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By Christopher J. Smiley, DDS
Editor-in-Chief

Will the Government Rip Up Employment Contracts?

On Jan. 5, 2023, the Federal Trade Commission announced a proposed rule to eliminate non-compete agreements, a practice dating back to the apprentice

system in 16th-century Europe. At that time, a mentor who shared skills and knowledge with an apprentice needed assurances that they weren't losing control of trade secrets and creating a future competitor.

How today's dentists view the elimination of these agreements used with employee dentists and key team members depends on whether they want to hire desperately needed talent locked up by non-compete contracts, or if they are concerned about preserving their current workforce and protecting their patient base from following an associate choosing to locate to a nearby practice.

Why does the federal government want to ban non-compete contracts? According to Elizabeth Wilkins, FTC director of the Office of Policy Planning, there is evidence that these agreements "suppress employee wages" and "stifle innovation and business dynamism." The evidence comes from contrasting decades of economic experience between states that banned non-competes and those where they are allowed. Additionally, Wilkins contends that the disruption from the pandemic increased job mobility when many employees quit to seek new jobs, resulting in better employer/employee matching that ultimately improved productivity.¹

Many non-compete agreements in dentistry result from boilerplate contract language that isn't truly valuable or grants excessive leverage over employees. For example, a non-compete radius is larger in rural communities based on a reasonable expectation of the distance a patient would travel to access care. Using contract language found in these situations would not be applicable in an urban setting, where patients are more reluctant to travel great distances and have more options.

The reality is that patients have all sorts of reasons for choosing a provider for their care and remaining with a practice. The perceived risk is often greater than the resulting damages.

Additionally, excessive leverage over employees is seen with dental organizations that have multiple facilities and enforce non-compete agreements that extend to each of their practice locations, not just those where the associate provided care and created relationships with patients. The impact is damaging to both the employee and the profession. Many recent graduates gain initial experience in these large group settings. The effect of restricting their job mobility across entire communities and county borders exceeds reasonable employer protection. It harms the associate's professional development and their opportunity to find a better employer/employee match. It further denies the profession the ability to grow and improve efficiency and productivity that would result from bringing these colleagues into more suitable positions.

The FTC's proposal would create consistency across state lines by eliminating all non-competes between employers and workers. This would address conflict between state laws if a corporation operating in a state currently banning non-competes wants to enforce restrictive employment contracts through a different state where they are based.

The proposed rule would continue to allow non-compete agreements against an individual selling a substantial interest in a business, defined as at least a 25% interest. This is important because a portion of the value of a practice sale comes from non-compete agreements assuring the seller's goodwill stays with the practice.

How soon will the FTC tell you to rip up that employment contract and revise employee handbooks, and confidentiality and nondisclosure agreements? It may be a year or more for any change to make its way through the rule-making process. Likely, court challenges will follow. Until then, it would be wise for dentist employers to place themselves in their associate's shoes, particularly employees new to our profession. Consider what is reasonably needed from a non-compete agreement to pro-

tect the practice, and then eliminate the terms that exceed that purpose.

The reality is that patients have all sorts of reasons for choosing a provider for their care and remaining with a practice. The perceived risk is often greater than the resulting damages. For example, once, after working in our office during a maternity leave a dentist purchased a practice less than a mile away. We hadn't stipulated non-compete terms — an oversight — and some patients followed him to the new location. We wished him well. He is successful, and we remain busy, confirming that sometimes the relationships preserved are not only with our patients, but are also with our colleagues. ●

References

1. What Next, Daily News and Analysis, Slate Podcast Productions, Jan. 13, 2023.

Editor's Note: See Dan Schulte's "Dentistry and the Law" column on this subject on Page 22 of this issue.

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