April 19, 2023

Via Electronic Submission: http://www.regulations.gov

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

Re: Non-Compete Clause Rule, Matter No. P201200
88 Fed. Reg. 3482 (January 19, 2023)
RIN No. 3084-AB74

Dear Ms. Lane:

The Home Care Association of America ("HCAOA") respectfully submits these comments to the Federal Trade Commission ("FTC," "Commission," or "the agency") with respect to the Notice of Proposed Rulemaking relating to non-competition agreements published in the Federal Register on January 19, 2023 (the "proposed rule"). We thank you for the opportunity to comment on this important matter, and to bring the concerns of the home care community to the Commission's attention.

Founded in 2002, HCAOA is the home care community's leading trade association—currently representing over 4,200 companies that employ more than 2.4 million caregivers across the United States. Our member agencies provide medical, skilled, personal and companion home care, enabling seniors and individuals with disabilities to remain in their homes as long as possible at a cost that is more affordable than institutionalized care. Home care also encompasses Private Duty Nursing (PDN), which is medically necessary nursing services under Medicaid caring for medically fragile patients, primarily children. Our members and their caregivers assist with a variety of non-medical activities of daily living, such as bathing, dressing, eating, and other services necessary for seniors and the disabled to thrive at home. It is through this community of members that the HCAOA has championed quality home care services and support of family caregivers. (See "The Value of Home Care" for a discussion of the benefits aging at home has for seniors and their families, available here.)"

The Value of Home Care

In 2018, home care agencies employed over 3 million individuals, including personal care and home health care providers. Home care agencies deliver services in the home often identical to those provided in post-acute care facilities, but in a non-acute setting. These services may include assistance

with activities of daily living, such as bathing, eating, and grooming, as well as instrumental activities of daily living, such as meal preparation, companion care, and the like. Home care is among the nation's fastest growing occupations, with some estimating that the need may grow nearly 40 percent over the next ten years, reflecting the increasing number of elderly patients and persons with disabilities who wish to receive care in the home.

In addition to providing services to individuals seeking care in their homes, home care agencies deliver emergency back-up staffing services to hospitals, rehabilitation facilities, and nursing homes. These home care providers are an integral component of post-hospitalization or other acute care, and help to prevent readmission to the acute health care system, an outcome the importance of which was dramatically underscored during the height of the COVID-19 pandemic public health emergency.

Home care agencies work to ensure that seniors and medically-frail individuals stay out of hospitals and other acute-care facilities, and ensure that those facilities are able to maintain adequate staffing levels and are not unnecessarily over-taxed where quality care can be provided in a non-acute setting. Moreover, in many instances, they provide continuity of care to patients in post-acute setting, on either a short-term or long-term basis.

When seniors and other medically-frail individuals are unable to obtain home care, they are, of necessity, required to obtain this care in hospitals or other acute care facilities. Receiving non-acute care in the home is not only most important to the individual receiving care, it is significantly less expensive and cost effective. In 2020, the Government Accountability Office (GAO) estimated the annual cost of home-care was approximately $53,000, while a semi-private room in a nursing home or similar facility exceeded $90,000 per year.[1] The increased cost of obtaining care in these settings is likely then to be borne by patients, further exacerbating the cost of care, and increasing the burden on our already over-taxed health care system.

The Home Care Staffing Model

Home care is generally provided under one of two models. First is the agency-directed model, where a home care agency uses its experience to interview and conduct background checks of applicants and employs individuals who provide caregiving services to patients under periodic agency supervision. The agency assists both the caregiver and the client with scheduling, quality of care concerns, and training of the caregivers. In this model, the agency management often attempts find a caregiver that has a personality and interests that are most suitable for the agency's client. These symbiotic relationships lead to the client's appreciation for the caregiver and, in some cases, the client seeks to hire the caregiver directly and promote the caregiver.

[1] *See* Government Accountability Office, "Fair Labor Standards Act: Observations of the Effects of the Home Care Rule," GAO-21-72 (October 2020) at 1-2.

Second is the direct-care model, wherein an individual (or their representative or family) engages a caregiver directly without agency screening, supervision, training, and scheduling, sometimes paid for by their own funds, or in some instances, by the federal Medicaid program. While there is an appearance of less cost involved with this model, there is also no agency supervisory services or scheduling support provided.

HCAOA would like to make clear to the Commission at the outset: Having extensively surveyed its membership, we can inform the Commission that few, if any, home care agencies, large or small, solicit or expect their caregivers to sign non-competition agreements that require them to work with only one home care agency. As such, caregivers are always free to work for multiple agencies simultaneously as client hours fluctuate, move to a competing agency, start their own business, seek employment "in house" with a health care institution or other facility, or otherwise engage in their profession.

While non-compete clauses are extremely rare in home care employment agreements, what is more common are "direct-hire" clauses in service agreements signed by the client or their responsible party: this may be an individual, or it may be a health care institution, such as an assisted living facility or acute-care provider. Under a direct-hire clause, an individual or institution who chooses to directly hire an agency caregiver, rather than contract for their services through the agency, may be required to pay to the agency a sum (a "direct-hire payment"). Direct-hire payments are designed to enable an agency to recoup the costs that they have invested in the staff member. These costs may include training and certification costs, the administrative cost of placement, background checks, orientation, maintenance of insurance and payroll taxes, and the like. While varying from state to state, these costs are often significant—in New Jersey and Washington, for example, an agency must provide 75 hours of training to a caregiver before they may be placed with a client. In many states, care staff must obtain certifications, or fingerprints must be taken and furnished, usually at the agency's expense. A direct-hire payment may also compensate those agencies that are accredited by the Joint Commission, or other accrediting agencies, for the costs incurred in obtaining and maintaining accreditation. Finally, it compensates the agency for the goodwill expended in arranging and facilitating the initial placement that lead to the caregiver's subsequent direct hire. The unique advantages and benefits of the agency preparation and placement of caregivers with clients make such direct-hire clauses necessary. But such clauses do not infringe on the home care staff member's choice of employer nor does it prohibit or restrict the staff from working for the agency's client. Rather, direct-hire clauses in client service agreements solely create a requirement in the relationship between the agency and the client.

A direct-hire payment is typically modest in amount. A common practice is a clause requiring a client directly hiring a caregiver from an agency to reimburse the agency 30% of the staff member's estimated annual wages. To put this in perspective, the average number of hours worked weekly by a home caregiver was estimated to be 34 hours in 2019, at a median average wage of $11.99 per hour.[2] Assuming full-time employment of 50 weeks per year, the direct-hire payment to the agency would be approximately

[2] *See id*. at 18.

$6,115. Given, however, that only 49 percent of home caregivers report that they usually work full-time, in practice that number will often be significantly less, insofar as it is based on the caregiver's work history.

In short, direct-hire agreements allow caregivers to maximize their own flexibility, while ensuring that the agency recoups the value of the investment it has made in its employee. While HCAOA has a number of concerns with the proposed rule broadly, it is specifically most concerned that these commonplace agreements would be prohibited under the broad "functional analysis" in the proposed rule.

Shortcomings of the Proposed Rule

HCAOA respectfully suggests that the proposed rule is deficient in a number of ways. Foremost, it is dramatically over-broad, and makes no effort to distinguish the many different ways in which employers strategically use non-compete agreements. The proposed rule makes no distinction between the Chief Operating Officer of a national health care agency, who will intimately know the company's business model, strategic plan, financial footing, and the like, with a caregiver who provides eight hours a week of comfort care to an elderly individual in her home. It cannot be seriously debated that a company has a strong business justification for limiting the ability of its executive—who is likely to have negotiated his contract, including salary, severance, and post-employment restrictions—to take the confidential and proprietary knowledge learned in the course of employment, and put this knowledge to work with a direct competitor. This calculus is far different when the employee at issue is an hourly caregiver—a distinction reflected in the fact that, as noted above, few if any home care agencies enter into non-competition agreements with their caregivers, who are free to move to any new job when they choose.

As a legal matter, the proposed rule is likely beyond the authority of the Commission to promulgate insofar as the agency is not empowered under its authorizing statute to issue substantive rules relating to unfair methods of competition. In addition, it raises significant constitutional concerns, potentially violating the major questions doctrine, the non-delegation doctrine, and the Takings Clause of the U.S. Constitution. Finally, as a matter of administrative law, it is highly unlikely that the proposed rule passes muster under the Administrative Procedure Act. In that regard, HCAOA associates itself with the comments filed by Littler Mendelson's Workplace Policy Institute and others setting forth the proposed rule's legal shortcomings.

The proposed rule appears to be a solution in search of a problem—one HCAOA suggests that the Commission has failed to demonstrate even exists. Indeed, at bottom, the proposed rule does little to suggest that the current state-based regulation and enforcement of non-compete agreements by state courts and legislatures, as has been the case for hundreds of years, is in any way deficient. Under these models, a court will make an individualized assessment of the subject employee; the non-compete at issue; the reasonableness of its scope and duration; and the business justifications for the agreement put forth by the employer. It will enforce a reasonable restriction, but not an unreasonable one.

We submit at a minimum that if the FTC feels the need to regulate in this area—whether it has the authority to do so or not—it should adopt an approach similar to the analyses that courts have applied successfully for hundreds of years. Put more simply, to the extent the Commission perceives that there is a problem with non-compete agreements for some limited universe of workers (which is not at all evident), a proposal that seeks to ban all non-compete agreements for all workers in all industries is a wrong-headed choice.

The Application of a "Functional Analysis" to Direct-Hire Agreements

Beyond its generalized concerns with the proposal, HCAOA is particularly concerned with its application of a "functional analysis" to certain contractual agreements that plainly fall outside the commonly-understood definition of "non-competition clause." As noted above, non-competition agreement for caregivers are exceedingly rare in the industry. Direct-hire provisions, which require agency compensation from a client but allow the caregiver to work for whomever they please, whenever they choose to, are far more commonplace. We urge that if the Commission goes forward with a final rule, it expressly make clear that provisions of this sort are permissible.

The proposed rule provides that "The term non-compete clause includes a contractual term that is a *de facto* non-compete clause because it has the effect of prohibiting 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." 88 Fed. Reg. 3535 (proposed rule § 910.1(b)(2)).

The Preamble to the proposed rule explains further:

> Proposed § 910.1(b)(2) would clarify the definition of non-compete clause in proposed § 910.1(b)(1) by explaining that whether a contractual term is a noncompete clause for purposes of the Rule would depend on a functional test. In other words, whether a contractual term is a non-compete clause would depend not on what the term is called, but how the term functions.

88 Fed. Reg. 3509. The proposed rule notes that non-disclosure agreements, confidentiality agreements, and similar contractual clauses generally will not be viewed as prohibited non-compete clauses, insofar as they "may affect the way a worker competes with their former employer after the worker leaves their job... [but] do not generally prevent a worker from competing with their former employer altogether; and they do not generally prevent other employers from competing for that worker's labor." *Id.* at 3410. It then includes two examples of contractual terms which may be *de facto* non-compete clauses, including, most relevant to HCAOA, "A contractual term between an employer and a worker that requires the worker to pay the employer or a third-party entity for training costs if the worker's employment terminates within a specified time period, where the required payment is not reasonably related to the costs the employer incurred for training the worker." *Id.* at 3535 (proposed rule § 910.1(b)(2)(ii)).

HCAOA has a number of concerns with this proposed definition and example. First, it appears to be narrowly cabined to allow an employer only to recoup the initial cost of training an employee—failing to take into account the numerous additional investments the company may have made in its employee. As set forth above, a direct-hire clause is designed to reimburse a home care agency for the numerous costs an agency incurs to hire and retain a caregiver beyond training, including certification, licensing, accreditation, and goodwill.

We are likewise concerned that, as written, the example would appear to allow recoupment of certain training costs, but only where an employee leaves a job "within a specified time period." While we recognize that certain costs are more likely be borne at the commencement of employment, the proposed rule does not appear to contemplate the ongoing costs and investments an agency must make in its caregivers throughout the course of their employment. We urge that any final rule include language making clear that a reasonable clause which provides for the recoupment of a range of investments, not limited in time or type, is permissible.

A tailored provision that allows for the current use of reasonable direct-hire agreements, would allow the agency-hire model to survive, which in itself serves a number of salutary purposes. HCAOA is committed to the safety and well-being of both its clients and its caregivers. The agency-model provides significant protections for both that are unavailable in the direct-hire model. With respect to caregivers, the agency model ensures that throughout their employment they are screened, supervised, covered by workers' compensation and unemployment insurance, and that payroll taxes are properly deducted from their salary.

Perhaps more important, the agency stands between a patient and a caregiver when something goes awry. Working with physically and often mentally compromised older persons, the potential for abuse or harassment by a client is a real one; in other instances, relatives or family members of a patient may press a caregiver to perform chores or other duties beyond the scope of their caregiving role. When an agency learns of these sorts of behaviors, it is well-situated to either correct any problem, or place the caregiver with another patient and allow them to continue to work—this will often not be the case in the direct-hire model, where a caregiver may be forced to choose between suffering abuse or mistreatment and earning a living.

Conversely, in the rare instances where a caregiver may engage in inappropriate behavior, an agency is able to remove them and provide a replacement caregiver, ensuring continued care. An agency is likewise required to professional liability insurance, in the unlikely event that a patient is injured or otherwise suffers harm from a caregiver. Again, in the direct-hire model, these important protections will almost certainly be lacking.

Finally, we note, that as with non-competition agreements generally, these sorts of contractual clauses are presently regulated by the states. Some have chosen to put limits on an agency's ability to enter into these agreements, others have not, each reflecting the workforces and economies in their states. Again,

there is no evidence that this system is failing to balance important competing interests. HCAOA respectfully suggests that any final rule the agency issues regarding non-competition agreements bear these concerns in mind.

Internal Staffing Considerations

HCAOA respectfully submits that the proposed rule is not only deficient with regard to caregivers, but also with regard to a home care agency's internal (*i.e.,* non-caregiver) staff. Notably, the proposed rule provides almost no guidance as to the breadth and scope of its "functional analysis" in other contexts, and whether or how a given program or restriction would be considered by the Commission to be a *de facto* non-compete clause. For example, insofar as the home care and home health industry is based on reimbursement rates from private payors, Medicaid, Medicare, and other managed healthcare sources, it is critical that internal staff do not leave one agency to work for a competitor and share important reimbursement data, business strategies, or other proprietary business information that could lead to anti-competitive behavior. Recognizing that many in the industry want to prevent this type of transference, HCAOA asks that the Commission address whether it believes that deferred compensation plans with restrictive covenants which withdraw financial incentives for non-competition would remain permissible under the current rule. Similarly, we seek clarification and more specificity as to whether agreements that preclude a departing employee from soliciting the agency's remaining employees and clients for a period of time post-termination would still be permissible and enforceable, as these too are an important tool to reduce anticompetitive information being shared amongst the industry.

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HCAOA and its members are dedicated to ensuring the health, safety, and economic well-being of the clients they serve, and the caregivers who provide much needed services in a caring, cost-effective environment. We urge that the Commission, if it regulates in this area, does not, intentionally or inadvertently, create a rule that limits or prohibits an agency's ability to continue to do both.

We thank the Commission for its consideration of these comments.

Sincerely yours,

Vicki Hoak, CEO
Home Care Association of America