

March 9, 2023

Hon. Lina M. Khan, Chair
Federal Trade Commission
600 Pennsylvania Avenue, NW
Washington, DC 20580

RE: Non-Compete Clause NPRM (RIN 3084-AB74)

Dear Chairwoman Khan:

The American Health Care Association and National Center for Assisted Living (AHCA/NCAL) is the nation's largest association of long-term and post-acute care providers. AHCA/NCAL advocates for quality care and services for frail, elderly, and disabled Americans. Our members provide essential care to millions of individuals in more than 14,500 nursing homes, assisted living and centers for individuals with intellectual and developmental disabilities.

AHCA/NCAL, its affiliates, and member providers advocate for the continuing vitality of the long-term care (LTC) provider community. We are committed to developing and advocating for public policies which balance economic and regulatory principles to support quality of care and quality of life. Therefore, AHCA/NCAL is commenting on the proposed rule focused on non-competes issued by the Federal Trade Commission (FTC).

As you know, the COVID-19 pandemic deeply challenged the entire health care continuum: the industry is grappling with a historic workforce crisis, financial challenges, and closures of some communities and centers across the country. The health care workforce continues to experience significant shortages while the demand for services has increased. In fact, LTC communities have lost more than 307,000 caregivers since the beginning of the pandemic, and workforce levels are at a 13-year low.¹ Projections show the country will require an additional 3.5 million LTC health workers by 2030 to maintain current staff-to-care recipient ratios.²

Due these staffing shortages, federal data shows that the proportion of nursing hours clocked by contracted (or outside) agency staff have more than tripled since early 2020 and continues to increase.³ As you may be aware, a common practice of these staffing agencies is to charge the workers they hire out to our provider LTC centers a separation payment if those workers choose to work for a center. We believe that this fee runs directly contrary to the spirit of your proposed rulemaking.

¹ American Health Care Association (AHCA). (2022). BLS January 2023 jobs report. Retrieved from: <https://www.ahcancal.org/News-and-Communications/Fact-Sheets/FactSheets/LTC-Jobs-Report-Jan2023.pdf>

² Institute of Medicine. (2008). Retooling for an aging America: Building the health care workforce. Washington, DC: National Academies Press.

³ American Health Care Association (AHCA). (2022). CMS Payroll Based Journal. Retrieved from: [What They Are Saying: One-Size-Fits-All Minimum Staffing Mandate Will Not Improve Care, Solve Labor Shortages In Nursing Homes \(ahcancal.org\)](https://www.ahcancal.org/News-and-Communications/Fact-Sheets/FactSheets/LTC-Jobs-Report-Jan2023.pdf)

While the proposed rule is clear that a provision does not need to be a non-compete clause per se to come under the proposed rule's prohibitions if it is "so broad in scope that they serve as de facto non-compete clauses," the FTC should offer some clear examples of conduct that would be covered by this statement. For example, such language could include separation payments to be paid either by the worker or new employer that would serve as anti-competitive obstacles to new employment. Demands for separation payments can significantly deter workers from seeking or gaining new employment and can also serve to "coerce workers into remaining in their current jobs" just as much as per se non-compete clauses.

We are requesting that in the final rule you address this separation payment matter. If you have any questions around this issue or would like to visit directly with a provider that has been impacted, please do not hesitate to contact me at dritchie@ahca.org. AHCA/NCAL looks forward to working with you to develop solutions, such as this one proposed, to help our LTC workforce continue to serve those most in need.

Sincerely,

A handwritten signature in black ink that reads "Dana Ritchie". The signature is written in a cursive, flowing style.

Dana Ritchie
Associate VP of Constituency Services and Workforce
American Health Care Association/National Center for Assisted Living