

July 14, 2021

Re: B24-256, Non-Compete Conflict of Interest Clarification

Dear Chairperson Silverman and Members of the Committee,

Thank you for the opportunity to testify in today’s hearing. I am the legal director at the Open Markets Institute (OMI), an antimonopoly research and advocacy organization based here in the District of Columbia. OMI supports labor market rules that encourage fair competition among employers for workers’ services and protect the right of all workers to form unions and engage in other forms of concerted action. In March 2019, OMI, the AFL-CIO, SEIU, and more than sixty other labor and public interest groups and scholars petitioned the Federal Trade Commission to ban non-compete clauses for all workers.¹ Last week, in his Executive Order on Promoting Competition in the American Economy, President Biden called for FTC regulatory action against non-compete clauses.²

In my testimony, I will not recite the harms of non-compete clauses to workers and the public. These harms, which are especially severe for members of marginalized groups,³ are familiar to members of the Committee, as indicated in its report published last November. Instead, I will focus on two specific issues: workers’ general inability to bargain over non-compete clauses and the specious employer justification for these contracts.

Non-compete clauses are classic contracts of adhesion presented to workers by employers on a take-it-or-leave-it basis. Only a small fraction of workers can, or believe they can, resist or try to negotiate these contractual provisions. A leading study on the practice reported that only about one in ten workers attempted to negotiate over a non-compete.⁴ This appears true of highly paid workers too. One survey of automatic speech recognition professionals—the tech workers who develop and improve apps like Siri—found that fewer than one in six tried to bargain with their employer over a non-compete clause.⁵

Workers are at a bargaining disadvantage relative to their employers for several reasons. In general, workers need wages and salaries to subsist and do not have significant non-labor

¹ Press Release, Open Markets Institute, Open Markets, AFL-CIO, SEIU, and Over 60 Signatories Demand the FTC Ban Worker Non-Compete Clauses (Mar. 20, 2019), <https://www.openmarketsinstitute.org/publications/open-markets-afl-cio-seiu-60-signatories-demand-ftc-ban-worker-non-compete-clauses>.

² Exec. Order on Promoting Competition in the American Economy (July 9, 2021), <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/07/09/executive-order-on-promoting-competition-in-the-american-economy/>.

³ Michael Lipsitz & Evan Starr, *Low-Wage Workers and the Enforceability of Noncompete Agreements*, MGMT. SCI. (forthcoming).

⁴ Evan P. Starr, J.J. Prescott & Norman D. Bishara, *Noncompete Agreements in the U.S. Labor Force*, 64 J. L. & ECON. 53, 71-72 (2021).

⁵ Matt Marx, *The Firms Strikes Back: Non-compete Agreements and the Mobility of Technical Professionals*, 76 AM. SOC. REV. 695, 706 (2011).

income.⁶ In addition to paying for housing, food, and other essentials, millions of workers have substantial amounts of debt to service every month, including credit card balances, car loans, and student loans from undergraduate and graduate study.⁷ Many workers believe that questioning or objecting to a non-compete clause could lead to the revocation of a job offer or termination.⁸ Millions of workers across the country also have only a few prospective employers due to highly concentrated labor markets.⁹ For example, hospital markets in many areas, including in the District, are dominated by a single or a few large chains¹⁰—concentration that further disempowers doctors, nurses, and other health care professionals relative to their employers.

Whereas the harms from non-competes are real and well documented, the conventional justification for these contracts does not withstand scrutiny. Employers and their representatives assert that non-competes are necessary for protecting trade secrets, customer lists, and other valuable information. According to this theory, restricting worker departure is necessary to prevent the appropriation of knowhow by rivals or workers who want to start competing businesses. To the extent employers do need to safeguard proprietary information, they have several less restrictive alternatives for preventing unauthorized disclosures. They can use copyright and trade secret law and targeted non-solicitation agreements to ensure that their information is protected.

If employers believe that retaining workers is the only way to protect their business information, they once again have other methods. To ensure a loyal workforce, employers can offer regular raises and promotions and provide fair treatment on the job,¹¹ as well as bonuses tied to length of tenure. For high-level workers with regular access to sensitive business information, employers can also opt out of the default rule of at-will employment through fixed-term employment contracts that commit both parties (employer and employee) to the relationship for a period.¹² Such contracts characterize professional sports in the United States today.

In contrast to these methods of protecting proprietary information, non-competes are, in the words of law professor Viva Moffat, “the wrong tool for the job.”¹³ They are overbroad. Non-competes restrain worker mobility with the purported aim of protecting business information even if it is dated or trivial. For instance, a worker who has been with an employer for ten years

⁶ BD. OF GOV. OF THE FED. RES. SYS., REPORT ON THE ECONOMIC WELL-BEING OF U.S. HOUSEHOLDS IN 2018 12, 21 (2019).

⁷ E.g., Letter from Allegheny Cnty. Med. Soc’y to Fed. Trade Comm’n (Feb. 10, 2020), https://downloads.regulations.gov/FTC-2019-0093-0260/attachment_1.pdf.

⁸ Starr, Prescott & Bishara, *supra* note 4, at 72.

⁹ José Azar, Ioana Marinescu & Marshall Steinbaum, *Labor Market Concentration*, 55 J. HUMAN RES. 1218 (2020).

¹⁰ Brent D. Fulton, *Health Care Market Concentration: Trends in the United States: Evidence and Policy Responses*, 36 HEALTH AFF. 1530 (2017).

¹¹ Janet Yellen, *Efficiency Wage Models of Unemployment*, in ESSENTIAL READINGS IN ECONOMICS 280 (Saul Estrin & Alan Marin eds., 1995)

¹² *Nickens v. Labor Agency of Metropolitan Washington*, 600 A.2d 813, 816 (D.C. 1991).

¹³ Viva R. Moffat, *The Wrong Tool for the Job: The IP Problem with Noncompetition Agreements*, 52 WM. & MARY L. REV. 873 (2010).



and generated substantial revenues and profits for the company can be locked into place by a non-compete because the employer wants to guard job training materials provided to the worker years earlier. At the same time, non-competes are also too narrow. For example, they do not prevent the unauthorized, covert disclosure of trade secrets to competitors. They are poorly targeted for their ostensible purpose.¹⁴

Given these considerations, the Council of the District of Columbia should not amend the current law on non-compete clauses to carve out additional workers. If the Council does make amendments to the law, it should eliminate existing exemptions in the statute and extend its protection to all workers in the District.

Sincerely,

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¹⁴ Sandeep Vaheesan, *The Bogus Justification for Worker Non-Compete Clauses*, ONLABOR, Apr. 24, 2019, <https://onlabor.org/the-bogus-justification-for-worker-non-compete-clauses/>.