The Hospital + Healthsystem Association of Pennsylvania

Leading for Better Health

April 11, 2024

Honorable Representatives
Pennsylvania House of Representatives
Main Capitol Building
Harrisburg, PA 17120

Dear Representative:

On behalf of over 230 member hospitals and health systems, The Hospital and Healthsystem Association of Pennsylvania (HAP) writes to strongly oppose House Bill 1633 PN 2817, which proposes banning restrictive covenants ("non-compete agreements") between health care practitioners and the primary health care facilities and offices that employ them.

We appreciate the patient-focused intent of this legislation—to assure continuity of care—and are also deeply committed to that concept. As written, however, the non-compete prohibition is not appropriate, and the notification obligation is unworkable.

While HAP represents the hospital and health system community statewide, we think it's important to note that the bill's provisions apply to every "person or group of persons that employ a health care practitioner at a health care facility or office."

A non-compete agreement is an essential element of consideration for a sophisticated and highly compensated professional as they assess an offer for potential employment. Courts already review non-compete agreements for reasonableness and skeptically construe language that restricts the rights of employees. A non-compete agreement also may, for example, be deemed by the courts to be unenforceable if found to be unduly restrictive or an impediment to patients' access to care.

As a practical matter, restrictive covenants are most typically used in health care settings with the highest level of providers, such as physicians. Such providers are in extremely high demand; if they do not choose to sign a restrictive covenant, they need not do so.

It takes considerable time and resources to find, hire, train, and establish a doctor in patient practice. In addition to cash compensation and signing bonuses, hospitals and health systems make significant investments to recruit, establish, and retain staff physicians by obtaining liability coverage, securing a wide array of credentials, and facilitating extensive training activities. Health care employers also frequently cover moving expenses and/or pay student loan debt, for example. Hospitals and health systems often cover physicians' salaries even before they start seeing patients or are approved for reimbursement by public and private payors.

Agreements that are evaluated by both parties and signed before accepting an offer of employment protect the investments made to attract these highly skilled individuals and, in turn, provide reliability, as well as protect access to care for patients and communities they serve.

Eliminating non-compete agreements may unintentionally create an environment in which providers can hop between health systems at any interval for any reason, triggering 'bidding wars' for practitioners, increasing health care costs, and decreasing access to care.

As amended, the legislation provides an exception for practitioners whose work largely takes place in counties with populations of 89,000 or less. We appreciate the effort to protect rural health care from the consequences of the legislation. We do wonder, however, why the line was drawn at counties of the sixth class? And why do patients in even larger counties not warrant such safeguards? It is arguable that larger counties offer both more options for providers prior to deciding to enter into non-compete agreements and greater risks of arbitrary staffing mobility for employers that have invested in establishing the provider in practice.

The exceptions point to the fundamental problem with this policy: Banning restrictive covenants does more harm than good. We urge you to stand against inappropriate government interference in private contracts between practitioners and employers.

Like the non-compete prohibitions, the notification provisions do not reflect the complexity of health care reality.

As amended, employers are required to notify patients whenever a physician, a certified registered nurse practitioner, or a physician assistant—whom the patient has seen within the past year and with whom the patient has an "ongoing outpatient relationship"—that the provider has departed employment; where the practitioner will be rendering services in the future, if known; and how the patient may continue with the practitioner or be assigned a new practitioner.

The lack of specificity in this new government mandate is remarkable. Does this require proactive, affirmative notification? What defines an "outpatient relationship?" Must an employer prove that they tried to obtain information related to where every departing practitioner of this type may be rendering services in the future to be able to defend that they do or do not know this information? Are there consequences to the employer if the information they share is inaccurate or becomes dated?

Just as with any employer, people leave their positions for myriad personal and professional reasons. Some choose to leave their previous fields of practice or move out of the region or state. Some may be asked to leave for performance-based reasons. In the most extreme cases, some die. Even if remaining in active practice locally, it may not be suitable for providers to treat past patients for any number of reasons, not the least of which may be participation in the patient's insurance network. (If an employer makes a referral and the patient follows the provider, subsequently incurring uncovered expense, does the employer have any liability?)

It is also important to think about the patient who would be notified. It may be confusing to receive notices related to a provider they had seen only a handful of times, had seen on a temporary basis, had seen for specialty care that is no longer relevant, or dozens of other possible real-world scenarios.

Finally—and I believe we would all agree—by far the most important consideration: There are any number of scenarios in which unsolicited and unexpected contact from a health care provider has the potential to cause patient harm. As you know, there are complex requirements safeguarding health information. *This is for good reason.* Imagine one scenario, for example, in which a notification is sent to a home address that contains a specific provider name or specialty that the patient needs to keep confidential.

We urge you to vote against House Bill 1633, in part, because of the very real possibility of triggering unintended negative consequences without achieving the intended positive outcomes of the proposal.

The hospital community stands ready to work with you and your legislative colleagues to increase the number of well-trained professionals to provide high-quality care to every Pennsylvanian in every community across the state.

If you have any questions, comments, or concerns, please contact me at HTyler@HAPonline.org or (717) 433-1997.

Sincerely,

Heather Tyler
Vice President, State Legislative Advocacy