

Dissenting Statement of Commissioner Jon Leibowitz In re Ohio Executive Order 2007-23S, Matter Number V080001

Although I share my colleagues' concern with laws creating antitrust immunity (both in general and especially in health care), I dissent from the decision to authorize the staff letter on the Governor of Ohio's July 2007 Executive Order permitting self-employed home health care workers to collectively bargain with Ohio's Medicaid program.

States are struggling to control Medicaid costs and to improve access to in-home care, which may offer a less-costly alternative to nursing homes. Ohio is operating under a Medicaid waiver so that it can make home services available to Medicaid recipients as an alternative to institutional care, and the Executive Order is part of that effort. I do not believe that the FTC has enough information about the context and circumstances in which the Executive Order operates to offer a thoughtful evaluation of its likely effects.

There does not appear to be any reason to proceed on the basis of such limited information. There is no indication of any pending review of the Executive Order or its implementation. A state legislator requested the letter, but the letter does not address any action pending in the legislature related to the Executive Order. As far as I know, except for two occasions, since 1994, the staff has submitted comments only where a pending proposal existed (whether it was to adopt a new law, rule, or regulation; repeal it; modify it; or renew it). This letter can have no effect on policy because there is nothing to affect.

In fact, rather than assisting state decision-makers, the primary effect of the letter may be to discourage home health care workers from participating in the state's effort to expand access to Medicaid home health services. The letter warns that participation pursuant to the Executive Order will violate the antitrust laws if the state's effort to confer antitrust immunity is ineffective. When there is no political or regulatory decision pending, we should not issue a letter that would undermine a state's implementation of its programs and limit the governor's ability to address health care problems in his state.

Respectfully, I dissent.