PROHIBITING ANTI-COMPETITIVE CONTRACTING TO *promote competition* AND *lower costs*

Health care consolidation continues to allow both dominant health care providers, including hospitals and physician groups, and insurers to increase their market share and establish market dominance, driving up costs with little to no improvement in care quality. In a healthy, competitive marketplace, hospitals engage in negotiations with insurers to establish contract terms and set prices for health care services. Unfortunately, as health care consolidation accelerates, hospitals and physician groups – and, in some cases, insurers – have been able to demand more favorable prices for services during these negotiations by engaging in so-called anti-competitive contracting practices that can disrupt normal market dynamics by preventing fair price competition.

In addition to exacerbating consolidation, the impacts of these anti-competitive practices limit people's access to certain providers, increase people's health care costs, and disproportionately hurt people living in rural or underserved communities. What's more, these negotiations between providers and insurers are often opaque, making it difficult for policymakers and regulators on both the state and federal levels to identify and limit the worst of these abuses.

A SOLUTION: PROHIBITING ANTI-COMPETITIVE CONTRACTING

Recognizing the harmful effects of these practices, states have begun to prohibit these restrictive anti-competitive clauses employed by both dominant providers and insurers in order to protect people's access to care. Beyond reducing incentives that drive further consolidation, these policies are effective in already-concentrated markets where other policies to address high costs may be less effective. And to maximize their effectiveness, states have paired these prohibitions with enforcement, regulatory oversight, and data reporting to ensure compliance and inform additional policies to lower the cost of care.

BENEFITS OF PROHIBITING ANTI-COMPETITIVE CONTRACTING

Limits on anti-competitive contracting practices by dominant providers and insurers benefits people who rely on a competitive health care marketplace to keep costs low. By banning these provisions, states can help restore price competition during negotiations between these providers and insurers to preserve and even expand affordable care options by allowing for more lower-cost, higher-quality networks with lower premiums and out-of-pocket costs. At the same time, these prohibitions would also allow small providers to push back against growing consolidation and maintain their independence by limiting the ability of dominant providers to box them out with unfair contract demands.

STATE APPROACHES TO PROHIBITING ANTI-COMPETITIVE CONTRACTING

States should take action to prohibit anti-competitive contracting by:

- **Prohibiting anti-competitive contracting clauses:** States should strengthen their health care markets by prohibiting certain anti-competitive contracting clauses between dominant providers and insurers. The bans on the practices listed below aren't mutually exclusive and can be combined to establish more comprehensive protections:
    - *All-or-nothing clauses*: These contract provisions require insurers to include every hospital and provider in a health system's network and are often leveraged by health systems when their network has a "must-have" provider. Restricting these negotiating tactics can allow insurers to selectively contract with lower-cost, higher-quality providers that could promote price competition, make care more affordable, and allow people greater transparency.

- *Anti-steering and anti-tiering clauses:* Anti-steering clauses block insurers from "steering" people toward more affordable providers by using financial incentives like lower copays more broadly. Anti-tiering contract provisions focus specifically on prohibiting insurers from placing certain providers, such as hospital outpatient departments that charge higher prices for similar services delivered at independent physician offices, in higher-cost tiers. Prohibiting these clauses can allow insurers to direct patients to lower-cost, higher-quality providers and structure their networks to reflect differences in price across providers.
- *Most favored nations clauses:* These contract provisions require providers to offer an insurer the lowest price it offers any other insurer. By banning this practice, it restores a provider's ability to offer different prices to different insurers and increases the insurer's incentive to negotiate discounted rates that could lead to lower premiums for people.
- *Gag clauses:* These contract provisions prohibit insurers from disclosing provider-negotiated health care prices to patients or agencies, limiting price transparency and making it much more challenging to identify lower-cost providers. Federal legislation passed in 2021 banned many of these gag clauses, although it focuses largely on plan data transparency through self-attestations by insurers. States can build on these protections by requiring proactive data sharing by insurers and other entities, including providers and pharmacy benefit managers, and allowing regulators greater enforcement authority to ensure compliance and improve price transparency for people.

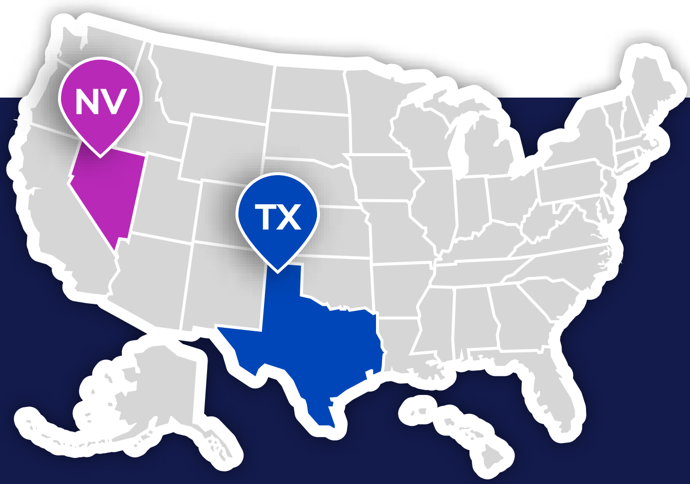
- **Ensuring compliance:** States can grant their Attorney General, Department of Insurance, or other state agency the authority to ensure health care entities comply with state restrictions on anti-competitive contracting by reviewing provider-insurer contracts. Any state that establishes a private right of action should be paired with public enforcement to minimize the burden on harmed individuals.
- **Establishing limits on health care non-compete agreements:** Non-compete clauses in health care contracts restrict individual providers' ability to work for competing systems or start their own health care practice, which can limit competition and innovation and increase people's costs. With a short-lived 2024 Federal Trade Commission ban blocked in court, states can implement their own ban on provider non-compete agreements in health care and other market sectors.

STATE SUCCESSES

States across the country have led the way in pushing back against anti-competitive contracting practices that limit people's access to care and increase costs:

Nevada's legislation to limit anti-competitive contracting practices was the first to implement a comprehensive ban on all-or-nothing clauses, in addition to other limits on anti-steering and anti-tiering clauses.

Texas passed comprehensive legislation to ban all anti-competitive contracting practices – including anti-tiering and anti-steering clauses, gag clauses, and most favored nations clauses – except for all-or-nothing clauses.



See here for a full list of states with similar policies

MOVING FORWARD

Limiting anti-competitive contracting behaviors requires coordinated action between both federal and state regulators. Alongside federal actions, states should continue to protect patients by restricting these practices that, if left unchecked, increase costs and limit patient choice.