

The Ripple Effects in Dentistry of the FTC Noncompete Ban

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Although noncompetition agreements (NCAs) have been a staple in associate dentist employment agreements in New York for decades, there could soon be a seismic shift regarding a practice's ability to limit where an associate can work. While the restricted geographic range may vary from a few blocks to a few miles, to 10 -20 miles depending on the location of the practice, employers could count on New York courts enforcing reasonably drafted NCAs. However, there could soon be a seismic shift regarding a practice's ability to limit where an associate can work. This is the result of a rule that was recently issued by the Federal Trade Commission (FTC). In a 3-2 vote on April 23, 2024, the FTC adopted a final rule that essentially bans all NCAs arising from the employer/employee/independent contractor relationship. This would enable an associate to open a competing practice in the same building, block, borough, or town as their prior employer.

This rule will cover almost all dental practices and clinics unless the business is established as a not-for-profit entity. The rule prohibits any "contractual term 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." The rule does not prohibit "exclusivity agreements," which require that an associate work only for one practice or that prohibit an associate from working for a competing practice during the term of employment. The rule also does not prohibit non solicitation agreements or confidentiality agreements. However, if the non-solicitation agreement is too broad to essentially prohibit an employee from working in a specific geographic area, then it may be determined to be a de facto NCA and will not be enforceable.

When does the rule go into effect?

The rule takes effect 120 days after it is officially published in the Federal Register. This means it may become effective sometime in September or October 2024. However, there are already legal challenges to the rule that question whether the FTC has the authority to enact a ban on NCAs, or if the Commission usurped Congresses' legislative authority. There's a possibility that the courts will issue an injunction, which will stay the rule while the lawsuits are pending.

Impact on existing non-compete agreements

All NCAs between employers and employees will be void and unenforceable once the rule goes into effect. Consequently, any employer that entered into an NCA with a worker will be required to rescind that NCA prior to the effective date. If the rule becomes effective, employers will be required to provide written or electronic notice to current and former workers who are subject to an NCA. This is to inform them that the NCA is no longer in effect and will not be enforced against the workers, and that the workers are free to seek employment with a competitor of the employer or operate a business that is competitive with the employer. We recommend that for existing employees, the company provide an addendum to the employment agreement that voids the NCA.

Are there any exceptions?

There are two exceptions to the rule. The first exception permits an NCA in an employment agreement with a senior executive provided it was entered into prior to the ban's effective date. Once that agreement terminates, even this senior executive cannot be required to enter into a successor agreement that includes a noncompete clause. However, the definition of who is a senior executive is extremely narrow. A senior executive is defined as a highly compensated person, earning at least \$151,164 a year, who has final authority to make policy decisions on significant aspects of operating a business entity. In the dental industry, this is unlikely to be applicable to more than one person in a traditional practice or clinic but may apply to more employees at a large or corporate practice.

The second exception permits an NCA that arises from or ancillary to the sale of a practice. If a dentist sells their practice, the buyer can negotiate the inclusion of a traditional geographic NCA in the purchase agreement.

What are the next steps?

If an injunction against the FTC rule is issued while the litigation is proceeding, then the status quo will be maintained. However, until there is clarity from the courts, employers should identify all current and former employees who are subject to an NCA and be prepared to issue the required notification should the rule become effective. Practices should also determine if there are any employees who would fit the definition of senior executive.

This current uncertainty may continue for a while, as the wheels of justice can move slowly. The courts may enforce the ban on NCAs, strike down the ban on NCAs, or permit a modified rule. It's important for dental practice employers and employees to stay up to date on the status of this rule, which could drastically alter the employer/employee relationship in the dental world.

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Celebrating Asian American Pacific Islander Excellence



(left to right) NYSDA Vice President Maurice Edwards, NYCDs President Suchie Chawla, member Stacy Spizuoco, past President Mina Kim, President-Elect Vera Tang, NYSDA Trustee Lois Jackson, member and AADS President Janet Youn and Member Dr. Ray Cheng take a moment for a photo.

In honor of Asian American Pacific Islander (AAPI) Month NYCDs, NYSDA, and the Asian American Dental Society (AADS) hosted a special program celebrating Asian American Pacific Islander excellence on May 7th. The celebration highlighted the many successes of the AAPI community and created a call to action for the next generation to break down even more barriers. Many thanks to our inspiring and motivating panelists Dr. Minerva Patel and businessman Ace Watanasuparp. Wearing a magnificent sari, President Suchie Chawla, welcomed members and reflected on her own journey as the daughter of Asian immigrant parents. Past NYCDs President and NYSDA Diversity, Equity, and Inclusion Chair Ioanna Mentzelopoulou led an enlightening panel discussion. Dr. Patel spoke about her fearless approach to overcoming obstacles she faced on her way to becoming president of the 9th District Dental Society in 2019. Dr. Patel encouraged new dentists to aim high and assume more leadership and ownership roles. While Asian Americans represent the second largest group of dental professionals in the U.S. today, they are under-represented as practice owners.

Prior to achieving success through banking, real estate, and restaurants, Ace Watanasuparp was the first Asian-American in the University of Connecticut's history to become a member of their prestigious men's basketball team. The son of Thai and Taiwanese parents, he spoke about the challenges of following his own career path rather than his parent's wishes that he become a lawyer, and growing into leadership roles at an early age. Both speakers inspired attendees with their individual but connected stories of achieving success despite challenges and preconceived notions. We would be remiss if we didn't mention that the event featured a wonderful selection of delicious dishes that spanned the diverse cuisine of the AAPI community! Many thanks to the sponsors of this special event: Bank of America Practice Solutions, the Chinese American Dental Association, Henry Schein Dental, and Kettenbach USA.



Guest speakers for the evening: businessman and entrepreneur Ace Watanasuparp and pediatric dentist Dr. Minerva Patel, an ADA delegate and Membership Committee vice chair.

Attendees enjoying the delicious selection of Asian food.

