



September 30, 2021

Via Federal eRulemaking Portal at www.regulations.gov

Federal Trade Commission
600 Pennsylvania Avenue, NW
Washington, DC 20580

Re: FTC-2021-0036 (Request for Public Comment Regarding Contract Terms That May Harm Fair Competition)

To Whom It May Concern:

The Economic Innovation Group (EIG) is a bipartisan economic research and advocacy organization dedicated to fostering a more dynamic and entrepreneurial American economy. We thank the Federal Trade Commission (FTC) for turning its attention to contract terms that may harm fair competition. We write to express our support for stronger FTC policy and enforcement with regard to covenants not to compete (otherwise known as “non-compete agreements” or “non-competes”). While congressional action is needed to broadly restrict the use of non-compete agreements at the federal level, the FTC can take important and immediate steps to limit the worst abuses of non-compete agreements, which inhibit worker mobility, reduce wage growth, and stifle innovation and entrepreneurship.

The Problem

The use of non-compete agreements has become prevalent throughout the economy—a common practice reaching employees across industries, skill levels, and wage bands. Today, an estimated 20 percent of all workers (approximately 30 million Americans) are covered by a non-compete agreement;¹ some surveys place the figure substantially higher.² The likelihood that a worker will be required to sign a non-compete agreement varies across industries: in the agricultural industry, the use of non-competes is estimated at 9 percent, whereas that figure surpasses 30

¹ Evan Starr, J.J. Prescott, and Norman Bishara, “Noncompete Agreements in the U.S. Labor Force,” *Journal of Law and Economics* 64 (1) (2021).

² Alexander Colvin and 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*, December 2019.

percent for the professional, scientific, and technical industry. The use of these agreements varies by occupation, too. Eleven percent of workers in groundskeeping and maintenance jobs are bound by non-compete agreements, compared to 26 percent of healthcare support workers.³

Workers at all income levels are impacted by non-competes. While it remains true that higher-income workers are more likely to be subject to a non-compete, with such contracts impacting an estimated 46 percent of workers earning over \$150,000 per year, millions of middle- and lower-income workers are bound by non-compete agreements as well. Twenty-one percent of workers making between \$40,000 and \$60,000 have signed a non-compete. Twelve percent of workers making less than \$20,000 have signed such contracts.⁴

In many cases, non-competes can also result in unfair and deceptive practices by employers. Consider that the majority of non-competes are signed as originally presented: just 10 percent of employees negotiate their non-compete. Moreover, around a third of employers who require their employees to sign such agreements only present the contract after a prospective employee has accepted the job offer. As such, non-competes are often entered into in profoundly skewed and unfair circumstances. Research also finds that the use of non-competes is common even among employers in states where such agreements are entirely unenforceable.⁵ In such cases, it is likely employers are relying on the *in terrorem* effect of the contract, whereby the worker with a non-compete will comply with the contract, despite the lack of legal consequence for breaking it, due to assumed enforceability. Such a practice is potentially deceptive as it takes advantage of an information asymmetry where an employer knowingly presents an employee with a document that appears to threaten legal action if the employee fails to comply with the terms, despite there being no real threat of legal consequences.

The use and enforcement of non-compete agreements have a significant negative impact on workers and the broader economy. As EIG highlighted in a recent piece⁶ on the impact of non-competes on worker mobility and economic dynamism:

- *Non-compete enforcement hurts worker wages:* The preponderance of the research finds that non-compete agreements exert negative effects on wages. A slew of important recent

³ Starr, Evan, “The Use, Abuse, and Enforceability of Non-Compete and No-Poach Agreements.” Economic Innovation Group, 2019.

⁴ Starr, Evan, J.J. Prescott, and Norman Bishara, “Noncompetes in the U.S. Labor Force.” U of Michigan Law & Econ Research Paper No. 24831, 2018.

⁵ Starr, Evan, J.J. Prescott, and Norman Bishara, “The Behavioral Effects of (Unenforceable) Contracts.” Journal of Law, Economics, and Organization, 2020.

⁶ O’Donnell, Jimmy, “[The Case for Non-compete Reform: How the Workforce Mobility Act Would Support Workers and Spur Entrepreneurship](#).” Economic Innovation Group, 2021.

studies confirms that reforms to curtail the use of non-competes raise wages for the covered workers *and* noncovered workers alike.⁷

- *Negative wage effects are worse for historically marginalized workers:* New research has found that stricter non-compete enforceability lowers earnings for female and nonwhite workers by twice as much as for white male workers.⁸ Other studies have shown that workers with less education experience larger negative wage impacts from non-competes.⁹
- *Non-competes deter workers from finding better opportunities:* Workers bound by a non-compete stay in their jobs 11 percent longer.¹⁰ Since job mobility is key for boosting earnings, these longer tenures reinforce the negative earnings effects of non-competes.

Beyond harming workers through reduced job mobility and wage gains, non-compete agreements have a chilling effect on entrepreneurship and innovation, which limits the growth potential of the U.S. economy. As entrepreneurs are most likely to launch a new firm in the sector they already work in and know—leverage existing skills, industry knowledge, and the knowledge of new areas of opportunity—non-compete agreements represent a strong deterrent to new firm creation. Non-competes also deprive startups of the talent they need to grow and thrive by making it difficult for them to hire from firms in their industry and area that use non-competes. As a result, strictly enforcing non-competes reduces startups’ growth and survival rates.¹¹

These negative effects on new business growth are worse for underrepresented entrepreneurs. The threat of non-compete enforcement appears to particularly dampen entrepreneurship among women, more risk-averse demographics, and entrepreneurs starting with less capital (and less ability to fight a protracted legal battle).¹²

Non-competes likely slow the pace of innovation by obstructing the flow of knowledge through restricting the churn of workers among firms. Traditionally, non-competes have made venture

⁷ See Office of Economic Policy, U.S. Department of the Treasury, “Non-compete Contracts: Economic Effects and Policy Implications.” 2016; Michael Lipsitz and Evan Starr, “Low-Wage Workers and the Enforceability of NonCompete Agreements,” *Academy of Management Proceedings* (2020); Evan Starr “The Use, Abuse, and Enforceability of Non-compete and No-Poach Agreements: A Brief Review of the Theory, Evidence, and Recent Reform Efforts,” *Economic Innovation Group* (2019); Matthew Johnson, et al, “The Labor Market Effects of Legal Restrictions on Worker Mobility,” *Working Paper* (2020).

⁸ Johnson, Matthew, Kurt Lavetti, and Michael Lipsitz, “The Labor Market Effects of Legal Restrictions on Worker Mobility.” 2020.

⁹ Starr, Evan, “Consider This: Training, Wages, and the Enforceability of Covenants Not to Compete.” 2018.

¹⁰ Starr, Evan, J.J. Prescott, and Norman Bishara, “Noncompetes in the U.S. Labor Force.” *U of Michigan Law & Econ Research Paper No. 24831*, 2018.

¹¹ Starr, Evan, et al, “Screening Spinouts? How Noncompete Enforceability Affects the Creation, Growth, and Survival of New Firms.” *Management Science*, 2017.

¹² Marx, Matt, “Punctuated Entrepreneurship (Among Women).” (2018). <https://www.census.gov/library/working-papers/2018/adrm/ces-wp-18-26.html>

capital less effective in spurring new patents and job growth.¹³ The firms that do start tend to have fewer employees at launch and are more likely to die in their first three years.¹⁴ The ones that survive still tend to remain smaller for their first five years.¹⁵

Simply put, the proliferation of non-compete clauses leads to unfair competition in the labor market, which in turn has negative macroeconomic effects. By reducing labor market churn and preventing workers from starting their own businesses, non-competes have contributed to the long-term decline of U.S. economic dynamism. Non-competes also create a silo effect, which limits the potential for ideas to diffuse across companies. By slowing the dissemination of knowledge and keeping workers from pursuing careers best suited to their particular skillset, non-compete contracts are a hindrance to America’s free market economy.¹⁶

While the need to protect trade secrets or company-specific information is valid, non-compete agreements are an overly broad and harmful way to achieve this goal, especially when employers have alternative, more narrowly-scoped tools available to protect legitimate interests, such as non-disclosure agreements. Non-competes, by contrast, are often broadly written instruments that reach far beyond the goal of protecting a company’s proprietary information.

Recommendations for FTC Action

The FTC’s mandate is to uphold antitrust laws and foster a competitive business environment, and it has authority to regulate unfair methods of competition. Given the widespread use of non-competes and their chilling effect on labor market competition, EIG urges the FTC to enhance its oversight of these contracts, such as by issuing a rule guided by three overarching principles: 1) Promoting Transparency; 2) Creating Disincentives for Overuse; and 3) Limiting the Scope of Agreements.¹⁷

¹³ Samila, Sampsa, and Olav Sorenson, “[Noncompete Covenants: Incentives to Innovate or Impediments to Growth](#).” 2011.

¹⁴ Starr, Evan, et al, “Screening Spinouts? How Noncompete Enforceability Affects the Creation, Growth, and Survival of New Firms.” *Management Science*, 2017.

¹⁵ O’Donnell, Jimmy, “[The Case for Non-compete Reform: How the Workforce Mobility Act Would Support Workers and Spur Entrepreneurship](#).” Economic Innovation Group, 2021.

¹⁶ See Evan Starr “[The Use, Abuse, and Enforceability of Non-Compete and No-Poach Agreements](#)” (2019) for a good summary of the negative macroeconomic impacts of non-compete agreements.

¹⁷ Lettieri, John, “[A better bargain: How noncompete reform can benefit workers and boost economic dynamism](#).” American Enterprise Institute, 2020.

1) **Promoting Transparency:**

The FTC should require a clear and transparent process to govern the use of non-competes, which would mitigate their worst abuses and lead to a more competitive labor market. For example, the FTC should mandate that employers notify job candidates of their intent to require a non-compete agreement, as well as present the contract to prospective employees when they are offered the job—not after they have accepted the position and likely exhausted other employment options. Employers that request a non-compete agreement should also be required to inform the prospective signee of applicable state and federal laws, and provide the candidate with adequate time to deliberate before making a decision. It is also important that any new rules overseeing non-competes be easy to understand and administer.

2) **Creating Disincentives for Overuse:**

Employers currently have few reasons not to use non-compete agreements—and often face no penalties even for presenting employees with contracts that are overly broad, unenforceable, or imposed upon employees who possess no trade secrets or specialized skills. The FTC should discourage the overreaching and predatory use of non-competes by employers. For example, overly broad non-competes should be voided rather than rewritten by courts to make them enforceable because these provisions are more commonly found in contracts of adhesion, not the carefully negotiated contractual relationships typically afforded such deference by the courts. Additionally, employers should face penalties if they require employees to sign non-competes in states where these contracts are not enforceable.

3) **Limiting the Scope of Agreements:**

The FTC should consider placing additional guardrails on non-competes that place uniform limits on their scope and severity—for example, by limiting their duration to a reasonable time period, and voiding them if an employee is laid off or terminated without cause.

While there are significant steps the agency can take absent congressional action on this issue, EIG believes statutory changes are ultimately needed to fully address the ways that non-competes harm fair competition, worker mobility, and economic dynamism. The [*Workforce Mobility Act*](#) is bipartisan, bicameral legislation that would limit the use of non-competes to very narrow circumstances, such as the sale of a business and the dissolution of a partnership. Passing



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this legislation would provide the FTC with a clear directive to act on their statutory authority to address the unfair use of non-competes as provided under Section 5 of the FTC Act.¹⁸

We appreciate the opportunity to provide comments on this issue. If you have any questions about our recommendations, please contact Catherine Lyons, Director of Policy, at catherine@eig.org.

Sincerely,

Scott Shewcraft
Vice President of Policy
Economic Innovation Group

¹⁸ See 15 U.S.C. § 45