



Practice Management

# Noncompete Clauses and Veterinary Practice



A proposed FTC rule could ban noncompete clauses. The debate is fierce and ongoing. This article explores some of the challenges and repercussions of the proposed ban.

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## Will Proposed FTC Rule End These Common Contractual Restrictions?

In summer 2022, the US Federal Trade Commission (FTC) signed a memo of understanding with the National Labor Relations Board to collaborate on efforts “to protect workers from anticompetitive, unfair, and deceptive practices.” The FTC, then, voted 3-1 to publish a Notice of Proposed Rulemaking in January 2023 about banning most noncompete clauses for

current workers and negating those for prior workers, with a few exceptions for certain transportation and communications industries and employers. The FTC estimates that noncompete clauses affect 18% of US workers, about 30 million people. Supporters of the ban name possible benefits such as increasing workers' earnings by nearly \$300 billion and closing racial and gender wage gaps by 3.6–9.1%.

“The freedom to change jobs is core to economic liberty and to a competitive, thriving economy,” said FTC Chair Lina M. Khan in a media release. “Noncompetes block workers from freely switching jobs, depriving them of higher wages and better working conditions, and depriving businesses of a talent pool that they need to build and expand. By ending this practice, the FTC’s proposed rule would promote greater dynamism, innovation, and healthy competition.”

In a dissenting statement, FTC Commissioner Christine S. Wilson countered, “The proposed noncompete clause rule represents a radical departure from hundreds of years of legal precedent that employs a fact-specific inquiry into whether a noncompete clause is unreasonable in duration and scope, given the business justification for the restriction.”



The FTC extended the original public comment end date from March 10 to April 19, 2023, and received approximately 20,000 comments. Nearly 200 of the comments mention veterinary medicine. Of those, four oppose the ban—individual practitioners/practice owners in Utah and South Carolina; an attorney whose wife is a veterinarian in Florida; and one anonymous commenter. All other veterinary-related comments support the ban. Many called noncompete clauses outdated, forced, unfair, harmful, and even a threat to public health by exacerbating veterinary shortages with positions going unfilled. Some point to the oversized benefit to private equity firms taking over more practices.

Consensus from both those who support and oppose the ban is that the FTC will enact some version of the rule, likely triggering legal challenges not only to the rule itself but also to the FTC’s authority to authorize the ban in the first place based on something called “the major questions doctrine” addressed in the case *West Virginia v. EPA*. While waiting to see how the FTC responds to the feedback with possible revisions or limitations on the proposed ban, which may take 18 to 24 months, the debate about noncompete clauses continues.

## What's Next?

“A limbo period. That’s exactly what I would call it,” said Arline Kline, JD, an equity partner with Akerman LLC, in the labor and employment practice group. “The final rule is going to be maybe a little bit less stringent than the one that’s proposed, but we don’t think it’s going to be that much less restrictive so that it would ward off any challenges.”



Kline also mentions potential financial, tax, and valuation implications from noncompetes that feature so-called garden leave provisions or those that add security and value for potential business sales. An understaffed or unstaffed business isn’t worth much. “Garden leave” basically means being paid a full salary not to work in the specific profession during noncompete periods, which, in some industries, last a year or two and vary in geographic footprint based on the person’s role, the community in question, and the claimed business case for the limit. These payouts typically get included as an enticement to sign the contract. If an employer paid a garden leave and that noncompete is later voided by the FTC rule, will they claw back that money? How far back will they go? And if so, how does that affect taxes and other financials for everyone involved? “It really just touches so many aspects of the life of the business [including] what the rule would do to valuations and the day-to-day running of a business,” Kline said.

If noncompetes get banned, it might also bleed into other things, including nondisclosure agreements, nondisparagement clauses, and others that sometimes serve similar purposes. “Those kinds of provisions would be subject to attack,” Kline explained, “and therein lies the rub. [The proposed rule] is just so open to interpretation that it leaves employers kind of scrambling.”



How potential legal challenges pan out depends on choices to act at state or federal levels or in precise jurisdictions in specific states, where existing case law potentially supports the case being filed. For example, California, North Dakota, Oklahoma, and Washington, DC, ban noncompetes with a few exceptions. Other states, including Colorado, Illinois, Maryland, New Hampshire, Oregon, Rhode Island, Virginia, and Washington, prohibit noncompetes only for those earning less than certain financial thresholds. In most cases, veterinarians' salaries exceed those earning limits, so any state restrictions less than outright bans don't apply.

## Ongoing Debates

Kline's firm typically represents employers requiring noncompete clauses rather than individuals wanting to negotiate or nix them. Sometimes, though, that means arguing against noncompetes. For example, a fertility clinic contacted Kline's team recently about hiring a physician restricted by a broad geographic noncompete from a prior employer. Even as the only IVF provider within 50 miles, they couldn't hire this doctor. Kline said, "It's a real issue. Obviously, that's the other side of the argument, representing an employer who wants to do the hiring and doesn't want to enforce that [noncompete]. It depends on every state law, so it's a different standard, depending on the state."

Longtime veterinary



## FTC Comments Supporting the Ban (Excerpts)\*

"I opened my own veterinary clinic in 2015 and did not require my associate to sign one. I felt that if I had a good business environment and treated my employees fairly, they would stay. If they left and a few clients followed them, I would recover."

"As a veterinarian, my previous employer's noncompete resulted in abandonment of all my patients without an alternative solution. I was a solo practitioner, and when I turned in my notice, I was not able to provide my clients with recommendations, and the company was not able to find a replacement. This resulted in not just a loss of continuity of care but loss of *all* care within six months as the clinic ended up closing."

"I am a veterinarian and have worked close to 40 years. I have been an associate and a practice owner. I see no justification for noncompetes and, in fact, feel it harms the entire profession."

recruiter Paul Diaz also has spent time on both sides of this issue and now regrets the 1,100+ contracts with noncompete clauses veterinarians signed while he worked for one of the largest veterinary companies.

“I live in New Jersey with my family and young children, and I had to commute to Delaware and Pennsylvania for two years to be able to change jobs.”

*\*Edited for grammar.*

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Reformed, Diaz now counsels all veterinarians—especially new graduates—to refuse to sign contracts with noncompete clauses. This includes increasingly broad ones stemming from consolidation. “Corporate practices [have contracts], where they will restrict you from working within a specific radius of your home hospital and any other hospital owned by the company,” Diaz scoffed. “And you’re not going to believe this one—‘any hospital locations that we may own in the future. We don’t even know it exists today, but if we happen to own it one day, you can’t work anywhere near that one either.’”

In 2022, he helped a veterinarian end a noncompete preventing her from leaving a job where she felt trapped and even suicidal. The solution? The practice where she wanted to work paid the old one \$20,000 to buy out the noncompete. Clearly, not everyone can afford to do that. But thanks to experience helping this one veterinarian, as well as other conversations Diaz called “uncomfortable” between him and at least one person with the power to end noncompete clauses for many veterinarians, Diaz concluded, “This is about revenue.”

Thumbs down

He enjoys swatting common defenses of noncompetes in veterinary medicine, including that they protect intellectual property (IP). “If you truly had intellectual property that you were trying to protect, wouldn’t you want to protect it across the board outside of your community as well?” he asked. “Nobody can give me an example of some type of IP that only needs to be protected within a 20-mile radius of your hospital.”

Diaz points to all the other

## FTC Comments Opposing the Ban (Excerpts)\*

“I own a small business, and I am a veterinarian. Without a noncompete clause, any veterinarian that works for me could take my clients and open a practice beside my office. The damage to my business would be catastrophic, and it may result in the loss of my business.”

“I have been a veterinarian for about 40 years, and if there were no rules about noncompetition, it would have dramatically changed my approach in hiring and training new veterinarians. [...]Why would anyone teach another person the things that have made them successful if that person then takes away clients and potential income?”

“The completely predictable consequence of outlawing noncompetes in veterinary medicine is the acceleration of corporate consolidation, [...]and it will, in the long run, result in local monopolies and oligopolies of corporately owned practices after all the small local practices have been bankrupted by their associate doctors.”

“There is a critical shortage of veterinarians and fierce competition to hire them. [...]Currently it is common to see signing bonuses of \$50,000 to \$100,000. I believe this fact clearly refutes the argument that properly crafted noncompetes limit competition and depress wages.”

*\*Edited for grammar.*

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available legal protections for IP, including patents, trademarks, copyrights, nondisclosure agreements, and so on. That's how he is protecting Offer First, a recruiting technology platform he founded. He added, "If you truly had something that improved patient outcomes or enhanced surgical procedures that decreased recovery times of an animal and you didn't share that with the industry, you're a problem. You don't belong in this industry."

Another frequent defense of noncompetes focuses on preventing clients from following associates when they go to another practice or start their own. Diaz countered, "That is what the poor business owner would say—somebody who isn't doing what they need to be doing to ensure loyalty to the brand. Because if you are relying solely on the veterinarian to establish relationships with your clients, that's your single point of failure. [Clients will think,] 'I've got no reason to stay at that building, other than the doctor. If she leaves, chances are I'm going with her, but if they did create some type of experience for me that no other practice was doing, well, chances are I'm going to stay there.'"

While garden leaves probably sound pretty good to exhausted practitioners, Diaz said those only work in professions where skills don't generally diminish over time. "Take a doctor out of the clinic for two years," he said, "and imagine how difficult it is going to be for that doctor to get back into practice. That's why garden leave is not the answer, not in any health care field. These doctors? Their skills need to be maintained, and they maintain their skills by continuing to practice."

## Confluence of Critical Issues?



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A veteran of the US Marine Corps, Diaz chokes up when talking about the similarities between veterans and veterinarians—namely, high suicide rates. For him, several critical veterinary issues meet at a noncompete crossroads such as veterinary shortages, educational debt, mental health struggles, and corporate consolidation. He asks why so many focus on wellness efforts that target symptoms rather than removing at least one of the causes, noncompetes.

Whether the FTC ultimately bans noncompetes in a way that affects the veterinary world or not, Diaz hopes a groundswell of individuals drives the change by simply refusing to sign contracts that feature such restrictions.

"Once employers realize that they have to make a choice between a

noncompete requirement and being able to hire,” Diaz predicted, “we’ll get rid of them. The reason why is because the noncompete is nothing more than a mechanism for them to control a portion of the industry’s revenue. [...]That noncompete tells me that I now know with reasonable assurance that you’re not going to be generating revenue for my competition. [...]And that’s why the corporations do not want to end this practice. It enables them to elicit control over the one individual who generates revenue in this industry.”

Yet, seeing possible life-changing options to knock down debt, associates sign the deals and take the bonuses. This limits the candidate pool for other practices that end up struggling due to less than optimal staffing—leaving them vulnerable to later buyouts.

When associates do change jobs, it often requires lengthy commutes that make long days even longer and complicates responsibilities such as child care or elder care. Or, they end up uprooting everything to move to practice in another state with another noncompete clause, where the cycle continues.



**Roxanne Hawn brings 25+ years of experience writing about veterinary topics for professionals and consumers. She writes an award-winning site called *Champion of My Heart* and is the author of *Heart Dog: Surviving the Loss of Your Canine Soul Mate*. Based in the Colorado Rocky Mountains, Roxanne fosters litters of puppies until old enough for adoption as well as hit-by-car dogs needing time to heal and rehab injuries.**

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