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March 2, 2020

The Honorable Joseph J. Simons
Chairman
U.S. Federal Trade Commission
600 Pennsylvania Avenue, NW
Washington, DC 20580

Re: Federal Trade Commission: Non-Competes in The Workplace: Examining Antitrust and Consumer Protection Issues

Dear Chairman Simons:

This letter is sent in response to the Federal Trade Commission's (FTC) January 9, 2020 workshop concerning Non-Competes in the Workplace. The American Academy of Emergency Medicine (AAEM) welcomes any relief the FTC may bring to the unfair use of non-compete clauses in the employment contracts of practicing emergency physicians.

For practicing emergency physicians (EPs), consolidation of independent practices and hospitals has resulted in the reality that the majority of EPs will work as an employee or independent contractor for a hospital or a contract management group (CMG) that provides staffing services to hospitals. Virtually all of our EP members are forced to sign contracts with non-compete clauses.

While AAEM recognizes non-compete clauses may be appropriate in limited settings, such as the sale of a business, such is not the case in the employment of an emergency physician. No hospital or CMG has ever invested money to build the patient base of an *individual* emergency physician. Unlike a private practice of cosmetic surgeons, there is no legitimate business interest to be protected when a hospital *introduces* its *client emergency patients* to the staffing physician. However, the lack of a legitimate protectable interest does not mean there is no business advantage in forcing employed physicians to sign non-compete clauses. The real reason hospitals and CMG employers insist on a non-compete clause in emergency physician contracts is illustrated by the following examples of how employers have used non-compete clauses in an anti-competitive and abusive manner:

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1) A hospital in a medium size city with 3 hospitals sought to impose a pay reduction on its employed emergency physicians. When the physicians protested, with some informing the hospital they would quit and work for one of the other 2 hospitals in the city, they were threatened with litigation enforcing the 2 year post-employment non-competes in their employment contracts. The physicians were faced with either working for below market pay or moving their families to another city.

2) A CMG's polished sales force wins an emergency department staffing contract by making promises of increased efficiency and patient satisfaction. One year later, the hospital is disappointed with the CMG's failure to deliver the promised improvements. However, the hospital is stuck keeping the CMG because all of the CMG-employed emergency physicians would be precluded from continuing to practice at the hospital if the CMG-hospital contract is terminated. For the hospital, the disruption of a complete turnover of its emergency physician staff is too high a price to pay for getting rid of the poorly performing CMG.

AAEM has reviewed the February 7, 2020 AMA letter to you stating its recommendation the FTC not use its rule making or other authority to address the abusive use of non-compete clauses in physician employment contracts¹. While the AMA's bottom-line recommendation is in bold font on p.5 of the letter, we think it is important to understand the context of the AMA recommendation. As its letter points out:

"The AMA has a large and diverse membership, with some members having different perspectives than others on this issue. Physicians who are employers and owners in physician practices or leaders in integrated delivery systems may favor the use of reasonable non-competes, while physicians who are employees of practices, hospitals, health systems, or other organizations may have concerns about being subject to overly restrictive non-competes that limit employment opportunities and may impact access to care.²"

While the AMA is diverse, it is clear from its recommendation the owner/executive physicians' view dominated on this issue. The AAEM is less diverse. We represent the practicing physicians. We are the physicians who the owner/executive physicians hire to actually see patients 24 hr/day, 365 days/year.

"The standard of 'unfairness' under the FTC Act encompasses not only practices that violate the Sherman Act and other antitrust laws, but also practices that the Commission determines are against public policy for other reasons.³" As currently used in emergency physician employment contracts, non-compete clauses are anti-competitive. The FTC has the power to curtail the abuse of employment non-compete clauses. **The AAEM urges the FTC to prohibit non-compete clauses in physician employment contracts.** Legitimate protectable business interest can be safeguarded by other appropriate means.

Sincerely,



David A. Farcy, MD FAAEM FCCM
President, AAEM

1. "The AMA does not recommend that the FTC at this time use its rule making or other authority, such as its law enforcement authority, with respect to non-compete agreement in physician employment agreements." Bold font on p. 5 AMA letter to Honorable Simmons dated February 7, 2020

2. AMA-FTC February 7, 2020 letter p.1

3. Federal Trade Commission v. Indiana Federation of Dentists, 476 U.S. 447, 106 S. Ct. 2009, 90 L.Ed.2d 445 (1986)