



April 19, 2023

Shannon Lane
Attorney, Office of Policy Planning
Federal Trade Commission
600 Pennsylvania Ave. NW, Ste. CC-5610 (Annex C)
Washington, DC 20580

Submitted via regulations.gov

RE: Non-compete Clause Rulemaking, Matter No. P201200 (RIN 3084-AB74)

Dear Ms. Lane:

On behalf of The Leadership Conference on Civil and Human Rights, a coalition of more than 230 national organizations committed to promoting and protecting the civil and human rights of all persons in the United States, we write in support of the Federal Trade Commission's ("FTC") proposed rule to ban employers from imposing non-compete agreements on virtually all workers. The FTC's proposed rule is squarely within the commission's legal authority, and it will benefit all workers, contributing to higher wages and greater opportunities for workers to rise in their fields by switching jobs. Further, it will uplift workers of color and women who have been adversely affected by the proliferation of non-compete clauses. The Leadership Conference represents diverse communities that are affected by non-competes and stands against racial, gender, and economic injustice in all arenas, including in the workplace.

1. The widespread usage of non-competes impacts workers by limiting their freedom to change jobs and depressing wages.

Non-compete agreements prevent employees from leaving their current workplace for competitors, starting a competing business, or sharing trade secrets. Non-competes are often presented in a "take it or leave it" fashion. This pressures workers to sign the non-compete or forego employment altogether. Specifically, non-competes restrict workers through time, industry, and/or geography. A time restriction prevents an employee from working for a competitor for a defined period of time after leaving a position; a geographic restriction prevents an employee from accepting work in entire regions of the United States; and an industry restriction prevents an employee from working for a particular type of company.

The FTC estimates that about one in five workers in the United States — approximately 30 million people — are bound by non-competes and are thus restricted from pursuing better career opportunities. Less than 10 percent of workers negotiate these clauses, and 93 percent of them read and sign them anyway. Moreover, 30 to 40 percent of workers who are asked to sign non-competes are first asked after they have already accepted the position. And nearly

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40 percent of workers in the United States have been constrained by a non-compete at some time during their career, demonstrating how widespread the practice is. These clauses are pervasive across industries for high and low wage earners.¹

As noted in the FTC's Notice of Proposed Rulemaking, non-competes often prevent workers from taking jobs in the same geographic area and in their field of expertise. This coerces many workers to remain in a job in which they are less productive or to take a job outside of their field of expertise. As a result, non-competes suppress wages, hamper innovation, and reduce entrepreneurship.² Economists refer to this dynamic as the problem of monopsony, where employers have greater market power and are able to negatively impact the economy by offering lower wages to workers due to the lack of competition.³ In this way, non-compete agreements reduce social mobility and clog up the labor market. And just as non-competes prevent workers from taking the jobs they want; they also prevent businesses from hiring the workers they want.

In 2015, Krishna Regmi started to work as a personal care aide for a Pittsburgh home health agency.⁴ When he started work, he was given paperwork to sign and did not think much of it until he decided to accept a position at a competing agency. Regmi's employer sued him for violating a non-compete clause he did not know he had signed. The non-compete agreement barred Regmi from working as a personal care aide at another home health agency for two years. Fortunately, Regmi's ex-employer ended up dropping the lawsuit after receiving a letter from a Pennsylvania legal aid organization. But for many workers, the threat of legal action is enough to cause them to either stay in their position, or withdraw from their career and restart in a different industry. Moreover, greater non-compete agreement enforceability diminishes workers' earnings and job mobility, and workers facing high enforceability are unable to leverage tight labor markets to increase their wages, even when labor market conditions improve.⁵

The FTC's proposed rule will almost certainly raise wages. A 2021 study on the impact of Oregon's ban on non-competes found that hourly wages increased by 2 to 3 percent on average.⁶ Additionally, multiple studies have found similar results from the banning or limiting of non-compete clauses.⁷ These studies support the FTC's assessment that a ban on non-compete agreements could increase workers' earnings across industries and job levels by \$250 billion to \$296 billion per year.

¹ Evan Starr, *The Use, Abuse, & Enforceability of Non-Compete and Non-Poach Agreements*, Economic Innovation Group, February 2019, <https://eig.org/non-compete-brief/>.

² Marshall Steinbaum, *How widespread is Labor Monopsony? Some New Results Suggest its Pervasive*, ROOSEVELT INSTITUTE, December 18, 2017; Greg Robb, *Wage growth is soft due to declining worker bargaining power, former Obama economist says*, MARKETWATCH, August 24, 2018.

³ *Id.*; Greg Robb, *Wage growth is soft due to declining worker bargaining power, former Obama economist says*, MARKETWATCH, August 24, 2018.

⁴ Sophie Quinton, *Why Janitors Get Noncompete Agreements, Too*, PEW/STATELINE, May 17, 2017, <https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2017/05/17/why-janitors-get-noncompete-agreements-too>

⁵ Matthew Johnson, Kurt Lavetti, & Michael Lipsitz, *The Labor Market Effects of Legal Restrictions on Worker Mobility* (June 6, 2020), <https://ssrn.com/abstract=3455381>.

⁶ Michael Lipsitz and Evan Starr, *Low-Wage Workers and the Enforceability of Noncompete Agreements*, Management Science, April 5, 2021, <https://pubsonline.informs.org/doi/10.1287/mnsc.2020.3918>

⁷ Mark Lemley & Orly Lobel, *Banning Noncompetes Is Good for Innovation*, HARVARD BUSINESS REVIEW, February 6, 2023, <https://hbr.org/2023/02/banning-noncompetes-is-good-for-innovation>.

2. Non-compete agreements have a negative impact on workers of color and women.

The use of non-competes for underpaid workers, especially workers of color, can be traced to the Reconstruction Era. Former slave owners used a wage-contract system reminiscent of modern non-competes in order to exploit freed Black Americans.⁸ Today, non-competes remain a racial and gender justice issue because they exacerbate racial and gender wage gaps.⁹

Non-competes have a detrimental impact on women and workers of color because they decrease entrepreneurship, produce lower wage gains, and provide firms more power to discriminate.¹⁰ Women in states with stricter non-compete enforcement are less likely than men to leave their jobs and start rival companies.¹¹ Further, when women entrepreneurs abandon their startups and go back and look for employment, they suffer larger penalties than men do because of the fact that women are more harshly penalized for failure.¹² Women and workers of color are also less likely to negotiate or violate non-competes than their white male counterparts, making these agreements more implicitly binding for them.¹³ Finally, there is consistent evidence that shows that earnings of women and workers of color are reduced by twice as much as white male workers when there is stricter non-compete enforcement.¹⁴

Non-compete agreements are a form of worker intimidation that exacerbates wealth inequality and job immobility. In addition, non-competes are common in workplaces with low pay and where workers have low education credentials. A 2019 survey by the Economic Policy Institute found that nearly 30 percent of the businesses where the average wage was less than \$13 an hour used noncompete agreements.¹⁵ Many of these workplaces largely employ women and workers of color, who in turn suffer the most by these agreements. This is the case for Bridget Mroczkowski, a customer service representative in Wisconsin where non-competes are legal. Before starting her work, Mroczkowski had to sign a noncompete agreement as a condition of employment even though she is not privy to “any trade secrets or things happening at a higher level.”¹⁶ Mroczkowski said that her pay is below the market rate and that it

⁸ Ayesha Bell Hardaway, *The Paradox of the Right to Contract: Noncompete Agreements as Thirteenth Amendment Violations*, [The Paradox of the Right to Contract: Noncompete Agreements as Thirteenth Amendment Violations](#), 39 SEATTLE U. L. REV. 957, 959 (2016).

⁹ John W. Lettieri, *Noncompete Agreements and American Workers – Testimony before the Senate Committee on Small Business*, Economic Innovation Group (Nov. 14, 2019), <https://eig.org/news/testimony-before-the-senate-committee-on-small-business-noncompete-agreements-and-american-workers>.

¹⁰ John W. Lettieri, *Noncompete Agreements and American Workers – Testimony before the Senate Committee on Small Business*, Economic Innovation Group (Nov. 14, 2019), <https://eig.org/news/testimony-before-the-senate-committee-on-small-business-noncompete-agreements-and-american-workers>.

¹¹ Matt Marx, *Employee Non-Compete Agreement, Gender, and Entrepreneurship*, at 3, 27 (May 4, 2020), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3173831.

¹² Tom Fleischman, *Women Indirectly Hurt More by Noncompete Pacts*, Cornell Chronicle (October 5, 2021), <https://news.cornell.edu/stories/2021/10/women-indirectly-hurt-more-noncompete-pacts>.

¹³ *Id.* at 11.

¹⁴ Matthew Johnson, Kurt Lavetti, & Michael Lipsitz, *The Labor Market Effects of Legal Restrictions on Worker Mobility* (June 6, 2020), 4, <https://ssrn.com/abstract=3455381>.

¹⁵ Alexander J.S. Colvin & Heidi Shierholz, *Noncompete Agreements* (December 10, 2019), <https://www.epi.org/publication/noncompete-agreements/>

¹⁶ Jessica Guynn, *How Noncompete Agreements Harm Women and People of Color: ‘Consequences Can Be Devastating’*, USA TODAY, January 20, 2023, <https://www.usatoday.com/story/money/2023/01/19/noncompete-agreements-harm-women-people-of-color/11046736002/>.

has not kept up with inflation. If she was not held back by a non-compete, she could double her income by moving to a competing company. In order to increase wages, people like Mroczkowski would need to change industries or move to a new area, something that many cannot afford to do. Non-competes continue to subject workers of color and women to disadvantages in the workplace, including severe wealth inequality and job immobility.

Furthermore, it is important to extend the ban on non-competes to protect independent contractors. When businesses mislabel their employees as independent contractors, they deprive their workers of basic protections like the right to minimum wage and overtime pay. Additionally, businesses have been allowed to transfer the costs of running the business to their employees. These arrangements often occur in underpaid, labor-intensive industries such as delivery services, janitorial services, and domestic and home care work¹⁷ where women and people of color are overrepresented.¹⁸ Thus, the non-compete ban must also include independent contractors to ensure that women and workers of color are not doubly penalized.

Non-competes can also trap low-wage workers, in many cases women, in jobs where they have been subjected to sexual harassment.¹⁹ Due to stricter non-compete enforcement and the fear of violating these agreements, many workers who have been or continue to be victims of sexual harassment are afraid to report it or to leave their job. These workers are often unaware of the ways in which a non-compete agreement may be invalidated — such as being subjected to sexual harassment.²⁰ Non-competes can contribute to forcing these workers to remain in unsatisfactory and abusive work environments, even when they do not have to, due to fear of probable repercussions, including the inability to find another job without violating their non-compete agreement.

Because non-competes disproportionately impact women and people of color, the FTC rule should be finalized as written to reduce the impact of race and gender discrimination in the workforce. Limiting the enforceability of non-competes would not only raise earnings on average, but also help close racial and gender wage gaps and increase reporting of sexual harassment in the workplace.

3. The FTC’s proposed rule should be finalized as written to reduce the proliferation of non-competes and raise wages.

The proposed rule will ensure that non-compete agreements will no longer limit workers’ freedom to raise their pay, obtain better working conditions, and/or achieve upward mobility in their careers by changing jobs.

¹⁷ *Independent Contractor Misclassification Imposes Huge Costs on Workers and Federal and State Treasuries*, National Employment Law Project 2 (Oct. 2020), <https://s27147.pcdn.co/wp-content/uploads/Independent-Contractor-Misclassification-Imposes-Huge-Costs-Workers-Federal-State-Treasuries-Update-October-2020.pdf>.

¹⁸ Charlotte S. Alexander, *Misclassification and Antidiscrimination: An Empirical Analysis*, 101 Minn. L. Rev. 907, 924 (2017) (finding that “seven of the eight high misclassification occupations were held disproportionately by women and/or workers of color”).

¹⁹ Raquel Flynn, *Non-Compete Agreement Got You Stuck in Sexual Harassment? #MeToo: An Analysis of the Correlation Between Non-Compete Agreements and Sexual Harassment* (2019), <https://scholarworks.law.ubalt.edu/cgi/viewcontent.cgi?article=2063&context=ublr>.

²⁰ *Id.* at 97.

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We urge the FTC to finalize the rule as it is currently written, including independent contractors, and eliminate the usage of non-competes except in the specific and very narrow exceptions listed.

Sincerely,

A handwritten signature in black ink, appearing to read "Jesselyn McCurdy". The signature is written in a cursive style with a long, sweeping underline.

Jesselyn McCurdy
Executive Vice President for Government Affairs