery, while helping others in their recovery process.

All things being equal, many patients would likely choose to maintain their doctor-patient relationship even after their doctor changes practices. But non-compete agreements for physicians typically include a "non-compete radius," meaning physicians cannot work for another

practice within so many miles of their current practice. Many physician non-compete provisions impose a radius of between 0-50 miles, but some can range between 51-99 miles, or more.¹

We are very concerned about the effect these sorts of non-compete provisions may have on patient care and patient choice. Likewise, we are concerned about similar restraints on patient care and choice arising from the duration of non-competes, and the effects non-competes can have in rural areas or other areas with only one large employer, where physicians would be restrained from introducing any competition.

Other professional industries have taken a self-regulation approach to eliminating non-compete agreements within their profession. Notably, lawyers, whose relationships with their clients involve the same intimate levels of trust as physicians and their patients, are prohibited by the American Bar Association's Model Rules of Professional Conduct from entering into any agreement that "restricts the right of a lawyer to practice after termination of the relationship."² While no such rule exists for physicians, professional medical associations do issue binding rules on physicians, such as the American Medical Association's Code of Medical Ethics. AAHKS supports the medical profession opening discussions to determine the profession's own, collective outlook and the relative costs and benefits of maintaining or eliminating non-compete agreements from the practice of medicine.

AAHKS members support a medical market with the patient at the center that enables physicians to provide the care they determine to be best for their particular patients. This means allowing physicians themselves to determine the services and care their patients need, determining the proper timing for a particular procedure, and ultimately, determining the setting and practice that best enables the physician to provide that care. Physicians may find it in their best interest to leave one practice to join another, even after signing a non-compete agreement with their employer. In these instances, some physicians and AAHKS members may find non-compete agreements a barrier to the type of care they wish to provide to their patients in the communities they know best. AAHKS is firmly committed to supporting physicians finding ways to provide the care they wish to provide to their patients, regardless of employer contract provisions.

II. Employers Should Harness the Full Range Incentives to Retain Employed Physicians

Practice groups and physician employers are an essential part of the health care system and provide the physical settings in which physicians deliver care to patients, as well as the supporting medical and non-medical staff required to deliver care, and many of the necessary materials and capital to care for patients. AAHKS ultimately seeks balance between the interests of physicians in autonomously caring for patients, and the legitimate financial interests of health care employers wishing to maintain operations and facilitate the care of patients. AAHKS members note that, whether or not an employer of physicians utilizes non-compete agreements

¹ See AAHKS poll results below.

² Model Rules of Prof'l Conduct § 5.6(a) (Am. Bar Ass'n 1983).

with their employed physicians, there are alternative means to incentivize physician employment and retention without ever turning to non-compete agreements.

To incentivize physicians to remain with a practice, the practice should consider increasing the salaries of employed physicians as if they were bound by a non-compete agreement. The resulting increase in earnings, and correlating increase in autonomy, would certainly be highly valued by employed physicians, and could lead to greater physician retention. Additional incentives could include increased vacation and personal days for employed physicians who do not sign a non-compete agreement, and other flexibilities and benefits identified at by the practice and negotiated with the physician.

Our members note that, among physicians who have signed non-compete arrangements, there are increased levels of burnout and lack of trust with their employer. Employers should consider the impact of non-compete provisions on physician morale. In early 2023, AAHKS conducted an internal poll of our membership’s experience and attitudes towards non-competes. The results are as follows:

- 72% of respondents have a current employment contract that includes a non-compete provision
- 12% report a non-compete radius of 10 miles or fewer
- 54% report a non-compete radius of 11 – 50 miles
- 30% report a non-compete radius of 51-99 miles
- 5% report a non-compete radius of 100 miles or more
- 90% report that the on-compete clause is in effect for 1-2 years following the end of the employment relationship

Further, the Proposed Rule cites research conducted on physicians who work under non-compete agreements. The research finds that, for physicians, non-compete clauses are associated with greater earnings and greater earnings growth.³ As has been noted, this study has a flaw in not limiting itself to study only non-compete clauses that are enforceable under local law, or otherwise accounting for variation in enforceability.

III. State Regulation of Non-Compete Agreements Better Accounts for Geographic Priorities

AAHKS supports continued action by state legislatures to establish policies for physician non-compete provisions that reflect the priorities and values of the impacted local physicians, patients, and employers. Some states have decided, as the FTC has proposed, that non-compete agreements are inappropriate for physicians. States including Massachusetts, New Mexico, South

³ Kurt Lavetti, Carol Simon, & William D. White, *The Impacts of Restricting Mobility of Skilled Service Workers Evidence from Physicians*, 55 J. Hum. Res. 1025, 1051 (2020).

Dakota and Tennessee have all enacted limitations on the kinds of non-compete agreements permissible to impose on physicians.

These range from Massachusetts, which has banned physician non-compete agreements entirely, to Tennessee, which has prohibited specific non-compete details, including durations longer than two years or a geographic radius greater than ten miles. As discussed above, the nature of the physician-patient relationship justifies treating physician employment and issues surrounding non-compete agreements as unique and separate from other employment contracts. State-based regulation has the additional advantage of being able to uniformly apply the same non-compete policy across for-profit and not-for-profits employers. AAHKS supports the states that have taken these sensitivities into account when drafting their legislative solutions.

AAHKS appreciates your consideration of our comments. If you have any questions, you can reach Mike Zarski at mzarski@aahks.org or Joshua Kerr at jkerr@aahks.org.

Sincerely,



Javad Parvizi, MD, FRCS
President



Michael J. Zarski, JD
Executive Director