

April 19, 2023

Lina Khan
Chair
Federal Trade Commission

Alvaro Bedoya
Commissioner

Rebecca Kelly Slaughter
Commissioner

Re: FTC’s proposed rule on non-compete clauses (Docket FTC-2023-0007)

Dear Chair Khan and Commissioners,

The undersigned organizations commend the Federal Trade Commission (FTC) for proposing a total ban on non-compete clauses in labor contracts,¹ which prevent workers from changing jobs to work for the employer of their choice or to start their own business. We urge the FTC to enact a final rule that preserves the total ban, without carveouts for specific occupations or tied to income. We further call on the FTC, in the final rule, to close loopholes in the proposal to ensure that the regulation is truly a complete ban on non-compete clauses and functionally similar contracts.

In March 2019, a coalition of civil society organizations, labor unions, legal experts, and economists formally petitioned the FTC to use its authority under the FTC Act to issue a rule prohibiting non-compete clauses in labor contracts as an unfair method of competition that is *per se* illegal. The petition called for an FTC rule that would make non-compete clauses illegal for all workers, irrespective of income or occupation. The FTC has clear authority to prohibit non-compete clauses under Sections 5 and 6 of the FTC Act.²

The evidence strongly supports the need for a ban on non-compete clauses through rulemaking. These contracts affect one in five workers in the U.S. economy, including low-wage workers who lack the resources to seek justice through the courts. Rulemaking, rather than case-by-case litigation, is the preferred method for addressing such widespread abuses. By limiting workers’ mobility, non-compete clauses drive down wages, reduce the formation of new businesses, and trap workers in jobs where they may be subject to unsafe working conditions or harassment.

Firms use non-compete clauses as a substitute for other means of retaining workers, such as good working conditions, high wages, and the opportunity for future raises and promotions. In the absence of restrictions on labor mobility, evidence shows that firms do in fact switch to these

¹ Non-Compete Clause Rule, 88 Fed. Reg. 3482 (proposed Jan. 19, 2023).

² Congress charged the FTC with policing “unfair methods of competition.” 15 U.S.C. § 45(a). Further, the FTC has the statutory authority to “make rules and regulations for the purpose of carrying out the provisions of this subchapter [the FTC Act].” 15 U.S.C. § 46(g).

alternative methods of worker retention.³ A prohibition on non-compete clauses would have benefits for all workers and especially pronounced benefits for women and people of color and contribute to the narrowing of gender and racial income gaps.⁴ Research has found that stronger enforcement of non-compete clauses “reduces earnings for female and for non-white workers by twice as much as for white male workers.”⁵

In the final rule, the FTC should categorically ban contracts that are functionally equivalent to non-compete clauses. Experience has shown that employers switch to similar restraints when specific restrictions on labor mobility are banned.⁶ These include training repayment agreement provisions (TRAPs),⁷ lengthy notice periods,⁸ and liquidated damages clauses,⁹ in which firms require workers to pay prohibitive sums if they leave a job before a certain period. TRAPs and liquidated damages clauses are in key respects more harmful than traditional non-compete clauses. While non-compete clauses prevent workers from working for a competitor or in the same occupation, TRAPs and liquidated damages provisions restrict workers from leaving their employer entirely, including, for example, taking time off to care for family members. Workers face the unpalatable choice of staying at their current job or leaving and assuming tens of thousands of dollars in debt to their employer.

The reasonableness test proposed by the FTC for TRAPs practically guarantees that these contracts remain an attractive option for employers. As the state experience with non-compete clauses shows, a legal standard that requires case-by-case evaluation by a court or administrative agency is likely to be ineffectual and ensure that employers continue to use TRAPs or adopt them in lieu of conventional non-compete clauses. Because many workers fear the cost and stresses of litigation and the risk of being liable for damages to their employers,¹⁰ comparatively few non-compete clauses are tested in court. These contracts inflict harm on workers through their mere existence. As legal scholar Harlan Blake wrote, “For every covenant [not to compete] that finds its way to court, there are thousands which exercise an *in terrorem* effect on employees who respect their contractual obligations[.]”¹¹ This chilling effect on labor market mobility may

³ Brian Callaci et al., *The Effect of No-poaching Restrictions on Worker Earnings* (2023), https://marshallsteinbaum.org/assets/franchise_no-poach_2-2023.pdf.

⁴ Michael Lipsitz & Evan Starr, *Low-Wage Workers and the Enforceability of Noncompete Agreements*, 68 MGMT. SCI. 143 (2022); Matthew S. Johnson, Kurt Lavetti, & Michael Lipsitz, *The Labor Market Effects of Legal Restrictions on Worker Mobility* 38 (2020), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3455381.

⁵ Johnson, Lavetti & Lipsitz, *supra* note 4, at 4.

⁶ Peter Norlander, *New Evidence on Employee Noncompete, No Poach, and No Hire Agreements in the Franchise Sector* (2023), <https://equitablegrowth.org/wp-content/uploads/2023/02/022323-WP-New-Evidence-on-Employee-Noncompete-No-Poach-and-No-Hire-Agreements-in-the-Franchise-Sector-Norlander.pdf>.

⁷ *Trapped at Work: How Big Business Uses Student Debt to Restrict Worker Mobility*, STUDENT BORROWER PROT. CTR. (July 2022), https://protectborrowers.org/wp-content/uploads/2022/07/Trapped-at-Work_Final.pdf.

⁸ Josh Eidelson and Zachary Mider, *Giving Four Months Notice or Paying to Quit Has These Workers Feeling Trapped*, BLOOMBERG BUSINESSWEEK (Jan. 26, 2023) <https://www.bloomberg.com/news/articles/2023-01-26/concentra-health-employees-feel-trapped-at-work>; Ariel Zilber, *JP Morgan Requires Tech Workers Give 6 Months Notice Before Quitting*, N.Y. POST (Mar. 3, 2023) <https://nypost.com/2023/03/03/jpmorgan-chase-requires-workers-give-6-months-notice/>.

⁹ Elizabeth Schulze & Michelle Stoddart, *FTC’s New Rule Could End Noncompete Agreements for Millions of Workers*, ABC NEWS (Mar. 8, 2023), <https://abcnews.go.com/US/ftcs-new-rule-end-noncompete-agreements-millions-workers/story?id=97684108>.

¹⁰ Matt Marx, *Employee Non-compete Agreements, Gender, and Entrepreneurship*, 33 ORG. SCI. 1756, 1760 (2022).

¹¹ Harlan M. Blake, *Employee Agreements Not to Compete*, 73 HARV. L. REV. 625, 682 (1960).

be especially strong for women.¹² In California, where non-compete clauses have been *unenforceable* for more than 150 years, nearly 30% of workplaces still impose non-compete clauses on *all* employees while approximately 45% use these contracts with some of their employees.¹³

The FTC should also prohibit all no-poach and no-hire agreements. The courts have been clear that these forms of collusion among competing employers are *per se* illegal under the Sherman Act.¹⁴ The law governing no-poach agreements among firms that do not directly compete for workers' services, such as fast-food franchisors and their franchisees, is less clear, however. While we believe that these contracts should be *per se* illegal under the Sherman Act, some courts have held that they should be evaluated using the fact-intensive, employer-friendly rule of reason.¹⁵ Failure to enact a *per se* ban on all no-poach, no-hire, and other similar anti-worker restraints between firms threatens to undercut the FTC's aim to promote fair competition among employers.

The Biden administration has made clear that empowering labor and rejuvenating employer competition for workers' services is essential to reviving an economy afflicted by low wages and lackluster business dynamism. The FTC cannot waste this opportunity to eliminate pernicious non-compete and similar coercive labor contracts. We call on the FTC to strengthen the proposed rule in the ways described and to move forward with the process of enacting a final rule with the urgency required.

Thank you for your consideration of our submission. For any questions or requests for additional information, please contact Sandeep Vaheesan at vaheesan@openmarketsinstitute.org or 301-704-4736.

Sincerely,

Open Markets Institute
Action Center on Race and the Economy
American Economic Liberties Project
Americans for Financial Reform Education Fund
Athena
Better Organizing to Win Legalization
Campaign for Family Farms and the Environment
Coalition on Human Needs
Committee to Support the Antitrust Laws
Colorado Plaintiff Employment Lawyers Association
Community Change Action
Consumer Action
Consumer Federation of America
Debt Collective

¹² Marx, *supra* note 10, at 1769-70.

¹³ Alexander J.S. Colvin & Heidi Shierholz, *Noncompete Agreements*, 6 (2019), <https://files.epi.org/pdf/179414.pdf>.

¹⁴ *Todd v. Exxon Corp.*, 275 F.3d 191, 201 (2d Cir. 2001) (Sotomayor, J.).

¹⁵ *Ogden v. Little Caesar Enterprises, Inc.*, 393 F. Supp. 3d 622, 636-37 (E.D. Mich. 2019).

Demand Progress Education Fund
Demos
Dutchess County Progressive Action Alliance
Economic Security Project
Farm Action
Fight Corporate Monopolies
Future of Music Coalition
HEAL (Health, Environment, Agriculture, Labor) Food Alliance
Indivisible Marin
Indivisible Media City Burbank
Institute for Local Self-Reliance
International Brotherhood of Teamsters
Liberation in a Generation
National Employment Law Project
New Jersey Citizen Action
North Carolina Justice Center
Oregonizers
Our Revolution
Oxfam America
P Street
People's Action
People's Parity Project
Public Citizen
Public Justice
Revolving Door Project
ROC United
RootsAction.org
SEIU Local 500
Service Employees International Union
Student Borrower Protection Center
Take on Wall Street
The Main Street Alliance
Towards Justice
UFCW International Union, AFL-CIO
VOICE (Voices Organized in Civic Engagement)
Workplace Fairness
Young Invincibles