

April 19, 2023

The Honorable Lina M. Khan
Chair
Federal Trade Commission
600 Pennsylvania Avenue, NW
Washington, D.C. 20580

Re: Notice of Proposed Rulemaking, Federal Trade Commission; Non-Compete Clause Rule; 88 Fed. Reg. 3482 (RIN: 3084-AB74) (January 19, 2023)

Dear Chair Khan:

We are pleased to submit these comments on the Notice of Proposed Rulemaking on Non-Compete Clauses, Matter No. P201200, published on January 19, 2023. (the “Non-Compete Rule”).¹

The Washington Center for Equitable Growth is a nonprofit research and grantmaking organization dedicated to advancing evidence-backed ideas and policies that promote strong, stable, and broad-based economic growth. Our fundamental purpose is to determine the channels through which rising economic inequality affects economic growth and stability in the United States. We have funded research and published reports analyzing non-compete agreements in the United States, as well as the broader structural and policy contexts shaping their impact on workers, labor and innovation markets, and equitable, broad-based economic growth. We appreciate the Federal Trade Commission’s work in this area and the opportunity to comment on this important issue.

Through this comment, we will discuss the following points on the impacts of non-compete clauses on workers and markets, in response to the FTC’s questions:

- Non-compete clauses limit labor market competition. Absent some offsetting benefit to labor market competition, non-compete clauses are plainly anticompetitive.
- If non-compete clauses had offsetting benefits to workers and labor market competition, then we would expect to see that reflected in workers’ wages. But the weight of the empirical evidence demonstrates that, in most cases, non-compete clauses are associated with *lower* wages and worse conditions for workers.
- Non-compete clauses are often implemented in deceptive or coercive ways. Even when not initially deceptive or coercive, once a non-compete clause is in place, employers can degrade working conditions or depress wages without the threat of competition from other employers or concern that workers will quit.
- Benefits *to employers* from non-compete clauses cannot offset harms to workers from non-compete clauses. Those engaged in anticompetitive conduct always benefit from that conduct, but those benefits are not cognizable under antitrust law. Rather, antitrust law looks to the

¹ Non-Compete Clause Rule, 88 Fed. Reg. 3482 (Jan. 19, 2023) (to be codified at 16 C.F.R. pt. 910).

impact of the firm’s conduct on competition, which is generally measured by the effect on that conduct on the firm’s trading partners.

- Non-compete clauses can also limit competition in product markets by locking up labor supply and making it costly or impossible for new firms to enter and compete. These exclusionary effects from non-compete clauses harm both workers and downstream customers. Workers with bargaining power may be compensated from the profits to the firm from their downstream market power for forgoing labor market competition.
- Non-compete clauses have few legitimate justifications. Only benefits to competition, not benefits to the employer, are legitimate. Only benefits that would not occur without the non-compete, not those that would occur regardless, are legitimate.
- Even if there are some circumstances where non-compete clauses are not anticompetitive, there are significant benefits to a clear, bright-line rule. Such rules provide unambiguous guidance to employers and employees alike, and they avoid uncertainty about what conduct is and is not allowed. Minimizing information and administrative costs also is necessary for effective regulation in this area.

Non-compete Clauses Have Long Been Recognized as a Competition Issue, and Recent Rethinking of Labor Market Competition Heightens the Concern

It is beyond dispute that non-compete clauses limit competition, at least with respect to competition for a particular worker’s labor. Accordingly, non-compete clauses have long been viewed as a competition problem and are one of the original “restraints of trade” under the common law.² English common law in the early 1600s made contracts in restraint of trade illegal. “A contract was said to be ‘in restraint of trade’ if it barred a party to the contract from practicing a specified trade.”³ This law was carried over to America.⁴

Such restraints were barred in the United States, even when entered into voluntarily, on competition and other grounds, until the early 20th century. As explained by the Supreme Court of California in 1868, the law followed from “the theory that the public welfare demands that private citizens should not be allowed, even by their own voluntary contracts, to restrain themselves unreasonably from the prosecution of trades, callings, or profession.”⁵ The court in *Alger v. Thacher*⁶ listed among the reasons for refusing to enforce a non-compete that “they discourage industry and enterprise, and diminish the products of ingenuity and skill,” that they “prevent competition and enhance prices,” and that they “expose the public to all the evils of monopoly.”⁷

² ERIC A. POSNER, *HOW ANTITRUST FAILED WORKERS* 99 (Oxford University Press 2021) (“[T]he common law has always regarded non-compete clauses as restraints of trade, and hence presumptively unenforceable.”).

³ GREGORY J. WERDEN, *THE FOUNDATIONS OF ANTITRUST* 208 (Carolina Academic Press 2020).

⁴ *Id.*

⁵ WERDEN, *supra* n.3 at 208 (citing *Wright v. Ryder*, 36 Cal. 342, 357 (1868)).

⁶ 36 Mass. 51 (1837).

⁷ *Id.* at 209.

While the American and English common law of contracts has become more permissive toward non-compete agreements, competition law has retained its skepticism toward non-compete agreements that fall outside of the narrow set of circumstances allowed in traditional common law. Justice Taft in *United States v. Addyston Pipe & Steel Co.*, two years before passage of the Sherman Act of 1890, held that non-compete clauses were only allowed in narrow circumstances at common law, and thus should only be upheld where “ancillary to the main purpose of a lawful contract” and “necessary to protect the covenantee in the enjoyment of the legitimate fruits of the contract.”⁸

But even competition law’s historical willingness to regard some non-compete clauses as competitively neutral now seems to have been misplaced. Competition scholars and policymakers have, until recently, labored under the misimpression that labor markets are generally competitive.⁹ As such, the competitive harms of non-compete agreements were not fully appreciated. Scholarship and data that has been developed over the past decade supports an emerging consensus that labor markets are generally monopsonistic.¹⁰ The monopsonistic nature of most labor markets heightens competitive concerns surrounding employee non-compete agreements.

Where markets are already monopsonistic, as most labor markets are,¹¹ the use of non-compete clauses tends to reinforce and exacerbate the monopsonistic nature of those markets. Labor market concentration is not the only source of monopsony power; in labor markets, search costs and differentiation contribute to significant monopsony power even in relatively unconcentrated markets.¹² The need for matching exacerbates the differentiation.¹³ The widespread use of non-compete clauses can act as a barrier to new entry, reinforcing the monopsony power held by incumbents.¹⁴ This exclusionary effect is the same whether the non-compete clauses are imposed by a

⁸ *Id.* at 213 (quoting *United States v. Addyston Pipe & Steel Co.*, 85 F.271, 282 (6th Cir. 1898)).

⁹ POSNER, *supra* n.2 at 24.

¹⁰ José Azar, Ioana Marinescu, Marshall Steinbaum, and Bledi Taska, *Concentration in U.S. Labor Markets: Evidence from Online Vacancy Data*, 66 *LABOUR ECONOMICS* 101886 (2020) (finding the average HHI for each U.S. commuting zone and 6-digit SOC occupation is 4,378, that 60% of labor markets are highly concentrated, and that labor market concentration is negatively correlated with wages); Ioana Marinescu, *Boosting Wages When U.S. Labor Markets Are Not Competitive*, Factsheet, Washington Center for Equitable Growth (Jan. 14, 2021) (same); *see also* Fabio Mendez and Facundo Sepulveda, *Monopsony Power in Occupational Labor Markets*, 40 *J. OF LABOR RESEARCH* 387-411 (2019) (using data from the 1979 National Longitudinal Survey of Youth and finding that most occupational labor markets during the period were characterized by substantial amounts of monopsonistic, wage-setting power). Studies in healthcare markets have found evidence of monopsonistic conduct across large swaths of those markets. *See* Douglas O. Staiger, Joanne Spetz, and Ciaran S. Phibbs, *Is There Monopsony in the Labor Market? Evidence from a Natural Experiment*, 28 *J. OF LABOR ECON.* no.2 (April 2010) (hospitals have market power in the nurse labor market and monopsony power in setting wages). Other studies have found most manufacturing plants operate in monopsonistic environments. Chen Yeh, Claudia Macaluo, and Brad Hershbein, *Monopsony in the US Labor Market*, 112 *AM. ECON. REV.* no.7 (July 2022).

¹¹ *See id.*

¹² POSNER, *supra* n.2. 14-19.

¹³ *Id.* at 18-19.

¹⁴ POSNER, *supra* n.2 at 106.

single dominant company or by multiple companies that collectively control a significant share of the labor market.

The competitive conditions in labor markets are directly relevant to the competitive impact of non-compete agreements. In a competitive labor market, employees would not sign non-compete agreements unless those agreements benefited them.¹⁵ Agreeing to a non-compete agreement limits workers' future job choices, so one would expect workers to agree only if they were compensated for that limitation either directly by increased immediate compensation or indirectly by some sort of training that would increase their future marketability and future earning potential. Accordingly, in competitive labor markets, only non-compete clauses with sufficient benefits to offset the harm of the restraint on workers will be imposed. In contrast, monopsonized labor markets enable employers to impose non-compete clauses even if the benefits do not offset the harms to competition in the labor market.¹⁶ Evidence suggests employers are, in fact, more likely to forgo the ability to enforce a non-compete agreement than to pay for the ability to enforce one.¹⁷

Moreover, unlike direct wage reductions, monopsony harms inflicted via non-compete agreements are unlikely to be unwound by competition.¹⁸ When employers in a monopsonistic market reduce wages directly, existing employers have an incentive to raise their wages to attract high-quality workers away from those paying subcompetitive wages. New employers also have an incentive to enter and attract those same workers with higher pay. In contrast, where monopsonistic employers use non-compete clauses to reduce wages, they not only directly harm workers but also undercut the ability and incentive of other employers to try to recruit the best workers by offering better pay or conditions. How? By making it legally impossible for other employers to hire those workers at any pay or conditions.¹⁹

¹⁵ *Id.*; see also David Balan, "Labor Practices can be an Antitrust Problem even when Labor Markets are Competitive" Competition Policy International, June 12, 2020, available at <https://www.competitionpolicyinternational.com/labor-practices-can-be-an-antitrust-problem-even-when-labor-markets-are-competitive/>.

¹⁶ POSNER, *supra* n.2 at 106; see also David Balan, "Labor Non-Compete Agreements: Tool for Economic Efficiency, or Means to Extract Value from Workers?" Working Paper. Washington Center for Equitable Growth (2021), available at <https://equitablegrowth.org/working-papers/labor-non-compete-agreements-tool-for-economic-efficiency-or-means-to-extract-value-from-workers/>.

¹⁷ Takuya Hiraiwa, Michael Lipsitz, & Evan Starr, *Do Firms Value Court Enforceability of Noncompete Agreements? A Revealed Preference Approach* (Feb. 20, 2023), available at <http://dx.doi.org/10.2139/ssrn.4364674> (finding no evidence that employers gave small raises to workers just below the enforceability threshold upon imposition of a dollar threshold for enforceability of non-compete clauses by Washington state, even in industries where efficiency justification for non-compete clauses are most plausible).

¹⁸ *Id.*

¹⁹ Peter Norlander, "New Evidence on Employee Noncompete, No Poach, and No Hire Agreements in the Franchise sector." Working Paper. Washington Center for Equitable Growth (2023), available at <https://equitablegrowth.org/working-papers/new-evidence-on-employee-noncompete-no-poach-and-no-hire-agreements-in-the-franchise-sector/>.

Other characteristics of non-compete clauses also make competitive forces ineffective at unwinding them. With wages, employers can easily advertise to workers that they are offering higher pay, and workers can easily make comparisons between the wages offered by different employers. Not so with non-compete clauses, of which many workers are unaware and which, in any event, are hard to compare and to value precisely.²⁰ In addition, employers have disincentives to recruit on the basis that they do not impose non-compete clauses, because of adverse selection effects; the workers most likely to be attracted by the absence of a non-compete are those most likely to quit.²¹

In sum, employers can exploit the monopsonistic nature of many labor markets to impose non-compete clauses that harm workers, and, unlike direct wage suppression, wage suppression via non-compete clauses does not incentivize countervailing competition. Accordingly, recent research has determined that in a monopsonistic labor contract setting: “[i]mposing a complete ban on non-compete clauses would be close to implementing the social optimum.”²²

Non-compete Clauses Are Often Imposed in a Deceptive or Coercive Manner

Many non-compete clauses are imposed on workers through coercion rather than through effective bargaining or competitive choice. Coercion has long been recognized as an unfair method of competition.²³ From an economic perspective, contract terms that are imposed through coercion are not entitled to the presumption typically applied in contract law that they are mutually beneficial and, therefore, generate economic surplus.²⁴ Where contract terms in employment agreements are imposed through coercion, the employer does not need to pay a price to the employee that reflects the value of what the employee is giving up by agreeing to the term, and so there is a real risk that what the employer gains is actually worth less than what the employees is giving up, and that value will be lost.

Non-compete clauses are imposed by coercion, rather than bargaining or competition, in a number of different circumstances.²⁵ Most obviously, when non-compete clauses are not disclosed to workers at all or not disclosed until after the parties have agreed on the other terms of employment, there is no chance to bargain over the non-compete agreement or compare the offer with the non-compete

²⁰ Balan, *supra* n.16.

²¹ *Id.*

²² Liyan Shi, *Optimal Regulation of Noncompete Contracts*, 91.2 *ECONOMETRICA* 425-463 (2023), available at <https://doi.org/10.3982/ECTA18128>.

²³ *E.I. Du Pont de Nemours & Co. v. FTC*, 729 F.2d 128, 137 n.7 (2d Cir. 1984) (citing the use of economic power to “coerce” compliance as an example of conduct successfully attacked under § 5); *see also cf. id.* at 140 (“[I]n the absence of proof of a violation of the antitrust laws or evidence of collusive, coercive, predatory, or exclusionary conduct, business practices are not ‘unfair’ in violation of § 5 unless those practices either have an anticompetitive purpose or cannot be supported by an independent legitimate reason.”)

²⁴ Balan, *supra* n.16.

²⁵ *Id.*

clause against competing offers.²⁶ It is generally costly for a worker to walk away from a job match once an offer has been made—the worker may have quit another job already or declined competing offers, and job searches are costly and time consuming.²⁷ In one study that surveyed technical professionals,²⁸ for example, it was found that employers strategically present non-compete agreements to workers when they have little bargaining power, such as on their first day of a new job, and workers who do leave their employers must take “career detours” to avoid running afoul of these agreements.

Most Non-compete Clauses Harm Workers

The weight of the empirical evidence, discussed below, suggests that non-compete agreements harm workers. Non-compete clauses harm workers by reducing mobility and, consequently, wages.²⁹ That we observe reduced job mobility and wages in association with non-compete agreements has significant competition implications. As discussed above, in a competitive market, one would expect workers to agree to a restraint that limits their future opportunities only if they were compensated for that limitation, either in the form of immediately higher wages or in the form of valuable skills and knowledge that could be used to obtain higher wages in the future. That we observe lower wages tied to non-compete clauses suggests that non-compete clauses are not making labor markets more competitive but are, instead, reinforcing monopsony in labor markets.³⁰ There are three specific ways in which most non-compete clauses harm workers.

Non-compete clauses reduce worker mobility. Non-compete agreements, by design, reduce competition in the labor market by reducing worker mobility. Workers who are bound by non-compete agreements have longer tenure³¹ within firms compared to those who are not subject to non-compete agreements. Mobility between jobs is one of the primary ways that workers achieve wage gains,³² find the jobs where they are most productive,³³ and take a leap to starting their own businesses. By

²⁶ Matt Marx and Lee Fleming, Non-compete Agreements: Barriers to Entry ... and Exit?, 12 *Innovation Policy and the Economy* 39-64 (2012), available at <https://www.journals.uchicago.edu/doi/full/10.1086/663155>.

²⁷ Evan Penniman Starr, J.J. Prescott, and Norman David Bishara, Noncompete Agreements in the U.S. Labor Force, 64 *Journal of Law and Economics* 53–84 (2021), available at <https://doi.org/10.1086/712206>.

²⁸ Matt Marx, The Firm Strikes Back: Non-Compete Agreements and the Mobility of Technical Professionals, 76(5) *AM. SOCIOLOGICAL REV.* (2011), <https://doi.org/10.1177/0003122411414822>.

²⁹ Matthew S. Johnson, Kurt Lavetti, and Michael Lipsitz, The Labor Market Effects of Legal Restrictions on Worker Mobility, Working Paper, available at https://papers.ssrn.com/sol3/Papers.cfm?abstract_id=3455381.

³⁰ Natarajan Balasubramanian, Jin Woo Chang, Mariko Sakakibara, Jagadeesh Sivadasan, and Evan Starr, Locked In? The Enforceability of Covenants Not to Compete and the Careers of High-Tech Workers, 58 *Journal of Human Resources* S349, S352-S353 (May 2020), available at <https://doi.org/10.3368/jhr.monopsony.1218-9931R1>.

³¹ Evan Penniman Starr, J.J. Prescott, and Norman David Bishara, *Non-compete clauses and Employee Mobility*, *Academy of Management Proceedings* (Aug. 1, 2019), available at <https://journals.aom.org/doi/abs/10.5465/AMBPP.2019.31>.

³² Jason Faberman and Alejandra Justiniano, Federal Reserve Bank of Chicago, Chicago Fed Letter, No. 337 (2015), available at <https://www.chicagofed.org/publications/chicago-fed-letter/2015/337>

³³ Toshihiko Mukoyama, *The Cyclicity of Job-to-Job Transitions and Its Implications for Aggregate Productivity*, 39 *Journal of Economic Dynamics and Control* 1-17 (Feb. 2014), available at <https://doi.org/10.1016/j.jedc.2013.12.004>.

compelling workers to signing non-compete agreements when they enter an employment relationship, employers shape future career trajectories. One study,³⁴ for example, found that when Michigan reversed its ban on the enforceability of non-compete agreements in 1985 the job mobility of patent-holders declined 8.1 percent and especially high-skilled inventors saw even greater declines in job mobility of 15.4 percent. In a more recent study,³⁵ Matthew Johnson of Duke University, Kurt Lavetti of The Ohio State University, and Michael Lipsitz of the Federal Trade Commission find that workers in states where non-compete clauses are not enforceable have higher job mobility than workers in states where they are enforceable.

Non-compete clauses tend to reduce worker wages, and to do so unequally. In theory, if non-compete clauses had benefits sufficient to offset the drag they impose on labor mobility, then one would expect to see that reflected in compensation from the employer to the employee, either in the form of immediately higher wages or in the form of valuable skills and knowledge that could be used to obtain higher wages in the future. For the vast majority of non-compete clauses, the evidence suggests non-compete clauses are associated with lower, not higher compensation. This implies that whatever benefits non-compete clauses may have for labor market competition (more on that below), they are outweighed by the harms to labor market competition imposed by the restraint.

While not uniform, the balance of the empirical evidence on non-compete clauses shows they tend to depress earnings for workers, and thus reinforce broader trends of rising income inequality. Analyzing the relative enforceability of non-compete clauses across states, Johnson, Lavetti and Lipsitz found that moving from a low-enforceability to a high-enforceability state resulted in declines of workers' hourly wages in the range of 3 percent to 4 percent.³⁶ This is further reinforced by a study by Lipsitz and Starr that found Oregon's ban on non-compete clauses³⁷ for hourly workers in 2008 resulted in higher wage growth for low-wage workers.

Estimates of the effects of non-compete agreements on workers also find that structural barriers in the labor market, including gendered and racial disparities, intersect with limitations to worker mobility and reductions in labor market competitiveness. Johnson, Lavetti and Lipsitz find that high enforceability of non-compete clauses reinforce gender and racial wage gaps. They estimate that moving from a high-enforceability regime to a low-enforceability regime across states would lead to reductions in the wage gap between White men and other demographic groups in the range of 3.6 percent for non-Black/non-White men, 4.6 percent for Black women, 5.6 percent for White women, 8.7 percent for Black men, and 9.1 percent for non-Black/non-White women. And in Lipsitz and Starr's

³⁴ Matt Marx, Deborah Strumsky, and Lee Fleming, *Mobility, Skills, and the Michigan Non-Compete Experiment*, 55 *Management Science* 6:875-889 (Jun. 2009), available at <https://www.ijstor.org/stable/40539267>.

³⁵ Johnson, et al., *supra* n.29.

³⁶ *Id.*

³⁷ Michael Lipsitz and Evan Starr, *Low-Wage Workers and the Enforceability of Non-Compete Agreements*, *Management Science* (Oct. 19, 2020), available at <https://ssrn.com/abstract=3452240>.

study of Oregon, they found women workers had even better earnings outcomes following the ban on enforceability for low-wage workers.

Studies that show non-compete clauses associated with higher wages require context. For some workers, it does appear that non-compete agreements are associated with higher wages. But, notably, this association appears to be driven more by the type of employee that is likely to be subject to a non-compete agreement, and not as a result of the presence of one.³⁸ In sum, it appears this positive correlation is because high-wage workers are more likely to be subject to non-compete clauses in the first place, rather than the idea that non-compete clauses cause higher wages. Indeed, recent research further supports an explanation of selection bias, by observing that non-compete clauses are often imposed alongside other employment restrictions that limit firm resource outflows—nondisclosure, nonsolicitation, and nonrecruitment agreements. By comparing workers subject to all four restrictions to those subject only to NDAs, the authors find lower wages associated with the workers subject to the broader suite of restrictions including the non-compete agreement.³⁹ This suggests that, once the selection bias is taken into account, we again see negative wage effects associated with non-compete clauses.⁴⁰

Even where the evidence does suggest there might be some benefit to workers from signing non-compete clauses specifically, there remains reason to be skeptical that non-compete clauses are procompetitive. The workers that appear to benefit from signing non-compete clauses are generally highly educated and highly compensated overall. Compensation packages for these workers tend to be individually negotiated with sophisticated parties on each side of the bargaining table. As a result, the workers can bargain for a share of the benefits from the non-compete clauses. But the evidence suggests that those benefits often come at the expense of third parties not at the bargaining table, such as excluded competitors, downstream customers, and other workers.⁴¹

Harms to Labor Markets and to Workers from Non-Compete Clauses Cannot be Offset by Benefits to Employers or Other Markets

If non-compete clauses have anticompetitive effects on workers, which in the vast majority of cases they apparently do, then those harms cannot be mitigated by reference to benefits to employers, downstream consumers, or participants in any other market. Such cross-party or cross-market

³⁸ Starr, et al, *supra* n.27.

³⁹ Natarajan Balasubramanian, Evan Starr, & Shotaro Yamaguchi, *Employment Restrictions on Resource Transferability and Value Appropriation from Employees* (Jan. 31, 2023), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3814403.

⁴⁰ *Id.*

⁴¹ Shi, *supra* n.22 (“[employers] overextract rent by setting an excessively long duration and blocking too many outside opportunities”); see also David J. Balan, *Labor Noncompete Agreements: Tool for Economic Efficiency or Means to Extract Value from Workers*, 66(4) THE ANTITRUST BULLETIN 593, 600 (2021) (“But it is important to note that even if non-compete clauses are mutually beneficial, they may not be economically efficient if they negatively affect third parties who did not agree.”).

balancing of harms and benefits has no place in antitrust analysis, and benefits to counterparties or participants at other levels of the supply chain or in other markets are not cognizable.⁴² The competitive harms to workers from non-compete clauses can only be justified if those same workers also enjoy benefits that more than offset those harms.⁴³

Employers clearly benefit from non-compete clauses, otherwise they would not continue to insist on including them in employment contracts. But that does not make those benefits relevant to evaluating whether non-compete clauses are a restraint on competition or an unfair method of competition. Just as we do not consider the benefits to cartelists or monopolists when evaluating whether their conduct harms consumers and competition in product markets, so too we should not consider the benefits to employers when their contracting practices harm competition and compensation in labor markets.⁴⁴ The relevant competition inquiry is not whether the benefits to employers are greater than the competitive harms to the workers, but rather whether the balance of harms and benefits to the workers suggest the non-compete clauses cause net competitive harm in the labor market.⁴⁵

That labor harms should only be offset by labor benefits is also not to say that other harms should be ignored. In addition to reducing worker wages through diminished competition, non-compete agreements can also act to raise rivals' costs and discourage or exclude new entrants to markets by locking up the available. Where non-compete clauses have such exclusionary effect, they harm workers but also can harm the excluded competitor and downstream consumers.

These harms to competitors and consumers are competitive harms that should be taken into account. But again, they should be measured against the relative benefits to the competitors and consumers, if any, from the non-compete agreement.⁴⁶ This tracks how courts evaluate exclusionary harms from other types of exclusive buying arrangements with exclusionary effect.⁴⁷

Non-compete Causes Can Also Cause Competitive Harms in Product Markets

As discussed immediately above, the potential harms from non-compete clauses are not limited to labor markets. Non-compete clauses also can exclude competitors in downstream product markets.⁴⁸ Where specialized workers are a critical input to a product market, and a substantial portion of those

⁴² Laura Alexander and Steven C. Salop, *Antitrust Worker Protections: The Rule of Reason Does Not Allow Counting of Out-of-Market Benefits*, 90.2 U. CHI. L. REV. 273 (2023); Erika M. Douglas, *Reconsidering the 'Rule' against Cross-Market Justifications in Conduct Cases*, in *JUDGING BIG TECH* 67 (Laura Alexander ed. 2023).

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ Alexander & Salop, *supra* n.42 at 325 (noting that the Supreme Court in *Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co.*, 549 U.S. 312 (2007), found harms to upstream sellers sufficient for antitrust liability without requiring showing that it offset benefits to buyers or downstream consumers).

⁴⁸ Toby Stuart and Olay Sorenson, *Liquidity Events and Geographic Distribution of Entrepreneurial Activity*, 48 *Administrative Science Quarterly* 175 – 201 (2003), available at <https://doi.org/10.2307/3556656>.

workers are bound by non-compete clauses, the non-compete clauses can serve as a barrier or deterrent to exclude new entry.⁴⁹ This exclusionary effect harms workers by depriving them of a new buyer for their labor, but also harms consumers in the downstream market who are deprived of the additional competition, and attendant increased choice and decreased prices, that the new entrant would have made available to them in the product market.

Exclusionary effects from non-compete clauses are most likely where product markets are concentrated and rely on a specialized workforce. In such markets, non-compete clauses reinforce the existing concentration. A compelling example of such a dynamic is presented in healthcare provider markets, where doctors and nurses are often subjected to non-compete clauses.⁵⁰ Those non-compete clauses make it harder for a competing hospital to enter the market, because it must import doctors and nurses to staff the hospital.⁵¹ The barrier to entry formed by the non-compete clause makes the monopsonist's power more durable.

Where non-compete clauses create such barriers to entry, employees with bargaining power may be well-compensated for agreeing to a non-compete agreement. This is, essentially, a sharing of monopoly rents between the employer earning the rents and the employee whose complicity is necessary to make the strategy effective. While non-compete clauses in such circumstances may be mutually beneficial to the employers and employees that are parties to the non-compete clauses, those benefits come at the cost of harms to potential market entrants and, perhaps most significantly, downstream consumers who are subject to higher prices and fewer choices.⁵²

Non-compete Clauses Have Few Legitimate Justifications

The justifications provided for non-compete clauses are largely illegitimate. As discussed above, to justify a practice that imposes competition harms on a particular market or trading partner, one must point to countervailing benefits that the practice confers on *the same* market or trading partner. To the extent there are benefits from non-compete clauses, however, they mostly accrue to the employer, and not to competition, the employees, competitors, or downstream customers harmed by the restraint.

⁴⁹ *Id.*

⁵⁰ Shannon Pettypiece, *Biden's Push to Ban Noncompete Agreements Could Have Big Implications for Health Care*, NBC NEWS (Feb. 13, 2023, 1:49 PM), available at <https://www.nbcnews.com/politics/economics/biden-ban-non-compete-agreements-health-care-industry-rcna70099>.

⁵¹ POSNER, *supra* n.2 at 106; see also Erin C. Fuse Brown, *Comments of Health Law and Policy Researchers on Non-Compete Clause Rulemaking as Applied to Physicians (Matter No. P201200)*.

⁵² POSNER, *supra* n.2 at 91 (“[T]he common law has always regarded non-compete clauses as restraints of trade, and hence presumptively unenforceable.”).

The two most commonly alleged benefits associated with non-compete clauses are increased incentives for employers to provide training⁵³ to employees and increased incentives for employers to share sensitive information with employees to enable greater productivity.⁵⁴

For the vast majority of workers, these justifications are simply not relevant; they are not provided with training by their employers beyond what is required to perform their jobs and they do not have access to the type of sensitive, company-specific information that would be of value to competitors. Yet the evidence suggests that more than 30 million of them are still subjected to non-compete clauses,⁵⁵ including many in states where those non-compete clauses are already legally unenforceable.⁵⁶

More generally, in evaluating these claimed benefits, it is important to be clear on what types of benefits could conceivably qualify as cognizable justifications for restraints like non-compete agreements. First, benefits are only cognizable if they would not have occurred without the non-compete agreement.⁵⁷ This means that, for example, training necessary for workers to perform their jobs should not be counted as a benefit of the non-compete agreement, as it would have been provided anyway. Second, benefits are only cognizable if, as discussed above, they are benefits to competition in the market allegedly harmed by the restraint.⁵⁸ So, for example, the benefits to employers from non-compete clauses are not relevant, except to the extent they are shared with the workers who would otherwise be harmed by the restraint.

Training. Most training provided by employers would be provided in the absence of non-compete clauses. We know this both as a theoretical matter, as the vast majority of training is inseparable from performance of the job itself,⁵⁹ and as an empirical matter, as significant training occurs even where non-compete clauses are unenforceable. One analysis finds, for instance, that workers who have received some employer-provided training are only about 2 percentage points more likely to be bound by a non-compete agreement than workers who have received no employer-provided training.⁶⁰ Law

⁵³ Theoretical justifications for noncompete agreements propose that they may enhance efficiency by incentivizing firm investment in worker training that benefits both firms and workers. Balan, *supra* n.16.

⁵⁴ Tyler Cowen, “Noncompete Contracts can Help Both Workers and Firms” *Bloomberg*, January 10, 2023, available at <https://www.bloomberg.com/opinion/articles/2023-01-10/proposed-ftc-ban-on-noncompete-contracts-would-hurt-workers-too?sref=htOHjx5Y&leadSource=uverify%20wall>.

⁵⁵ Evan Starr, *The Use, Abuse, and Enforceability of Non-compete and No-Poach Agreements*, (Washington: Economic Innovation Group, 2019), available at <https://eig.org/wp-content/uploads/2019/02/Non-Competes-2.20.19.pdf>.

⁵⁶ *Id.*

⁵⁷ David Balan, *supra* n.16.

⁵⁸ Shi, *supra* n.22.

⁵⁹ David Balan, *supra* n.16.

⁶⁰ Donna Rothstein and Evan Starr, *Noncompete Agreements, Bargaining, and Wages: Evidence from the National Longitudinal Survey of Youth*, *Monthly Labor Review* (2022), available at https://www.bls.gov/opub/mlr/2022/article/noncompete-agreements-bargaining-and-wages-evidence-from-the-national-longitudinal-survey-of-youth-1997.htm#_edn25.

firms famously provide extensive training of new lawyers, for example, even though legal ethics codes generally ban non-compete clauses.⁶¹

Most importantly, even where non-compete clauses do create incentives for employers to provide additional training, they also guarantee that the employer, not the employee, will be the beneficiary of that training. Employees benefit from enhanced training when it *both* increases their productivity *and* they are able to capture the benefits of that increased productivity. Absent a non-compete clause, a more productive worker should either be able to demand higher wages from her current employer or change jobs to one that will compensate her for her new skills.⁶² But, where additional training is motivated by a non-compete agreement, it prevents the worker from capturing any of those gains.⁶³ These workers cannot take their skills to new employers and, as a consequence, their current employers have no incentive to increase their wages.

Evan Starr finds that workers in states with typical enforceability of non-compete agreements have a 14 percent higher incidence of receiving training, with a stronger relationship for firm-sponsored training.⁶⁴ But the simultaneous decrease in earnings growth demonstrates a delinking of worker productivity and worker earnings.⁶⁵ Thus, even where non-compete clauses increase training, that training does not benefit the workers; instead, non-compete clauses increase the extraction of value from the employee without benefiting employees overall.

For this reason, training has never been considered a cognizable competition justification for a non-compete agreement.⁶⁶

Information sharing. Employers often cite the need to protect trade secrets as a justification for non-compete agreements. Such protection, they argue, both encourages the creation of trade secrets in the first place and enables the sharing of those trade secrets with employees without worry that they misappropriate them to competitors upon departure. The extent to which either of these claims is true is very hard to measure, in part because so many other tools exist to protect inventions, ideas, and information from misappropriation.⁶⁷

⁶¹ Sharon Miki, “Training for Lawyers: A Guide to Selecting a Lawyer Training Program,” Clio, available <https://www.clio.com/blog/training-for-lawyers/>.

⁶² John McAdams, *Non-Compete Agreements: A Review of the Literature*, *Law & Society: Private Law - Labor & Employment Law eJournal* (2019) 1–24, available at <https://doi.org/10.2139/ssrn.3513639>.

⁶³ *Id.*

⁶⁴ Evan Starr, *Consider This: Training, Wages, and the Enforceability of Covenants Not to Compete*, 72.4 ILR REV. (2019).

⁶⁵ *Id.*

⁶⁶ Steve Carey, Sarah Hutchins, Tory Summey, “FTC’S Noncompete Ban Leaves Room to Prevent Trade Secret Theft” *Bloomberg* January 24, 2023, available at <https://news.bloomberglaw.com/bloomberg-law-analysis/ftcs-noncompete-ban-leaves-room-to-prevent-trade-secret-theft?context=article-related>.

⁶⁷ *See, e.g.*, Balasubramanian, *supra* n.39 (discussing overlapping nature of employer information protections).

Identifying to what extent non-compete clauses, over and above these other tools, add to incentives to invent and share information is challenging, but what evidence exists suggests that non-compete clauses have complex impacts on innovation. Non-compete clauses appear to alter both the character and the quantity of innovation by firms, although the direction of the impacts is unsettled, sensitive to measurement design, and likely heterogenous by industry. On the one hand, one study found non-compete clauses increase the incentives of firms to invest in research and development by protecting their investment in their employees, but that these investments do not seem to yield more valuable inventions, because the non-compete simultaneously undermines the employee's incentives to invent.⁶⁸ The end result being that non-compete clauses appear reduce value creation from R&D investments.⁶⁹ On the other hand, other studies have found a positive but weak correlation between enforceability of non-compete clauses and job creation and patenting activity.⁷⁰ Enforcement of non-compete clauses also appears to have negative impacts on entrepreneurship and employment growth. Investments of venture capital in states with weaker non-compete regimes is associated with stronger positive effects on the number of patents, the number of firm starts, and employment.⁷¹

Beyond whether non-compete clauses actually do add to the incentives of firms to create and share valuable secrets with their employees, there is also the question of whether any of this activity benefits the employees who are constrained by the non-compete clauses. As with training, at the same time that non-compete clauses *may* increase the incentives for firms to create and share information, they also decrease the value to individual employees from creativity and inventiveness by making it harder for those employees to realize gains from their inventions and inventiveness.⁷² As with training, to the extent non-compete clauses incentivize the creation and sharing of information, they simultaneously ensure that workers do not benefit from those gains.

Rulemaking Is an Appropriate Tool for Addressing Non-compete Clauses⁷³

Non-compete clauses present a competition problem particularly well-suited to resolution through rulemaking. Non-compete clauses are broadly used. Moreover, once established, non-compete clauses are unlikely to be unseated through market forces. Case-by-case litigation is both administratively infeasible and unable to reach some of the competitive harms caused by the widespread nature of non-compete clauses but not attributable to a particular defendant in isolation. Accordingly, a broad

⁶⁸ Zhaozhao He, *Motivating Inventors: Non-competes, Innovation Value and Efficiency* (May 15, 2021), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3846964.

⁶⁹ *Id.*

⁷⁰ Gerald A. Carlino, *Do Non-Compete Covenants Influence State Startup Activity? Evidence from the Michigan Experiment*, Fed. Res. Bank of Phila. Working Paper No. 21-26 (Aug. 6, 2021), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3900300.

⁷¹ Sampsa Samila and Olav Sorenson, *Noncompete Covenants: Incentives to Innovate or Impediments to Growth* (Jan. 20, 2011), available at <https://pubsonline.informs.org/doi/abs/10.1287/mnsc.1100.1280>.

⁷² Balan, *supra* n.16.

⁷³ Some have questioned whether the FTC has the legal authority to engage in Unfair Methods of Competition rulemaking. This comment expresses no opinion on that issue and assumes that the FTC has such authority.

and clear rule is the most effective and efficient way to address the competition problems posed by non-compete clauses.

While there is no official estimate of the prevalence of non-compete agreements and who is covered by them from U.S. government statistical agencies, economists and other social science researchers have estimated their scale across the labor market, characteristics of workers subject to non-compete agreements, and how they shape labor market outcomes. While non-compete agreements are more common for jobs requiring higher levels of education and with higher pay levels, they are also common in low-wage jobs. Evan Starr, J.J. Prescott and Norman D. Bishara fielded a novel survey of workers⁷⁴ in the private sector, in public healthcare systems, or who are unemployed, first describing to survey respondents what a non-compete agreement is and then asking whether the worker is currently bounded or has been bound by one. They estimate that more than 38 percent of the U.S. labor force have agreed to a non-compete agreement in the past and almost one-fifth are currently working under one. These agreements typically are geographically defined and time-limited, such as applying for only 2 years, but 20 percent were found to be vague on terms.

And, importantly, while non-compete clauses are generally more frequent among those with higher levels of education and higher annual earnings, almost 35 percent of those without a bachelor's degree report ever having worked under one and 33 percent of workers earning less than \$40,000 per year also report ever having worked under a non-compete agreement. And 14 percent say they are currently subject to a non-compete clause.⁷⁵ In surveys, 29 percent of firms paying an average hourly wage of \$13 per hour report that *all* of their employees are subject to non-compete clauses. Likewise, among firms whose typical employee has a high school diploma but no college, 27 percent say they subject *all* of their employees to non-compete clauses.⁷⁶

Other research has likewise attempted to estimate the prevalence of non-compete agreements. In an innovative new study⁷⁷ by Peter Norlander of Loyola University in Chicago, analysis of franchise agreements between franchisee and franchisor from 2011 to 2022 reveals that 26 percent include language that impose non-compete agreements on the employees of franchisees. Norlander also finds that the incidence of non-compete agreements has grown over this time period, with non-compete clauses included in nearly half of all franchise agreements as of August 2022. In response to recent public and policymaker attention to overreach of non-compete agreements, including a settled lawsuit against the restaurant chain Jimmy John's⁷⁸ over non-compete clauses and the passage of prohibitions on their enforceability in some states,⁷⁹ so-called "naked" non-compete agreements with no

⁷⁴ Starr, *supra* n.38.

⁷⁵ Starr, et al., *supra* n.27.

⁷⁶ Alexander J.S. Colvin & Heidi Shierholz, *Noncompete Agreements: Ubiquitous, Harmful to Wages and to Competition, and Part of a Growing Trend of Employers Requiring Workers to Sign Away Their Rights*, Economic Policy Institute (Dec. 10, 2019), available at <https://files.epi.org/pdf/179414.pdf>.

⁷⁷ Norlander, *supra* n.19.

⁷⁸ Daniel Wiessner, *Jimmy John's Settles Illinois Lawsuit over Non-Compete Agreements*, Reuters (Dec. 7, 2016), available at <https://www.reuters.com/article/us-jimmyjohns-settlement/jimmy-johns-settles-illinois-lawsuit-over-non-compete-agreements-idUSKBN13W2JA>.

⁷⁹ Leah Shepherd, *More States Block Noncompete Agreements*, SHRM (Sept. 15, 2022), available at <https://www.shrm.org/resourcesandtools/legal-and-compliance/state-and-local-updates/pages/states-restrict-noncompete-agreements-colorado.aspx>.

qualifications to their coverage have declined since a peak in 2015 at the same time that incidences of so-called “dressed” non-competes have increased.⁸⁰

Once non-compete clauses are in place, they are very unlikely to be unseated by competitive forces, even in markets that are otherwise competitive. The incentives for any given company to use non-compete clauses increases as the use of non-compete clauses becomes widespread because employers know they will not be able to hire workers away from competitors, and thus are incentivized to use tools such as non-compete clauses to hold onto the workers they have.

Moreover, employers have little incentive to compete on the basis of their lack of a non-compete clause because of high information costs and the fact that such competition is likely to attract workers who are more likely to leave for a competitor.⁸¹ Where non-compete clauses are widespread, workers are also less likely to push back against any particular employer’s use of a non-compete agreement because they lack viable alternative options without a non-compete clauses. Without intervention, labor markets where non-compete clauses are well-established are likely to stay that way or become even more saturated with non-compete clauses.⁸²

Case-by-case adjudication is not an effective way to address the problem of no-ncompete agreements for most workers. Addressing each agreement through case-by-case enforcement is administratively infeasible. According to recent survey data, nearly a third of all U.S. employers currently apply non-compete agreements to all of their employees.⁸³ Almost a half currently apply non-compete clauses to some of their employees.⁸⁴ In contrast, cumulatively over the past 10 years, the Federal Trade Commission has challenged fewer than 500 mergers and other practices as anticompetitive.⁸⁵ Even including enforcement actions short of full-blown litigation, it is plainly impossible, absent a massive expansion of size and resources, for the federal antitrust agencies to challenge effectively on a case-by-case basis the use of non-compete agreements, and it would be efficient to do so. The resources of state attorneys general and private plaintiffs are even more limited.

Some of the competition harms arising from non-compete clauses are not attributable to any particular non-compete agreement or any particular employer’s non-compete practices, but rather to the widespread use of non-compete clauses within a given labor market or industry. Targeted

⁸⁰ Norlander, *supra* n.19.

⁸¹ Balan, *supra* n.20 at 602.

⁸² *Id.*

⁸³ Colvin, *supra* n.76.

⁸⁴ *Id.*

⁸⁵ See, Legal Library: Cases and Proceedings, Federal Trade Commission, available at https://www.ftc.gov/legal-library/browse/cases-proceedings?sort_by=field_date&items_per_page=20&field_mission%5B30%5D=30&search=&field_competition_topics=All&field_consumer_protection_topics=All&field_federal_court=All&field_industry=All&field_case_status=All&field_enforcement_type=All&search_matter_number=&search_civil_action_number=&start_date=2013-04-19&end_date=2023-04-18.

enforcement actions simply cannot reach these diffuse harms, even under Section 5 of the Federal Trade Commission Act, because the harm is not attributable to a particular defendant. In particular, the widespread use of non-compete clauses within a given labor market can reduce competition for labor in that market, even where the market is initially competitive and even where there is no concerted action.⁸⁶

Further, as discussed above, because of the incentives facing any given company in a labor market where non-compete clauses are widespread, companies in such markets will have incentives to implement non-compete clauses independently. This harm is nonetheless an “actual effect on competition” from the use of non-compete clauses that can be eliminated by a rule banning their use.⁸⁷

Under these circumstances, a broad, clear rule is defensible and beneficial. A clear rule avoids “doubt as to the types of otherwise legitimate conduct that are lawful and those that are not.” A clear rule creates “workable rules of law” rather than “uncertain guesswork.”⁸⁸ Such rules are easier to enforce and provide due process to those subject to them. A rule requiring a fact-specific inquiry to determine a violation in each case would also be ineffective to remedy the harm to competition. The evidence shows that even unenforceable or uncertain non-compete clauses have detrimental impacts on mobility, wages, and markets.⁸⁹

Conclusion

Non-compete clauses limit labor market competition, while doing little to promote competition and increase productivity. The weight of the empirical evidence demonstrates that, in most cases, non-compete clauses are associated with *lower* wages and worse conditions for workers. This empirical evidence suggests that the harms to competition in labor markets from non-compete clauses outweigh the benefits. While non-compete clauses are often imposed in a deceptive or coercive manner, the competitive harms from non-compete clauses are not limited to these situations. Moreover, even where non-compete clauses benefit workers in the form of higher wages, they often do so at the expense of harms to consumers or other third parties.

There are few, if any, legally cognizable justifications for non-compete agreements. While employers who impose them clearly benefit from non-compete clauses, those benefits are not legally cognizable to offset the harm to workers. Rather, antitrust law looks to the impact of the firm’s conduct on competition, which is measured by the effect of that conduct on the firm’s trading partners. While incentives for employers to provide certain types of training and information sharing may be increased

⁸⁶ See, e.g., POSNER, *supra* n.2 at 107.

⁸⁷ *Boise Cascade Corp. v. FTC*, 637 F.2d 573, 582 (9th Cir. 1980).

⁸⁸ Cf. *E.I. Du Pont de Nemours*, 729 F.2d at 140.

⁸⁹ See, e.g., J.J. Prescott & Evan Starr, *Subjective Beliefs about Contract Enforceability*, forthcoming in J. LEGAL STUDIES (July 19, 2022), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3873638.

by non-compete clauses, those benefits are overstated. Moreover, the very features of non-compete agreements that create those benefits also ensure that the workers subject to the restraint will not benefit from them.

Finally, even if there are some circumstances where non-compete clauses are not anticompetitive, there are significant benefits to a clear, bright-line rule. Such rules provide unambiguous guidance to employers and employees alike, and they avoid uncertainty about what conduct is and is not allowed. Minimizing information and administrative costs also is necessary for effective regulation in this area.

Thank you for the opportunity to comment on this important issue.

Sincerely,

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