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Comments on: **Non-compete Clause Rulemaking, Matter No. P201200**
Submitted at: <https://www.regulations.gov/document/FTC-2023-0007-0001>

Dear Ms. Lane:

The National Employment Law Project (“NELP”) submits these comments in support of the Federal Trade Commission’s (“FTC”) proposed rulemaking to ban employers from imposing non-compete agreements (“noncompetes”) on virtually all workers. The FTC’s Proposed Rule is squarely within its legal authority to promulgate, and it would help all workers, contributing to higher wages and greater opportunities for workers to advance in their careers by switching jobs. Equally important, it will also improve economic mobility for workers of color and women who have been particularly adversely affected by the proliferation of noncompete clauses.

NELP is a leading non-profit and non-partisan advocacy organization with the mission to build a just and inclusive economy where all workers have expansive rights and thrive in good jobs. Together with local, state, and national partners, NELP advances its mission through transformative legal and policy solutions, research, capacity-building, and communications. NELP regularly partners with federal, state, and local lawmakers on a wide range of issues to promote workers’ rights and labor standards enforcement, including opposition to noncompete clauses, non-disclosure agreements, non-solicitation agreements, and forced arbitration. NELP has testified about how workers are unable to lift their wages and improve their financial situation by earning a living wage when hampered by these abusive contracts. We have previously submitted comments in the past supporting FTC rulemaking in this area and appreciate another opportunity to engage with the FTC and comment in support of the FTC’s Proposed Rule.

Our comments will address these primary points:

1. Noncompetes are coercive agreements that harm workers by trapping workers in jobs, reducing their access to employment, and depressing wages.
2. Noncompete agreements are rooted in racism and continue to have a negative impact on workers of color and women.

3. State law changes have had a positive effect, but the resulting patchwork demonstrates the need for a federal ban that will lift wages for all workers.
4. NELP supports the broad definition of ‘workers’ in the Proposed Rule, particularly considering the widespread misclassification of employees as independent contractors in industries with a disproportionate share of workers of color.
5. The final rule can be improved by clarifying the “de facto noncompete” section and improving the training repayment agreements section with a more focused analysis and explicit language.

1. Noncompetes are coercive agreements that harm workers by trapping workers in jobs, reducing their access to employment, and depressing wages.

Noncompete agreements prevent workers from working for a competitor company during or after their current employment. These so-called agreements typically restrict workers through time, industry, and/or geography. A time restriction prevents someone from working for a competitor for a specific 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 noncompete also prevents a worker from starting their own competitor company. The seminal paper published on noncompetes by economists Evan Starr, Norman Bishara, and J.J. Prescott found that nearly 1 in 5 workers in the United States were bound by a noncompete and that 38 percent had agreed to at least one noncompete in the past.¹ Currently, the FTC estimates that noncompetes affect 30 million workers, which is 18 percent of all workers.² That means nearly 20 percent of workers cannot search for new work and expand their career opportunities because of noncompete agreements.

NELP often refers to noncompetes as “coercive waivers” as opposed to “agreements” because employers usually present noncompetes in a “take it or leave it” fashion, forcing workers to sign the noncompete or reject the job altogether. Far from an agreement negotiated at arm’s length, these coercive waivers have become a routine condition of employment for many. 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.³ In addition, 30 to 40 percent of workers are asked to sign noncompetes after they have already accepted the position.⁴ And, as discussed above, up to 38 percent of workers have signed a noncompete at some time during their career, demonstrating that this practice is widespread.

Not only do businesses routinely demand their workers sign noncompetes, but they also use similarly coercive methods to ensure compliance. Employers send threatening cease-and-desist letters to former employees “reminding them” of their signed agreement. If an initial letter does not result in the response they want, some employers then take it a step further and call the new

¹ Evan Starr, and J.J. Prescott, and Norman D Bishara, *Noncompete Agreements in the U.S. Labor Force*, JOURNAL OF LAW AND ECONOMICS 2021, October 2020, p. 6, <https://ssrn.com/abstract=2625714>.

² Non-Compete Clause Rule, 16 C.F.R. § 910, p. 15 (2023), <https://www.federalregister.gov/documents/2023/01/19/2023-00414/non-compete-clause-rule>; Federal Register Vol. 88 No. 12 Jan. 19, 2023 3485.

³ Starr *supra* n. 1 at p. 8.

⁴ Two studies have shown that approximately 30 percent of workers received the non-compete after they have accepted the job offer. Starr, *supra* n. 1 at p. 8; Matt Marx, *The Firm Strikes Back: Non-Compete Agreements and the Mobility of Technical Professionals*, AMERICAN SOCIOLOGICAL REVIEW, vol. 76, no. 5, 2011, pp. 695-712.

employer to threaten litigation. These tactics make it nearly impossible for most workers to challenge these agreements in court. Indeed, studies have shown that many workers simply comply with the agreements rather than risk a lawsuit, even where the agreement would not be legally enforceable.⁵ This method of enforcing noncompetes is encouraged and is demonstrated by many blog posts and management lawyer websites that discuss this method approvingly.⁶

Noncompetes stop workers from obtaining higher paying jobs, enable businesses to avoid competition for workers, and have been shown to depress wages by reducing competition.⁷ As the FTC notes in the Notice of Proposed Rulemaking (NPRM), noncompetes often prevent workers from taking jobs in their field of expertise.⁸ This forces many workers to remain in a job in which they are less productive and end up being paid less than what workers could obtain in the broader job market.⁹ When many workers are legally precluded from seeking opportunities or exiting a job that does not suit them, the result is a job market that materially reduces wages for all workers. Therefore, not only do noncompetes reduce workers' wages, but they also have damaging impacts on the overall job market.

Traditionally workers have used their ability to exit or leave a job to demand higher wages. This means that their ability to change jobs gives them the opportunity to demand a higher wage from the current employer or seek better paying work elsewhere.¹⁰ This phenomenon known as "job-hopping" helps workers early on in their career secure stronger lifetime earnings.¹¹ In contrast, being bound by a noncompete is associated with an 11 percent increase in the length of time in a job,¹² which when artificially lengthened by noncompetes, negatively impacts workers' earnings. Widespread usage of noncompetes reduces job mobility and the power to bargain for a higher wage.¹³ Not only do noncompetes trap workers, stifle competition for labor, and possibly increase

⁵ Matt Marx and Ryan Nunn, *The Chilling Effect of Non-compete agreements*, THE HAMILTON PROJECT, May 20, 2018, available at: https://www.hamiltonproject.org/blog/the_chilling_effect_of_non_compete_agreements (last visited xx/xx/xxxx).

⁶ Emily Halliday, *Analysis: 5 Things to Consider Before Suing Over a Noncompete*, BLOOMBERG LAW, Aug. 19, 2021, <https://news.bloomberglaw.com/bloomberg-law-analysis/analysis-5-things-to-consider-before-suing-over-a-noncompete>; Minnesota Non-Compete Legal Tips, Minnesota Noncompete Law Blog, https://minnesotanoncompetelaw.com/Legal_Tips.html.

⁷ Alexander J.S. Colvin and Heidi Shierholz, *Noncompete Agreements*, THE ECONOMIC POLICY INSTITUTE, December 10, 2019, <https://www.epi.org/publication/noncompete-agreements/>

⁸ Non-Compete Clause Rule, 16 C.F.R. § 910.1(b)(2), (2023), <https://www.federalregister.gov/documents/2023/01/19/2023-00414/non-compete-clause-rule>; Federal Register Vol. 88 No. 12 Jan. 19, 2023 3485.

⁹ Non-Compete Clause Rule, 16 C.F.R. § 910.1(b)(2), (2023), <https://www.federalregister.gov/documents/2023/01/19/2023-00414/non-compete-clause-rule>; Federal Register Vol. 88 No. 12 Jan. 19, 2023 3485.

¹⁰ Kim Parker and Juliana Menasce Horowitz, *Majority of workers who quit a job in 2021 cite low pay, no opportunities for advancement, feeling disrespected*, PEW RESEARCH CENTER, March 9, 2022, <https://www.pewresearch.org/fact-tank/2022/03/09/majority-of-workers-who-quit-a-job-in-2021-cite-low-pay-no-opportunities-for-advancement-feeling-disrespected/>.

¹¹ John W. Lettieri, *Noncompete Agreements and American Workers – Testimony before the Senate Committee on Small Business*, THE ECONOMIC INNOVATION GROUP, Nov. 14, 2019, <https://eig.org/news/testimony-before-the-senate-committee-on-small-business-noncompete-agreements-and-american-workers>.

¹² Colvin *supra* n. 7 at p. 2; *see also*, Jessica Jeffers, *The Impact of Restricting Labor Mobility on Corporate Investment and Entrepreneurship*, 2022, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3040393 (finding that increased noncompete enforceability can reduce the departure rates from 7-11 percent).

¹³ Alan B. Krueger and Eric Posner, *A Proposal for Protecting Low-Income Workers from Monopsony and Collusion*, The Hamilton Project, Feb. 2018, p. 4 & 7, (discussing how monopsony power and collusion have

inequality, but noncompetes also hurt the economy overall. As noted in a study by the Economic Policy Institute, because noncompetes limit workers' ability to take other jobs or start their own businesses, it is "not difficult to see that noncompetes may be contributing to the declines in dynamism in the U.S. labor market."¹⁴

The increasing usage of noncompetes in the workplace has also been linked to the growing issue of monopsony where businesses have outside power to control wages.¹⁵ "Monopsony" refers to employers wielding excessive market power and being able to effectively set wages lower than what free competition would demand.¹⁶ Economists have connected noncompete enforceability as one way that employers are able to control the market. When noncompetes are more strictly enforced, they reduce workers' options to move to new firms and this reduction in labor market turnover or churn affects the overall job market.¹⁷ Researchers proposed that "strict enforceability [of noncompetes] hinders workers ability to leverage improvements in the labor market and to negotiate wage increases."¹⁸ This hypothesis was borne out in a finding that noncompete enforceability had a negative effect on workers' mobility and ability to leverage strong labor markets.¹⁹ This research shows how noncompetes affect the labor market and wages beyond the percentage of the workforce forced to sign them. For these reasons, the FTC Proposed Rule of a complete ban of noncompetes—rather than permitting some form of noncompetes to proliferate—is the best suited to increase wages.

The increased proliferation of noncompetes has also coincided with a period of increasing wealth and wage inequality.²⁰ There are numerous factors that drive low wages, including the abysmal \$7.25 federal minimum wage, but studies examining the impact of policies that limit the use of noncompetes confirm the deleterious effect they have on wages. A 2021 study of the impact of Oregon's ban on noncompetes found that hourly wages increased by 2 to 3 percent on average.²¹ Recently, the Economic Innovation Group (EIG) released another study showing that even limited noncompete bans such as Hawaii's ban on noncompetes for skilled technology workers have had a positive effect on workers and improved the economy for workers.²² The preamble to the bill states

grown due to the increase in noncompetes and the decline in the real value of the minimum wage and labor unions has not been enough to counteract the monopsony power and collusion).

¹⁴ Colvin *supra* n. 7 at p. 8-9.

¹⁵ Matthew Johnson, Kurt Lavetti, & Michael Lipsitz, *The Labor Market Effects of Legal Restrictions on Worker Mobility* (June 6, 2020), p. 4, <https://ssrn.com/abstract=3455381>; see also, Marshall Steinbaum, *How widespread is Labor Monopsony? Some New Results Suggest its Pervasive*, ROOSEVELT INSTITUTE, December 18, 2017, <https://rooseveltinstitute.org/2017/12/18/how-widespread-is-labor-monopsony-some-new-results-suggest-its-pervasive/>; Greg Robb, *Wage growth is soft due to declining worker bargaining power, former Obama economist says*, MARKETWATCH, August 24, 2018, <https://www.marketwatch.com/story/wage-growth-is-soft-due-to-declining-worker-bargaining-power-former-obama-economist-says-2018-08-24>.

¹⁶ *Id.*; Greg Robb, *Wage growth is soft due to declining worker bargaining power, former Obama economist says*, MARKETWATCH, August 24, 2018.

¹⁷ *Id.* at 5.

¹⁸ *Id.* at 3.

¹⁹ *Id.* at 66.

²⁰ Lawrence Mishel and Jori Kandra, *Wage Inequality Continued to Increase in 2020*, Working Economics Blog, Dec. 13, 2021, <https://www.epi.org/blog/wage-inequality-continued-to-increase-in-2020-top-1-0-of-earners-see-wages-up-179-since-1979-while-share-of-wages-for-bottom-90-hits-new-low/>.

²¹ 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>

²² Benjamin Glasner, *The Effects of Noncompete Agreement Reforms on Business Formation: A comparison of Hawaii and Oregon*, Economic Innovation Group Research Note Series, March 2023, <https://eig.org/wp-content/uploads/2023/03/Noncompete-Reform-Research-Note.pdf>.

that it concluded that “embracing employee mobility [was] the superior strategy for nurturing an innovation-based economy.”²³ The EIG study shows this was a winning strategy, as the law led to “a 10.2 percent increase in the number of technology businesses and a diffusion of skilled technology workers across the sector.”²⁴ The diffusion of skilled workers across the technology sector likely led to increased wages given the positive effects of job-hopping on workers’ careers as discussed above. Further, the positive effects of this partial ban show the potential of a complete ban—no sector should be stifled by these coercive waivers.

Economic studies have shown that noncompetes also stifle business growth by inhibiting workers’ ability to start their own business.²⁵ States with laws that allow noncompetes to be more strictly enforced reduce the formation of new firms.²⁶

All told, the evidence and research are clear: noncompetes trap workers, depress wages, and stifle labor competition that has the potential to lead to wage increases. NELP wholeheartedly supports the FTC’s assessment that a ban on noncompete agreements will raise U.S. workers total earnings by \$250 billion per year. A complete ban, such as the one proposed by the FTC, is the only way to truly lift workers and short circuit the deleterious effect of noncompetes on workers and wage inequality.

2. Noncompete agreements are rooted in racism and continue to have a negative impact on workers of color and women.

The use of noncompetes for underpaid workers, especially workers of color, can be traced to the Reconstruction Era. Former slave-owners used noncompetes on freed African Americans.²⁷ Today, noncompetes continue to perpetuate and exacerbate racial and gender wage gaps.²⁸

Researchers have found that noncompetes can have a more detrimental impact on women and people of color because noncompetes decrease entrepreneurship, reduce wages, and provide firms more power to discriminate.²⁹ The NPRM discusses this very effect, citing a study by Johnson, Lavetti, and Liptsitz that noncompetes produce the monopsony power that gives firms more power

²³ Relating to Employment Agreements, H.B. No. 1090, 28th Legislature, 2015, State of Hawaii, [http://www.capitol.hawaii.gov/session2015/bills/HB1090_CD1 .htm](http://www.capitol.hawaii.gov/session2015/bills/HB1090_CD1.htm).

²⁴ Glasner *supra* n. 22.

²⁵ Jessica Jeffers, *The Impact of Restricting Labor Mobility on Corporate Investment and Entrepreneurship*, p. 11, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3040393; Glasner *supra* n. 22.

²⁶ Norman D. Bishara, *Fifty Ways to Leave your Employer: Relative Enforcement of Covenants Not to Compete*, Trends and Implications for Employee Mobility, UNIVERSITY OF PENNSYLVANIA JOURNAL OF BUSINESS LAW, 2011 13 (3) (Bishara identifies six factors that can be used to determine whether noncompetes are more strictly enforced including, whether a statute exists, the plaintiff’s burden of proof, if noncompetes can apply to terminated employees, consideration and ability to modify); Jessica Jeffers, *The Impact of Restricting Labor Mobility on Corporate Investment and Entrepreneurship*, p. 42, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3040393.

²⁷ 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](https://www.seattleu.edu/academic/center-for-law-and-ethics/wp-content/uploads/2016/06/Paradox-of-the-Right-to-Contract-Noncompete-Agreements-as-Thirteenth-Amendment-Violations.pdf), 39 SEATTLE U. L. REV. 957, 959 (2016).

²⁸ John W. Lettieri, *Noncompete Agreements and American Workers – Testimony before the Senate Committee on Small Business*, THE ECONOMIC INNOVATION GROUP, Nov. 14, 2019, <https://eig.org/news/testimony-before-the-senate-committee-on-small-business-noncompete-agreements-and-american-workers>.

²⁹ *Id.*

to discriminate.³⁰ Moreover, women in states with stricter noncompete enforcement are less likely than men to leave their jobs or start rival companies if they are subject to a noncompete.³¹ Further, if a woman were to abandon a startup and return to the broader labor market to look for employment, they suffer larger wage penalties than men do. Matt Marx, author of one study stated: “We see it in medicine, in financial services, and you also see that among entrepreneurs. When women entrepreneurs abandon their startups and go back and look for paid employment, they suffer more of a penalty than men do.”³² Women and workers of color also are less likely to negotiate than their white counterparts, making noncompetes more binding for them.³³ In fact, the earnings of women and workers of color are reduced by twice as much as white, male workers when there is stricter noncompete enforcement.³⁴ Significantly, the ultimate conclusion of this study is that banning noncompetes would close the earnings gap between white men and Black women by 4.6 percent; 5.6 percent for white women; 8.7 percent for Black men; and 9.1 percent for non-Black, non-white women.³⁵

3. State law changes have had a positive effect, but the resulting patchwork demonstrates the need for a federal ban that will lift wages for all workers.

Jimmy John’s, a national sandwich chain, made national news in 2014 for requiring its sandwich makers to sign noncompetes as a condition of employment.³⁶ The Jimmy John’s noncompete prohibited employees from working at companies that derived at least 10 percent of sales from selling sandwiches and operated within two miles of a Jimmy John’s store for a period of two years.³⁷ The revelation resulted in several state investigations, consumer protection litigation, and increased scrutiny of the use and impacts of noncompetes. New York and Illinois investigated the fast-food chain for the usage of these provisions in 2016, and Illinois eventually sued Jimmy John’s under the unconscionability provisions of the state’s Consumer Fraud and Deceptive Practices Act.³⁸ In addition, both states continued to further investigate noncompetes. In New York State, the

³⁰ Non-Compete Clause Rule, 16 C.F.R. § 910.1(b)(2), (2023), <https://www.federalregister.gov/documents/2023/01/19/2023-00414/non-compete-clause-rule>; Federal Register Vol. 88 No. 12 Jan. 19, 2023 3485, p. 28; Johnson *supra* n. 15 at p. 4.

³¹ Tom Fleischman, *Women Indirectly Hurt More by Noncompete Pacts*, Cornell Chronicle, Oct. 5, 2021; 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.

³² *Id.*

³³ Non-Compete Clause Rule, 16 C.F.R. § 910.1(b)(2), (2023), p. 11, <https://www.federalregister.gov/documents/2023/01/19/2023-00414/non-compete-clause-rule>; Federal Register Vol. 88 No. 12 Jan. 19, 2023 3485; Johnson *supra* n. 15 at p. 4..

³⁴ Johnson *supra* n. 15 at p. 4.

³⁵ *Id.* at p. 38.

³⁶ Sarah Whitten, *Jimmy Johns drops Noncompete Clauses Following Settlement*, CNBC, June 22, 2016, <https://www.cnbc.com/2016/06/22/jimmy-johns-drops-non-compete-clauses-following-settlement.html>

³⁷ New York State Office of the Attorney General, *Attorney General Schneiderman announces settlement with Jimmy John’s to stop including Non-Compete Agreements in Hiring Packets*, June 22, 2016, <https://ag.ny.gov/press-release/2016/ag-schneiderman-announces-settlement-jimmy-johns-stop-including-non-compete>; Dave Jamieson, *Jimmy Johns Makes Low-Wage Workers Sign ‘Oppressive’ Noncompete Agreements*, THE HUFFINGTON POST, October 15, 2014, https://www.huffingtonpost.com/2014/10/13/jimmy-johns-non-compete_n_5978180.html

³⁸ New York State Office of the Attorney General, *Attorney General Schneiderman announces settlement with Jimmy John’s to stop including Non-Compete Agreements in Hiring Packets*, June 22, 2016, <https://ag.ny.gov/press-release/2016/ag-schneiderman-announces-settlement-jimmy-johns-stop-including-non-compete>; Samantha Bonkamp, *Jimmy John’s agrees to pay \$100,000 to Illinois AG over noncompete*

attorney general concluded an investigation of WeWork for its usage of noncompete provisions in 2018 and filed a public comment about the issue in 2020.³⁹ Ultimately, these investigations also led to a variety of efforts nationwide to limit the usage of these coercive waivers.

In August 2016, Illinois Governor Bruce Rauner signed the “Illinois Freedom to Work Act,” prohibiting private-sector employers from entering into a covenant not to compete with any of their employees making close to the minimum wage.⁴⁰ Massachusetts then passed a law in 2018 which limited the duration of noncompetes to one year, required notice for new employees, and mandated that noncompetes could be only broad enough to protect legitimate business interests.⁴¹ New Mexico restricted the usage of noncompetes, but only among health care workers,⁴² while Hawaii prohibited the usage of noncompetes in the technology industry.⁴³ Maryland followed Illinois and prohibited noncompetes for workers making \$15 per hour or less.⁴⁴ Rhode Island, New Hampshire, and Maine each prohibited noncompetes for workers paid “low wages,” with varying definitions of what constitutes low wage.⁴⁵ Other states, such as New Jersey, New York, and Minnesota have been moving toward partially banning or restricting noncompetes. Recent research about the effect of noncompete laws on border states also speaks to the need for a national solution. Researchers concluded that the enforceability of noncompetes “affects a larger population than the relatively small share of workers bound by noncompetes and the magnitudes of spillovers account for a non-trivial share of the overall wage effects of enforceability.”⁴⁶ In other words, researchers have found that a change in noncompete enforceability not only affected the state with the noncompetes, but also affected the earnings and mobility of workers located the next state over.⁴⁷ Oregon previously had a noncompete law that banned noncompetes for workers making below the median income for a family of four.⁴⁸ In 2021, Oregon updated its noncompete law, increasing the threshold for enforcement of noncompete agreements to \$100,533, which will be adjusted for inflation.⁴⁹ As discussed above, Oregon’s law led to increased hourly wages.⁵⁰

contracts, CHICAGO TRIBUNE, December 7, 2016, <http://www.chicagotribune.com/business/ct-jimmy-johns-settlement-1208-biz-20161207-story.html>.

³⁹ Yuki Noguchi, *Under pressure, WeWork backs down on Employee NonCompete Requirements*, NPR, September 18, 2018, <https://www.npr.org/2018/09/18/648881004/wework-backs-down-on-employee-noncompete-requirements>.

⁴⁰ Kevin Cloutier and Mikela Sutrina, *Illinois Limits Non-Compete Agreements Yet Again*, Labor & Employment Law Blog, September 7, 2016, <https://www.laboremploymentlawblog.com/2016/09/articles/non-competition-covenants/illinois-brings-down-the-hammer-on-non-compete-agreements/>.

⁴¹ Shira Schoenberg, *What Does Massachusetts’ noncompete reform mean for you?*, MASSLIVE, Aug. 16, 2018, <https://www.masslive.com/expo/news/erry-2018/08/d4240441a67183/what-does-massachusetts-noncom.html>; Russell Beck, *Massachusetts’ New Noncompete Law: the Text*, Aug. 6, 2018, <https://www.faircompetitionlaw.com/2018/08/06/massachusetts-new-noncompete-law-the-text/>

⁴² Enforceability of a Non-compete provision, NM Stat § 24-11-2 (2015), <https://law.justia.com/codes/new-mexico/2015/chapter-24/article-1i/section-24-1i-2>

⁴³ Relating to Employment Agreements, H.B. No. 1090, 28th Legislature, 2015, State of Hawaii, http://www.capitol.hawaii.gov/session2015/bills/HB1090_CD1_.htm

⁴⁴ Saul Ewing LLP, *Maryland Restricts Noncompete Agreements for Law Wage Workers*, JDSUPRA, June 14, 2019, <https://www.jdsupra.com/legalnews/maryland-restricts-noncompete-10130/>.

⁴⁵ Kevin Burns, *Noncompete Reform Continues in New England: Maine, New Hampshire, and Rhode Island All Pass New Laws*, JDSUPRA, July 17, 2019, <https://www.jdsupra.com/legalnews/noncompete-reform-continues-in-new-18937/>

⁴⁶ Johnson *supra* n. 15 at p. 4.

⁴⁷ *Id.*

⁴⁸ ORS §653.295, Noncompetition Agreements, <https://www.oregonlaws.org/ors/653.295>

⁴⁹ ORS §653.295, Noncompetition Agreements, <https://www.oregonlaws.org/ors/653.295>

⁵⁰ Lipsitz *supra* n. 21. (Oregon has amended its statute twice since 2008).

Although research suggests these state laws are effective where they exist, these state laws are, at best, a modest and incomplete patchwork of protections that leave workers in most states subject to coercive waivers.⁵¹ In the absence of a national standard, workers' ability to seek other employment opportunities now depends largely on a happenstance of geography. Moreover, many of the laws are so complicated that most workers find it difficult to understand how they apply. For example, all the northeastern states that have noncompete laws have taken completely different approaches in defining what constitutes a worker in a low wage industry. In addition, studies have shown that even though noncompetes have been unenforceable in California since 1872, companies still subjected workers to noncompetes.⁵² Therefore, noncompetes in California may have had the same chilling effect on workers and the economy, despite being unenforceable. The laws vary in other ways as well: some have private rights of action, and some do not. Some provide monetary penalties, and some do not. More to the point: noncompetes produce harms that cannot be remedied by a mishmash of a varying state laws. Workers need a national standard that is easy to understand and to enforce.

In the wake of the COVID-19 pandemic, the FTC can contribute to a more just recovery. The FTC should not hesitate to set a clear rule—a national policy that completely bans noncompete agreements and requires rescission, as proposed in the NPRM. Such a step would ensure the rule is easily applied, that compliance is investigated, and that the standard is enforced. It would also completely change the national landscape for job mobility and provide relief and opportunity for millions of workers.⁵³

4. NELP supports the broad definition of “workers” in the Proposed Rule, particularly considering the widespread misclassification of employees as independent contractors in industries with a disproportionate share of workers of color.

The Proposed Rule appropriately prohibits noncompete agreements for a broad swath of workers, including independent contractors. Independent contractors run their own businesses; make investment decisions impacting profits and losses; and decide where and how to market their business, how to do the work, and what to charge. They are among the impacted ‘businesses’ described in the Proposed Rule’s well-supported analysis of the harms caused by noncompete clauses. Noncompete clauses suppress wages and restrain competition for workers among and between independent contractors and other businesses, and they restrain new independent contractor business formation by preventing workers with noncompete clauses from forming their own business. In short, noncompete clauses stifle new business growth for independent contractors just like they do with any other business. Accordingly, the ban on noncompete agreements should apply with equal force to agreements involving independent contractors.

Further, the Commission is right to be concerned that more narrowly defining covered workers in proposed § 910.1(f) would incentivize independent contractor misclassification and undermine the

⁵¹ Russell Beck, *New Map of Recent Changes to State Non-compete Laws*, Fair Competition Law Blog, June 8, 2021, <https://faircompetitionlaw.com/2021/06/08/new-map-of-recent-changes-to-state-noncompete-laws/>.

⁵² U.S. Department of the Treasury, Office of Economic Policy, *Non-compete Contracts: Economic Effects and Policy Implications*, March 2016, p. 7; *Cal. Bus. & Prof. Code § 1660 (1976)*. (“[i]n 1872 California settled public policy in favor of open competition, and rejected the common law “rule of reasonableness,” when the Legislature enacted the Civil Code”).

⁵³ The Economic Policy Institute estimates that 36-60 million private sector workers are covered by non-competes. Colvin *supra* n. 7 at p. 2.

Proposed Rule’s impact. Independent contractor misclassification is a serious problem in need of greater attention, not additional loopholes.

- A. *Independent contractor misclassification is a form of unfair competition that depresses wages, disproportionately impacts workers of color, and depletes government funds.*

For decades, corporations have imposed take-it-or-leave-it contracts on their workers, putting them outside of the workplace protections and tax requirements that apply only to employees and employers.⁵⁴ Too many companies mischaracterize their employees as “independent contractors,” “self-employed,” “partners,” or “freelancers.” In effect, companies require workers to form “limited liability companies”—or simply pay workers off the books—as a tactic to shift risk and costs downward onto workers, while channeling wealth upward to investors and CEOs. When they engage in this sham practice, companies shed responsibility for their workers, but often maintain control over where, how, when, and for how much money workers perform their jobs.⁵⁵

Either directly or indirectly, all workers in the United States feel the impacts of independent contractor misclassification. Over 21 million people work in misclassification-plagued construction, trucking, delivery, home care, personal care, agricultural, and janitorial and building service occupations in the United States.⁵⁶ At least 1.6 million workers work for digital labor platforms like Uber,⁵⁷ companies that use digital technologies to dispatch workers and control their work—for example, unilaterally setting fee rates and dictating when and how workers interact with customers. These digital labor platform companies often impose take-it-or-leave-it independent contractor agreements as a condition of work. In addition, corporations are actively campaigning to strip bedrock federal wage protections from workers across every industry and occupation.⁵⁸

Research shows that many so-called independent contractors (also called “self-employed”) earn significantly less than their employee counterparts. In contrast to the few high-earning

⁵⁴ Catherine Ruckelshaus, *Independent Contractor v. Employee: Why Misclassification Matters and What we can do to Stop It*, NAT’L EMP. L. PROJECT, May 2016, <https://s27147.pcdn.co/wp-content/uploads/Policy-Brief-Independent-Contractor-vs-Employee.pdf>. See also, e.g., Rebecca Smith & Sarah Leberstein, *Rights on Demand: Ensuring Workplace Standards in the On-Demand Economy*, NAT’L EMP. L. PROJECT, Sept. 2015, <https://s27147.pcdn.co/wp-content/uploads/Rights-On-Demand-Report.pdf>.

⁵⁵ See Catherine Ruckelshaus, et al., *Who’s the Boss: Restoring Accountability for Labor Standards in Outsourced Work*, NAT’L EMP. L. PROJECT, May 2014, <https://www.nelp.org/wp-content/uploads/2015/02/Whos-the-Boss-Restoring-Accountability-Labor-Standards-Outsourced-Work-Report.pdf>.

⁵⁶ NELP analysis of 2020 Current Population Survey Annual Social and Economic Supplement microdata. For underlying data, see *CPS Annual Social and Economic Supplement*, U.S. Census Bureau, <https://data.census.gov/mdat/#/search?ds=CPSASEC2022>.

⁵⁷ See U.S. Bureau of Lab. Statistics, *Electronically Mediated Work: New Questions in the Contingent Worker Supplement*, Monthly Labor Review, Sept. 2018, <https://www.bls.gov/opub/mlr/2018/article/electronically-mediated-work-new-questions-in-the-contingent-worker-supplement.htm>.

⁵⁸ Maya Pinto, et al., *How the Coalition for Workforce Innovation is Putting Workers Rights at Risk*, NAT’L EMP. L. PROJECT, Jul. 19, 2022, <https://s27147.pcdn.co/wp-content/uploads/The-Truth-About-CWI-Report.pdf>; *On the Anti-Worker Worker Flexibility and Choice Act*, NAT’L EMP. L. PROJECT, Aug. 2, 2022, <https://www.thetruthaboutcwi.com/updates/wfca>; Josh Eidelson, *The Gig Economy is Coming for Millions of American Jobs*, BLOOMBERG, Feb. 17, 2021, <https://www.bloomberg.com/news/features/2021-02-17/gig-economy-coming-for-millions-of-u-s-jobs-after-california-s-uber-lyft-vote>; Richard Morgan, *Apps have turned restaurant work into a gig-economy hustle. Here’s how one cook chases a paycheck*, WASHINGTON POST, Feb. 25, 2020, https://www.washingtonpost.com/lifestyle/food/apps-have-turned-restaurant-work-into-a-gig-economy-hustle-heres-how-one-cook-chases-a-paycheck/2020/02/24/1f02ee5c-54a8-11ea-9e47-59804be1dcfb_story.html.

professionals, “low- and middle-wage workers who become self-employed see lower take home pay than they could have expected if they remained just as wage earners.”⁵⁹ In fact, nearly ten percent of independent contractors earn less than the federal minimum wage of \$7.25 per hour.⁶⁰ The U.S. Department of the Treasury’s analysis confirms that “workers who earn their living outside the formal employee-employer relationship earn less, are less likely to have health insurance coverage, or to participate in or contribute to a retirement account.”⁶¹ Their earnings are startlingly low, with more than 40 percent of digital labor platform workers and others who rely primarily on self-employment earning less than \$20,000 per year.⁶² Indeed, the average Uber driver’s wage is just \$9.21 per hour after deducting fees and expenses, putting them in the lowest ten percent of wage earners, and earning lower than the minimum wage in New York, Chicago, and Los Angeles.⁶³

Independent contractor misclassification by companies is also strikingly racialized, occurring disproportionately in occupations in which people of color, including Black, Latinx, Asian/Pacific Islander, and Native American workers, are overrepresented. As a group, workers of color are overrepresented in construction, trucking, delivery, home care, agricultural, personal care, ride-hail, and janitorial and building service occupations by over 40 percent; they comprise just over a third of workers overall, but between 47 and 91 percent of workers in these occupations.⁶⁴ In digital labor platform work, Black and Latinx workers are overrepresented by 45 percent—more even than in more traditional misclassification-prone sectors.⁶⁵ Because independent contractor misclassification often comes with the wage and benefit penalties noted above, this corporate practice perpetuates growing racial income and wealth inequality and health disparities in the United States. The practice reinforces occupational segregation along lines of race and gender, and it fosters a second-tier workforce of workers of color in precarious jobs stripped of bedrock employment protections.⁶⁶

Cheating businesses that misclassify their employees make it more difficult for law-abiding businesses to compete. The practice, as the U.S. Treasury Inspector General found, “plac[es] honest

⁵⁹ Corey Husak, *How U.S. Companies Harm Workers by Making Them Independent Contractors*, WASH. CTR. FOR EQUITABLE GROWTH at 3, Jul. 2019, <https://equitablegrowth.org/wp-content/uploads/2019/09/IB-Independent-Contracting.pdf>. See also Corey Husak, OFF. OF REVENUE ANALYSIS, D.C. GOV’T, *The Self-Employment Income Drop*, Dec. 12, 2022, (finding that roughly 60 percent of self-employed tax filers were in the lowest income bin, earning \$1-22,000 per year, with common occupations including drivers, janitors, home/office cleaners or hair stylists), <https://ora-cfo.dc.gov/blog/self-employment-income-drop>.

⁶⁰ Karla Walter & Kate Bahn, *Raising Pay and Providing Benefits for Workers in a Disruptive Economy*, CTR. FOR AM. PROGRESS at 37, Oct. 2017, <https://www.americanprogress.org/wp-content/uploads/2017/10/GigEconomy-report.pdf>.

⁶¹ Emilie Jackson, et al., *The Rise of Alternative Work Arrangements: Evidence and Implications for Tax Filing and Benefit Coverage*, OFFICE OF TAX ANALYSIS WORKING PAPER 114 at 22, Jan. 2017, <https://home.treasury.gov/system/files/131/WP-114.pdf>.

⁶² *Id.* at 34, Table 6.

⁶³ Lawrence Mishel, *Uber and the Labor Market: Uber Drivers’ Compensation, Wages, and the Scale of Uber and the Gig Economy*, THE ECONOMIC POLICY INSTITUTE, May 15, 2019, p. 13 <https://files.epi.org/pdf/145552.pdf>.

⁶⁴ NELP analysis of March 2022 Current Population Survey Annual Social and Economic Supplement microdata. For underlying data, see *CPS Annual Social and Economic Supplement*, U.S. Census Bureau, <https://data.census.gov/mdat/#/search?ds=CPSASEC2022>.

⁶⁵ See U.S. Bureau of Lab. Statistics, *Electronically Mediated Work: New Questions in the Contingent Worker Supplement*, Monthly Labor Review, Sept. 2018, <https://www.bls.gov/opub/mlr/2018/article/electronically-mediated-work-new-questions-in-the-contingent-worker-supplement.htm>, (noting over-representation of Black and Latinx workers).

⁶⁶ See, e.g., Veena Dubal, *The New Racial Wage Code*, 15 HARV. L. & POL. REV. 511, 2022, (arguing that gig-worker carve outs are made possible by and reproduce racial subjugation).

employers and businesses at a competitive disadvantage.”⁶⁷ Businesses that misclassify their employees pocket between 20 to 40 percent of payroll costs they would otherwise incur for unemployment insurance, workers compensation premiums, the employer share of social security, and health insurance premiums.⁶⁸ They pressure their competition to shed labor costs, creating a “race to the bottom” where firms try to remain competitive by following suit.⁶⁹ A 2010 study estimated that misclassifying employers shift \$831.4 million in unemployment insurance taxes and \$2.54 billion in workers’ compensation premiums to law-abiding businesses annually.⁷⁰ Over time, fewer honest businesses can compete.⁷¹

Government funds also pay an enormous price when employees are misclassified as independent contractors. Conservative estimates suggest that the federal and state governments lose billions of dollars per year in unreported payroll taxes and unemployment insurance contributions.⁷² A 2009 report by the Government Accountability Office estimates that independent contractor misclassification cost federal revenues \$2.72 billion in 2006.⁷³ Additionally, the Treasury Inspector General for Tax Administration estimates that misclassification contributed to a \$54 billion underreporting of employment tax and losses of \$15 billion in unpaid FICA taxes and UI taxes.⁷⁴ State-level task forces, commissions, and research teams have also used agency audits along with unemployment insurance and workers’ compensation data to document the huge impact of independent contractor misclassification. These state reports suggest that at least 10 to 30 percent of employers misclassify employees as independent contractors.⁷⁵ In just one recent example, Pennsylvania’s Joint Task Force estimated that the state lost up to \$124.5 million in general revenues due to misclassification, with nearly 400,000 misclassified employees deprived of workplace protections in that state alone.⁷⁶

⁶⁷ Treasury Inspector General for Tax Administration, *Additional Actions Are Needed to Make the Worker Misclassification Initiative with the Department of Labor a Success* at 1 (2018-IC-R002: Feb. 20, 2018), <https://www.tigta.gov/sites/default/files/reports/2022-02/2018IER002fr.pdf>.

⁶⁸ Françoise Carré, *(In)Dependent Contractor*, THE ECONOMIC POLICY INSTITUTE at 5, Jun. 8, 2015, <https://files.epi.org/pdf/87595.pdf>.

⁶⁹ See David Weil, *THE FISSURED WORKPLACE: WHY WORK BECAME SO BAD FOR SO MANY AND WHAT CAN BE DONE TO IMPROVE IT*, p. 139-41, 2017.

⁷⁰ See Douglas McCarron, *Worker Misclassification in the Construction Industry*, 57 BNA Construction Labor Report 114, April 7, 2011. See also Michael P. Kelsay, *Cost Shifting of Unemployment Insurance Premiums and Workers’ Compensation Premiums*, Dep’t of Econ., Univ. of Mo., Kan. City 5-6, Sept. 12, 2010.

⁷¹ See Weil, *supra* n. 69.

⁷² *Independent Contractor Misclassification Imposes Huge Costs on Workers and Federal and State Treasuries*, NAT’L EMP. L. PROJECT at 2-3 (Oct. 2020), <https://s27147.pcdn.co/wp-content/uploads/Independent-Contractor-Misclassification-Imposes-Huge-Costs-Workers-Federal-State-Treasuries-Update-October-2020.pdf>. See also Carré, *supra* n. 68, at 2.

⁷³ See U.S. Government Accountability Office, *Employee Misclassification: Improved Coordination, Outreach, and Targeting Could Better Ensure Detection and Prevention*, Aug. 2009, <http://www.gao.gov/new.items/d09717.pdf> (noting \$1.6 billion lost in 1984 dollars).

⁷⁴ Treasury Inspector General for Tax Administration, *While Actions Have Been Taken to Address Worker Misclassification, Agency-Wide Employment Tax Program and Better Data Are Needed*, Feb. 4, 2009) (on file with authors).

⁷⁵ Rebecca Smith, *Public Task Forces Take on Employee Misclassification: Best Practices*, NAT’L EMP. L. PROJECT at 3, Aug. 2020, <https://s27147.pcdn.co/wp-content/uploads/Policy-Brief-Public-Task-Forces-Take-on-Employee-Misclassification-Updated-August-2020.pdf>.

⁷⁶ *Joint Task Force on Misclassification of Employees Annual Report*, PENNSYLVANIA DEP’T. OF LABOR & INDUS., Mar. 1, 2022, <https://www.dli.pa.gov/Individuals/Labor-Management-Relations/llc/Documents/Act%2085%20Annual%20Report%202022.pdf>.

Considering the scope and impact of independent contractor misclassification, particularly its impact on workers of color, the FTC is correct to include independent contractors in the Proposed Rule. Without broad coverage, the ban will contain loopholes that too many companies will seek to exploit. A rule that incentivizes an end-run around its mandates will not only exacerbate the problem of independent contractor misclassification but render any ban on noncompetes ineffective.

5. The final rule can be improved with more fleshing out of the “de facto noncompete” section and improving the training repayment agreements section with a more focused analysis and explicit language.

Section 910.1(b)(2) of the NPRM would also ban the functional equivalents of noncompete clauses, whether drafted for purposes of evasion or not.⁷⁷ The NPRM rightly looks at the functional equivalents of noncompetes and how they work and identifies a real threat to the utility and effectiveness of a noncompete rule. Many employers will indeed pivot to using de facto noncompete clauses such as training repayment provisions, liquidated damages provisions, and non-solicitation provisions in lieu of noncompetes if noncompetes are no longer lawful.

The FTC proposes to look at the actual language of these non-solicits and training repayment agreements to determine whether they can be lawfully applied under the Proposed Rule. (NPRM at 109.) The FTC will ban non-disclosure agreements (NDAs) that contain terms that bar a former employee from using any confidential information related to the employee’s industry because these NDAs are so broad in their potential interpretation of “any confidential information” as to prevent the worker from continuing to work in the same industry. The FTC would consider these NDAs to be overbroad for purposes of the noncompete rule. Similarly, the FTC would ban liquidated damages provisions that were “prohibitive” in the “magnitudes of liquidated damages they specify” and training repayment agreements that required payment for trainings that were not “reasonably related to the costs the employer incurred for training the worker.”⁷⁸

While these principles are sound and would make a serious dent in the usage of these de facto agreements, this section of the Proposed Rule is too vague, which would make enforcement challenging. Getting workers to come forward about violations requires them to have a clear understanding of the rule. Also, the way the language is written will lead to litigation of how to define a de facto noncompete that will weaken the rule over time. In the noncompete context, employers use the chilling effect of the agreements themselves and the threat of litigation to ensure compliance. Because of this, many of these agreements are never seen in a courtroom. Clearer language with bright-line parameters that are more easily recognized by workers and less subject to interpretation, would have a greater impact.

Having an agency such as the FTC ready to investigate these instances may help mitigate some of the effect, but not completely. The Proposed Rule should be more explicit. For example, Section 910.1(b)(2)(i) could be edited to state “a non-disclosure agreement that [effectively bans a] worker from working in the same field after the conclusion of a worker’s employment with the employer” is prohibited. For the rule to have teeth, it is critical that the language plainly describes the circumstances that apply to workers.

⁷⁷ Non-Compete Clause Rule, 16 C.F.R. § 910.1(b)(2), (2023), <https://www.federalregister.gov/documents/2023/01/19/2023-00414/non-compete-clause-rule>.

⁷⁸ Non-Compete Clause Rule, 16 C.F.R. § 910.1(b)(2), (2023), <https://www.federalregister.gov/documents/2023/01/19/2023-00414/non-compete-clause-rule>.

Similarly, we support banning the use of training repayment provisions entirely. Legal advocacy organizations, such as Open Markets and Towards Justice, have noted the increased usage of training repayment agreements (TRAPS) and liquidated damages clauses hamper workers and impair movement to a new job.⁷⁹ If the FTC determines to only limit training repayment agreements, rather than banning them, the training repayment terms could adopt an easily enforceable, bright line rule that bars training repayment agreements for workers in underpaid industries. If a ban of all training repayment provisions is not adopted, we suggest the next best option is to add a new section 910.1(b)(2)(iii) prescribing that TRAPS are banned for all workers making less than \$75,000 per year. Improving the clarity of these sections to make them more accessible to workers will support enforcement.

In addition, the FTC seeks comment about broadening the term to “workplace policy” as opposed to “contractual term.” This change would ensure the Proposed Rule’s ban would encompass noncompetes, nondisclosures, and other documents placed into workplace handbooks, which are not explicitly signed and agreed to by workers. As discussed above, the idea of a negotiated agreement on terms as it relates to these contracts is a misnomer and a legal fiction as it relates to the vast majority of workers. NELP agrees that expanding the noncompete clause definition to include all workplace policies of this nature makes the most sense and would most appropriately accomplish the goals of the Proposed Rule.

Conclusion

NELP supports the Proposed Rule because it will ensure that noncompete 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. Noncompetes also disproportionately impact women and people of color and banning noncompetes will reduce the effects of racism and gender discrimination in the workforce. In a country still amid the economic recovery from COVID-19, this Proposed Rule can be part of the just recovery that workers deserve.

For these reasons, we urge the FTC to finalize the rule as a total ban on noncompetes except in the narrow exceptions in the Proposed Rule, with the suggested changes to the de facto noncompete section and the training repayment sections.

Sincerely,

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⁷⁹ Sandeep Vaheesan, *Beyond Noncompetes, employers use these tactics to stop workers from leaving*, WASHINGTON POST, April 14, 2023, <https://www.washingtonpost.com/opinions/2023/04/13/noncompete-agreements-worker-restrictions-employers/>; Towards Justice, *Ground Breaking Lawsuit against PetSmart alleging illegal Training Repayment Agreement*, Towards Justice Press Release, July 28, 2022, <https://towardsjustice.org/2022/07/28/press-release-groundbreaking-lawsuit-against-petsmart-alleging-illegal-training-repayment-agreement/>