

[Due Date April 19, 2023]

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Washington, DC 20580

Comments on: **Non-compete Clause Rulemaking, Matter No. P201200 (BIN not assigned)**

Submitted at: <https://www.regulations.gov/document/FTC-2023-0007-0001>

Dear Ms. Lane:

On behalf of [insert name or organization], I submit these comments in support of the Federal Trade Commission's ("FTC") proposed rulemaking to ban employers from imposing non-compete agreements on virtually all workers. The FTC's proposed rule is squarely within its legal authority to promulgate and it will help all workers, contributing to higher wages, and greater opportunities for workers to rise in their fields by switching jobs. Equally important, it will also uplift workers of color and women who have been adversely affected by the proliferation of non-compete clauses.

[Explain organization, where located, and whether you represent or are in contact with and know of job challenges of workers or constituents, for example, non-competes have been found in underpaid and middle wage industries such as sandwich makers, IT professionals, healthcare professionals, cleaners, etc. Make the case for why this matters to you and your members/constituencies.]

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

Non-compete agreements prevent workers from working for a competitor company during or after their current employment. These so-called "agreements," which are often, presented in a "take it or leave it" fashion, which forces workers to sign the non-compete or reject the job altogether, typically restrict workers through time, industry, and/or geography. A time restriction prevents someone from working for a competitor for a defined period of time after leaving a position; a geographic restriction may restrict someone from accepting work in entire regions of the United States; and an industry restriction can prevent a worker from working for a particular type of company. Sometimes a non-compete also prevents a worker from starting their own competitor company.

As the FTC estimates, about 30 million workers, 18 percent of all workers, cannot search for new work and expand their career opportunities because of non-compete agreements. Research has shown that less than a mere 10 percent of workers negotiate these clauses and 93 percent of them read and sign them anyway. In addition, 30 to 40 percent of workers are asked to sign non-competes after they have already accepted the position. And up to 40 percent of workers have signed a non-compete at some time during their career, demonstrating how widespread the practice is.

As noted in the NPRM, non-competes often prevent workers from taking jobs in their field of expertise. This forces too many workers take and remain in a job in which they are less productive or a job outside of their field of expertise, leading to a job market that materially reduces wages for all workers. This is

because non-competes have been shown to depress wages by reducing competition.<sup>1</sup> This is what economists refer to as the problem of *monopsony*, where employers have greater market power and are able to continue to offer lower wages due to lack of competition.<sup>2</sup>

The proposed rule will almost certainly raise wages. A 2021 study of the impact of Oregon’s ban on non-competes found that hourly wages increased by 2 to 3 percent on average.<sup>3</sup> Other economic studies have shown similar benefits to workers resulted from the banning or limiting of non-compete clauses. These studies support the FTC’s assessment that a ban on non-compete agreements will raise total earnings by \$250 billion per year for workers in the United States.

[Insert any specific stories you or your members or clients have encountered with workers being faced with abusive non-compete contracts and unable to move on after having been employed.]

## 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 non-competes on freed African Americans.<sup>4</sup> Today, non-competes remain a racial and gender justice issue because they exacerbate racial and gender wage gaps.<sup>5</sup>

Researchers have posited that non-competes can have a more detrimental impact on women and people of color because they decrease entrepreneurship; produce fewer wage gains; and provide firms more power to discriminate.<sup>6</sup> Moreover, women in states with stricter non-compete enforcement are less likely than men to leave their jobs or start rival companies if they are subject to a non-compete.<sup>7</sup> Further, if a woman were to abandon a startup and go back and look for employment, they suffer larger wage penalties than men do because of the manner in which women are more harshly penalized for failure than men are.<sup>8</sup> Women and workers of color also are less likely to negotiate than their white male

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<sup>1</sup> 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.

<sup>2</sup> *Id.*; Greg Robb, *Wage growth is soft due to declining worker bargaining power, former Obama economist says*, MARKETWATCH, August 24, 2018.

<sup>3</sup> 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>

<sup>4</sup> 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).

<sup>5</sup> 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>.

<sup>6</sup> 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>.

<sup>7</sup> 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](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3173831).

<sup>8</sup> 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>.

counterparts, making these agreements more implicitly binding for them.<sup>9</sup> Finally, the earnings of women and workers of color are reduced by twice as much as white male workers when there is stricter non-compete enforcement.<sup>10</sup>

Moreover, it is critical to extend the ban on non-competes to independent contractors, given the disproportionate impact of independent contractor misclassification on women and workers of color. When businesses mislabel their employees as independent contractors, they rob their workers of bedrock protections, like the right to earning minimum wage and overtime, and transfer the costs of running the business to their employees. These sham arrangements often occur in underpaid, labor intensive industries such as delivery services, janitorial services, and domestic and home care work<sup>11</sup> where women and people of color, including Black, Latinx, and Asian workers, are overrepresented.<sup>12</sup> Thus, the non-compete ban must also include independent contractors to ensure that women and workers of color are not doubly penalized.

Because non-competes disproportionately impact women and people of color, the FTC rule should be finalized as written to help contribute to reducing the impact of racism and gender discrimination in the workforce.

[Insert any specific stories you or your members or clients have encountered with workers regarding the impact of the gender wage gap or racial wage gap.]

### **3. The FTC's Proposed Rule should be finalized as written to reduce the proliferation of non-competes and raise wages.**

[Insert name or organization] supports the Proposed Rule because it will ensure that non-compete agreements will no longer limit workers' freedom to change jobs to raise their pay, obtain better working conditions, and/or achieve upward mobility in their careers. In a country still in the midst of the economic recovery from COVID-19, this Proposed Rule can be part of the just recovery that workers deserve and need.

For these reasons, 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,

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<sup>9</sup> *Id.* at 11.

<sup>10</sup> 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>.

<sup>11</sup> *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>.

<sup>12</sup> 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").

[Insert name or organization]