

WEISS

**May 31, 2024****Immediate Action Required: Review All Employment, Independent Contractor, Partnership, and Shareholder Agreements to Avoid Claims of Unfair Competition and Surprise Unenforceability**

As featured in the lead article in last month's newsletter, [FTC Bans \(Most\) Worker Covenants Not to Compete and Their Equivalents](#), on April 23, 2024, the U.S. Federal Trade Commission issued its final Non-Compete Clause Rule (the "Rule") prohibiting most covenants not to compete and other equivalent restrictions applicable to workers. The Rule becomes effective on September 4, 2024.

Because of the way the Rule defines "employer", "employment", and "workers", it addresses situations both within and without the traditional employment and even independent contractor relationship. In general terms, you should consider that any person or entity that has someone, even a partner, providing services to or for it is covered under the Rule.

The Rule addresses not only facially obvious covenants not to compete, but any term or condition of "employment" that prohibits a worker from, penalizes a worker for, or functions to prevent a worker from (A) seeking or accepting work in the United States with a different person where such work would begin after the conclusion of the employment that includes the term or condition; or (B) operating a business in the United States after the conclusion of the employment that includes the term or condition.

The Rule further provides that, for purposes of the final rule, "term or condition of employment" includes, but is not limited to, a contractual term or workplace policy, whether written or oral.

The Rule applies to terms and conditions that expressly prohibit a worker from seeking or accepting other work or starting a business after their employment ends, as well as agreements that penalize or effectively prevent a worker from doing the same.

What This Means for You

All agreements, writing or oral, between your entity and anyone that provides service for it, no matter how the relationship is structured, must immediately be reviewed for compliance with the Rule.

This is the case even if there is no facially obvious covenant not to compete, but "just" terms laying out other prohibitions such as non-disclosure provisions, trade secret provisions, and non-solicitation provisions.

Although non-disclosure, trade secret, and non-solicitation provisions are not per se prohibited, if their effect, either alone or in concert with each other or with other provisions/ conditions of “employment”, function to prevent “workers” from obtaining employment or starting their own business there is a high likelihood that you are in violation of the Rule. Accordingly, each agreement containing those sorts of provisions must be analyzed and the terms of potentially violative provisions revised.

Because of the fast-approaching deadline for compliance, that work should begin as soon as possible.

One More Takeaway

Although new, i.e., post September 3, 2024, covenants not to compete will no longer be enforceable, we’ve developed methods to create “post-employment” restrictions that at this point appear to be outside of the FTC’s new Rule. Of course, any such course of action will require an analysis of your particular circumstances and of applicable state law.

Again, time is of the essence in regard to reviewing your current restrictive covenants, in making appropriate changes, and in designing structures that fall outside of legal prohibitions.

If you wish to discuss this further, [contact me](#) *immediately*.



Wisdom. Applied. 186: Don't Let Models Dictate Your Business Structure

Listen in as Mark talks about how healthcare models, such as Clinically Integrated Networks, are simply tools, not destinations, for structuring deals.

All Things Personal

That’s the way it’s always been done is usually a lie. It’s been done differently. Someone just doesn’t want you to remember or to think about it.

When Billy buys a burger at McDonald’s, the price was set in advance and payment is required before the food is delivered.

When Maggie buys a Mercedes, the price was negotiated before delivery, and the price (usually financed via a lender) is paid before the car is delivered.

Those are both similar to the way that consumer healthcare services are sold. Think, for instance, cosmetic surgery. It was once the way that all healthcare services were sold.

But the huge bulk of healthcare services is now sold on the basis of a price that is often not fully determined in advance and which is ultimately set by the *true* buyer (the payor), not the provider or the patient. On top of that, the true buyer is given time within which to pay, together with the right to determine whether payment “should” be made pursuant to their changeable “policies”.

As if that weren't enough, many of the sellers of those services are forced to play the payors' game by dint of so-called "No Surprises" ("NSA") legislation at both the federal and state levels.

Setting aside the unfortunate political problem of the NSA, why aren't arrangements between providers and payors structured like the sale of burgers or, even more analogous, in the manner of products purchased in bulk and paid for in advance and delivered in tranches upon need?

Over some three year period, medical group X performed an average of 10,000 CT studies per year for patients covered by some payor ("Bluptima"). For the following year, X sells Bluptima a package of 10,000 CT studies for \$Y each, paid in advance; perhaps Bluptima even has 14 months to use them. And, if medical group X thinks this is too difficult to negotiate, they can sell the package to an intermediary at \$Y-Z and the intermediary can sell them to Bluptima or their ilk.

If you think that this can't work in healthcare, it can and it has in the past in connection with, for example, imaging studies.

What I hope to get across to you is that how you currently see healthcare services being purchased and paid for hasn't always been the way it's worked. [In fact, you've seen this in your recent lifetime – just look at the NSA.]

One thing will never change: If you don't think about things differently, the chances are they will stay the same, or at least if there's any change, it won't cut in your favor.

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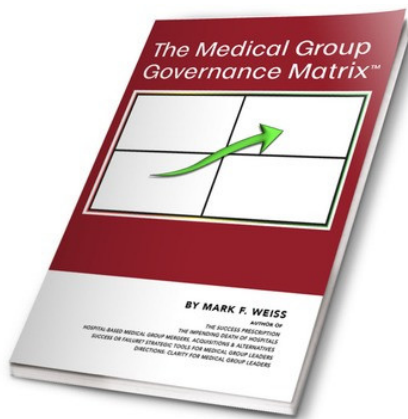
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Published Articles

- [More Bad News For the Company Model and its Sponsors](#), published in the [Fall 2023 Issue of Communique.](#)
- [What a \\$24.3 Million Judgement Tells You About a Potential Tool to Fight Unfair Awards of Exclusive Contracts](#), published in the [Winter 2023 issue of Communique.](#)

Books and Publications



We all hear, and most of us say, that the pace of change in healthcare is quickening. That means that the pace of required decision-making is increasing, too. Unless, that is, you want to take the “default” route. That’s the one in which you let someone else make the decisions that impact you; you’re just along for the ride. Of course, playing a bit part in scripting your own future isn’t the smart route to stardom. But despite your own best intentions, perhaps it’s your medical group’s governance structure that’s holding you back. In fact, it’s very likely that the problem is systemic. The Medical Group Governance Matrix introduces a simple four-quadrant diagnostic tool to help you find out. It then shows you how to use that tool to build your better, more profitable future. Get your free copy [here](#).

Whenever you're ready, here are 4 ways I can help you and your business:

- 1. Download a copy of The Success Prescription.** My book, The Success Prescription provides you with a framework for thinking about your success. Download a copy of The Success Prescription [here](#).
- 2. Be a guest on “Wisdom. Applied. Podcast.”** Although most of my podcasts involve me
- 3. Book me to speak to your group or organization.** I’ve spoken at dozens of medical group, healthcare organization, university-sponsored, and private events on many topics such as The Impending Death of Hospitals, the strategic use of OIG Advisory Opinions, medical group governance, and succeeding at negotiations. For more information about a custom presentation for you, [drop us a line](#).
- 4. If You’re Not Yet a Client, Engage Me to Represent You.** If you’re interested in increasing your profit and managing your risk of loss, [email me](#) to connect directly.