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March 20, 2023

SUBJECT: Comments on the Federal Trade Commission's Notice of Proposed Rulemaking on Non-Compete Clauses

Dear Sir/Madam:

The Antitrust Law Section of the American Bar Association respectfully proposes to submit the attached comments on the Federal Trade Commission's notice of proposed rulemaking on non-compete clauses.

The views expressed herein are being presented on behalf of the Section of Antitrust Law. They have not been reviewed or approved by the House of Delegates or the Board of Governors of the American Bar Association and, accordingly, should not be construed as representing the position of the Association.

If you have any questions after reviewing this report, we would be happy to provide further comments.

Sincerely,

Thomas F. Zych
Chair, Antitrust Law Section

COMMENTS OF THE AMERICAN BAR ASSOCIATION ANTITRUST LAW SECTION ON THE FEDERAL TRADE COMMISSION'S NOTICE OF PROPOSED RULEMAKING ON NON-COMPETE CLAUSES

March 2, 2023

The views expressed herein are being presented on behalf of the Section of Antitrust Law. They have not been reviewed or approved by the House of Delegates or the Board of Governors of the American Bar Association and, accordingly, should not be construed as representing the position of the Association.

I. INTRODUCTION[1]

The Antitrust Section ("Section") of the American Bar Association believes that non-compete agreements for low-wage workers are generally not justified or beneficial.[2] As applied to low-wage workers, non-compete clauses typically lack a compelling justification or redeeming value.[3]

Low-wage workers (i) are particularly vulnerable to having non-competes imposed on them without (a) compensation (and are frequently subject to such provisions) or (b) an understanding of the future effects of non-competes on their employment; (ii) are often subject to contracts of adhesion in which non-competes are inserted (i.e., form or boilerplate contracts with seemingly non-negotiable terms and conditions); and (iii) are less likely to have access to, or the resources to use, legal assistance to vindicate their rights as to non-competes, under either a common law or statutory approach.

Turning to the effects of such provisions, non-competes often do not benefit the individual low-wage workers who are subject to them. Specifically, low-wage workers may be harmed by the restrictions on their ability to accept the best available jobs and are often not compensated for this harm. In addition, non-competes covering low-wage workers can inhibit the functioning of the labor market more broadly, as well as the product markets that rely upon those labor markets.

Although the economic literature on this subject is limited, it does support the observation that non-competes when applied to low-wage workers are generally associated with lower wages

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[1] These comments focus on the treatment of non-compete agreements for low-wage workers, a subset of non-competes captured by the Proposed Rule. *See* Non-Compete Clause Rule, 88 Fed. Reg. 3482 (proposed Jan. 5, 2023), to be codified at 16 C.F.R. § 910.1(b)(1). These comments express no position on the Federal Trade Commission's ("Commission") rulemaking authority or on other aspects of the Proposed Rule, including the question of whether non-competes are harmful for high-wage workers in general or for any category of high-wage workers in particular. Nor do these comments express any position on whether the Commission's Proposed Rule should preempt state laws that adopt stricter bans on non-competes than the Proposed Rule..

[2] *See generally* Comments of the American Bar Ass'n Antitrust Law Section on Pet. for Federal Trade Comm'n Rulemaking to Prohibit Worker Non-Compete Clauses (Sept. 15, 2021) ("If the Commission undertakes a rulemaking on non-compete clauses in employment contracts, it should consider whether it is feasible to define a class of employment contracts in which non-compete clauses almost always restrict competition and lack any redeeming value. This class might be defined by criteria such as the absence of bargaining over the inclusion or content of the noncompete clause, the absence of significant investment in human capital, and compensation below some specified level. These criteria appear to characterize the vast majority of low-wage, low-skill jobs.") (internal citations omitted).

[3] *See id.* at 5-6.

and may have other negative impacts. The economic literature also does not support the notion that justifications commonly asserted in favor of non-competes are likely applicable to low-wage workers, or that less restrictive alternatives would not achieve those benefits.

II. HISTORICAL EFFORTS TO LIMIT THE USE OF NON-COMPETES

Non-compete clauses in employment contracts have been primarily a subject of contract law, and thus a matter mainly for the states.[4] Currently, thirty-three states entrust the courts to determine whether a non-compete is enforceable, relying on a common law approach rather than a statutory one.[5] Although each state retains autonomy to set its own criteria,[6] most courts require that a non-compete clause be "reasonable."[7] The threshold of reasonableness is not a bright-line rule. Courts have used a multi-factor test that weighs (i) the geographic scope and temporal duration of the clause; (ii) the employer's legitimate economic interest in enforcing the provision; and (iii) a balancing of the equities.[8] Some states also consider underlying policy issues.[9] If a non-compete clause is deemed unenforceable, courts may use the "equitable reform doctrine" or "blue pencil rule" to modify the clause to make it "reasonable" rather than completely striking it.[10] However, even courts that have traditionally relied on reformation or the blue pencil rule void non-compete provisions in their entirety rather than modifying them to comport with common law principles of reasonableness.[11]

Recently, state legislatures have enacted statutes that limit or ban the use of non-competes. Three states—California, North Dakota and Oklahoma—have banned almost all non-competes, except when they are between the buyer and seller of a business.[12] Currently, twelve states and the

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[4] *See* Public Comments of 20 State Attorneys General in Response to Federal Trade Commission's January 9, 2020 Workshop on Non-Compete Clauses in the Workplace 14 (Mar. 12, 2020) (covenants not to compete "are creatures of state law"), https://www.regulations.gov/comment/FTC-2019-0093-0322.

[5] *See* Kenneth Glenn Dau-Schmidt & Philip J. Jones, *The American Experience with Employee Noncompete Clauses: Constraints on Employees Flourish and Do Real Damage in the Land of Economic Liberty*, 42 COMP. LAB L. & POL'Y J 585, 589-90 (2022).

[6] *See* Public Comments of 20 State Attorneys General in Response to Federal Trade Commission's January 9, 2020 Workshop on Non-Compete Clauses in the Workplace*, supra* note 4, at 1 ("[Covenants not to compete [CNCs])] have a long history in the United States. They have been regulated to varying degrees by the states, who take different approaches to legislating and enforcing CNCs. California, for example, has long banned the enforcement of CNCs, while most other states have not.").

[7] *See* Dau-Schmidt & Jones, *supra* note 5, at 596.

[8] *See Kodiak Bldg. Partners, LLC v. Adams*, 2022 WL 5240507, at *9 (Del. Ch. Oct. 6, 2022).

[9] N.Y. Att. Gen., Letitia James, Non-Compete Agreements in New York State, Frequently Asked Questions, (explaining that a non-compete is "only allowed and enforceable to the extent it (1) is necessary to protect the employer's legitimate interests; (2) does not impose an undue hardship on the employee; (3) does not harm the public; and (4) is reasonable in time period and geographic scope"), https://ag.ny.gov/sites/default/files/non-competes.pdf.

[10] *See Compass Bank v. Hartley*, 430 F. Supp. 2d 973, 980 (D. Ariz. 2006); Russell Beck, Beck Reed Riden LLP, Employee Noncompetes: A State-by-State Survey (Aug. 17, 2022), https://beckreedriden.com/wp-content/uploads/2022/08/Noncompetes-50-State-Survey-Chart-20220817.pdf; *see also* FTC Non-Compete Clause Rule, 88 Fed. Reg. 3482, at 3495 (Jan. 5, 2023), to be codified at 16 C.F.R. pt. 910(b)(1).

[11] *See Ainslie v. Cantor Fitzgerald, L.P.*, 2023 WL 106924 (Del. Ch. Jan. 4, 2023); *Flatiron Health, Inc. v. Carson*, 2020 WL 1643396 (S.D.N.Y. Mar. 20, 2020).

[12] CAL. BUS. & PROF. CODE § 16600; N.D.C.C. § 9-08-06; OKLA. STAT. tit. 15, § 15-219A.

District of Columbia have laws prohibiting covenants not to compete for certain wage earners.[13] Other states may follow suit, including New Jersey, where a bill is pending that would impose broad restrictions and conditions on restrictive covenants.[14] In contrast to the Proposed Rule, however, none of the current or proposed legislation applies retroactively to contracts that were executed before the effective date of the legislation.

III. NON-COMPETE PROVISIONS AS APPLICABLE TO LOW-WAGE WORKERS ARE GENERALLY NOT BENEFICIAL OR JUSTIFIED

First, low-wage workers are particularly vulnerable to having non-competes imposed on them, without compensation, because low-wage workers (i) tend to be less knowledgeable about their legal rights as to non-competes or the ramifications of non-competes on their future employment opportunities; (ii) are often subject to form or boilerplate contracts with seemingly non-negotiable terms and conditions, in which non-competes are inserted; and (iii) are among the least likely to be able to resort to litigation to vindicate their rights as to non-competes.

Second, non-competes are unlikely to have offsetting benefits to the individual low-wage workers who are subject to them. Specifically, low-wage workers are often negatively impacted by the restriction on their ability to accept the best available job and are often not compensated for this harm (*i.e.*, they do not receive something of commensurate value, that they would not otherwise have received, in exchange for accepting it).[15] Among the reasons why non-competes

[13] *See* COLO. REV. STAT. ANN. §8-2-113(2)(a)–(b) (2022) (non-compete clauses are void except where they apply to a "highly compensated worker," currently defined as a worker earning at least $101,250 annually, *see also* COLO. CODE REGS. §1103-14-1.2); District of Columbia, D.C. CODE §32-581.02(a)(1) (2022), *as amended by* D.C. Law 24-175 § 101(13)(A)(i)-(ii) (where the employee's compensation is less than $150,000, or less than $250,000 if the employee is a medical specialist, employers may not require or request that the employee sign an agreement or comply with a workplace policy that includes a non-compete clause); Illinois, 820 ILL. COMP. STAT. 90/10(a) (2017) (no employer shall enter into a non-compete clause unless the worker's actual or expected earnings exceed $75,000/year); Maine, ME. REV. STAT. ANN. tit. 26, § 599-A (3) (2019) (an employer may not require or permit an employee earning wages at or below 400% of the federal poverty level to enter into a non-compete clause with the employer); Maryland, MD. CODE ANN., LAB. & EMPL. §3-716(a)(1)(i) (2019) (non-compete clauses are void where an employee earns equal to or less than $15 per hour or $31,200 per year); Massachusetts, MASS. GEN. LAWS ANN. Ch. 149, § 24L(c) (2021) (non-compete clauses shall not be enforceable against workers classified as non-exempt under the Fair Labor Standards Act ("FLSA")); Nevada, NEV. REV. STAT. § 613.195(3) (2021) (non-compete clauses may not apply to hourly workers); New Hampshire, N.H. REV. STAT. ANN. § 275:70-a(II) (2019) (employers shall not require a worker who earns an hourly rate less than or equal to 200% of the federal minimum wage to enter into a non-compete clause, and non-compete clauses with such workers are void and unenforceable); Oregon, OR. REV. STAT. § 653.295(1)(e) (2022) (non-compete clauses are void and unenforceable except where the worker's annualized gross salary and commissions at the time of the worker's termination exceed $100,533); Rhode Island, R.I. GEN LAWS § 28-59-3(a)(1) (2020) (non-compete clauses shall not be enforceable against workers classified as nonexempt under the FLSA); Virginia, VA. CODE ANN. § 40.1-28.7:8(B) (2020) (no employer shall enter into, enforce, or threaten to enforce a non-compete clause with an employee whose average weekly earnings are less than the Commonwealth's average weekly wage); Washington, WASH. REV. CODE ANN. §§ 49.62.020(1)(b), 49.62.030(1) (2020) (non-compete clause is void and unenforceable unless worker's annualized earnings exceed $100,000 for employees and $250,000 for independent contractors, to be adjusted for inflation).

[14] *See* N.J.S.A, A3715/SB 1410, Limits on Certain Provisions in Restrictive Covenants and Limits on Enforceability of Restrictive Covenants, 220th N.J. Legislature (2022).

[15] *See, e.g.,* David J. Balan, *Labor Noncompete Agreements: Tool for Economic Efficiency or Means to Extract Value from Workers?*, THE ANTITRUST BULLETIN (2021), at 599-601 (discussing the various ways in which non-competes

can often be imposed on low-wage workers without compensation are that: (i) low-wage workers are vulnerable to the imposition of non-competes without an understanding of their rights, (ii) low-wage workers often lack the ability to bargain for more compensation in exchange for agreeing to non-competes, and (iii) low-wage workers lack the ability, as a practical matter, to litigate in the event that a non-compete is asserted against them.

In aggregate, non-competes for low-wage workers can inhibit the functioning of the labor market more broadly, as well as the product markets that rely upon those labor markets.[16] Labor mobility is important to competitive labor markets, competitive wages, and labor productivity. And competitive markets for inputs like labor are as important to consumer welfare as are competitive markets for final products or the distribution of those products.[17]

Although the economic literature on the subject is limited, it does support the observations that: (i) non-competes are generally associated with lower wages for low-wage workers; (ii) the justifications or benefits asserted to be associated with non-competes are generally absent for those workers; and (iii) to the extent such justifications exist, they can be achieved by less restrictive alternatives.

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are harmful to workers); *infra* text at 8-10 (discussing the economic studies showing a depressive effect on the wages of low-wage workers due to non-competes).

[16] This was the theory advanced by the Commission in its recent case in the glass containers manufacturing industry. Fed. Trade Comm'n, Analysis of Agreement Containing Consent Order to Aid Public Comment, *In the Matter of O-I Glass, Inc.*, File No. 211-0182, at 1, 5-6 (Jan. 4, 2023), https://www.ftc.gov/system/files/ftc_gov/pdf/2110182o-iglassardaghaapc.pdf; *see* Fed. Trade Comm'n, Stmt. of Chair Khan, joined by Comms. Rebecca Slaughter & Alvaro Bedoya, *In the Matter of Prudential Security, O-I Glass Inc., and Ardagh Group S.A*, at 2, File Nos., 2210026, 2110182 (Jan. 4, 2023), https://www.ftc.gov/system/files/ftc_gov/pdf/21100262110182prudentialardaghkhanslaughterbedoyastatements.pdf ("While I cannot disclose confidential information uncovered through this investigation, the non-competes used by Owens-Illinois and Ardagh had the potential to deprive aspiring entrants of access to a critical talent pool, thereby impeding entry into a relatively consolidated industry that has experienced tight supply and unmet customer demand. Moreover, when a small number of dominant players engage in the same restrictive practices, the negative effects can compound."); *but see id.* Dissenting Stmt. of Comm. Wilson, at 2-4, https://www.ftc.gov/system/files/ftc_gov/pdf/wilson-dissenting-statement-glass-container-cases.pdf (complaining of the lack of findings as to scope and temporal length of the non-competes or more generally as to their unreasonableness, and as to market-wide effects on labor, as to the ability of workers to switch occupations).

[17] *See, e.g.,* Fed. Trade Comm'n, Concurring Stmt. of Fed. Trade Comm. Rebecca Slaughter & Chair Lina Khan, *Regarding FTC & State of Rhode Island* v. *Lifespan Corp. & Care New England Health Sys.*, File No. 2110031, at 1-2 (Feb. 17, 2022), https://www.ftc.gov/system/files/ftc_gov/pdf/public_statement_of_commr_slaughter_chair_khan_re_lifespan-cne_redacted.pdf; *accord,* Fed. Trade Comm. Christine Wilson, An Update on FTC Merger Enforcement, Remarks at International Bar Association's 19th Annual International Mergers and Acquisitions Conference at 6 n.20 (June 15, 2022); *see also, e.g., Mandeville Islands Farms, Inc. v. Am. Crystal Sugar Co.*, 334 U.S. 219, 234-36, 238, 240-41 (1948); *Nat'l Collegiate Athl. Assoc. v. Alston*, 141 S. Ct. 2141, 2166-69 (2021) (conc. op. of Kavanaugh, J.); *cf. United States v. Anthem, Inc.,* 885 F.3d 345, 360-61 (D.C. Cir. 2017) (refusing to credit as a merger-specific efficiency the notion that the combined payor entity could reduce provider inputs, while preserving the advantages of the to-be-acquired payor's products, because of the risk of the quality and innovation of that payor's products degrading when faced with such price cuts); *id.* at 370-71 (conc. op.) (lower prices for consumers are not the sole focus of consumer welfare, rather "product variety, quality, innovation, and efficient market allocation—all increased through competition—are equally protected forms of consumer welfare").

A. Non-competes for low-wage workers are generally harmful to the individual workers who are subject to them.

First, low-wage workers often have no ability to bargain in advance as to the conditions of their employment. More specifically, low-wage workers can face employment contracts of adhesion or form contracts, in which non-competes are present but not identified or otherwise made known to them. Frequently, low-wage workers are presented with these one-sided contracts on the day they start work on a "take it or leave it" basis.[18] Low-wage workers are less likely to have access to information regarding the legality of such contracts under the laws of their states.[19] Moreover, in the event that a low-wage worker is terminated, or quits his or her employment, low-wage workers are less likely to be in a position to litigate the validity of that non-compete.

Indeed, the presence of non-competes in such contracts can be exacerbated by the use of form contracts, which can be available on the Internet and used by employers who may lack understanding about the effects of non-competes or whether non-competes would be appropriate for their businesses under state law. Finally, low-wage workers do not appear to be compensated for non-competes;[20] but even if the worker was promised additional compensation in exchange for accepting a non-compete, the non-compete itself eliminates the worker's most important means of ensuring that the promise is kept—namely, the threat to quit and work for a competitor.

The Section recognizes the importance of labor mobility to fair and free markets and addressing barriers to competition that hinder such mobility.[21] Labor mobility is important to well-functioning labor markets.[22] If workers are unhappy in their present jobs or wish to be paid more,

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[18] *See, e.g.,* David J. Balan, *supra* note 15, at 600; *see also* Evan Starr, J.J. Prescott & Norman Bishara, *Noncompete Agreements in the U.S. Labor Force*, 64 J.L. & ECON. 53, 69-72, 81 (2021); U.S. Dept. of the Treasury Office of Econ. Policy, Non-compete Contracts: Economic Effects and Policy Implications 4, 12-13 (Mar. 2016), https://bit.ly/3pAAi70.

[19] *See* Non-compete Contracts: Economic Effects and Policy Implications, *supra* note 18*,* at 13.

[20] *See, e.g.,* Starr, Prescott & Bishara, *supra* note 18, at 81; Fed. Trade Comm'n, Analysis of Agreement Containing Consent Order to Aid Public Comment, *In the Matter of Prudential Security, Inc., et al.*, *supra*, note 16 at 5-6 ("This power imbalance is further evidenced by the fact that the employees did not receive any money, job security, or other compensation in exchange for being subject to the Non-Compete Restrictions."). The Section is not aware of any studies of non-competes in which low-wage workers were found to have received such compensation; the admittedly limited economic evidence on adverse impacts of non-competes on wages and labor mobility for low-wage workers suggests otherwise.

[21] This position is reflected in the American Bar Association's Formal Opinion 489 (Dec. 4, 2019), which states that non-competes should not be allowed for attorneys. As the Commission further observes in the context of a matter involving non-competes involving low-wage security guards, "In well-functioning labor markets, workers compete to attract employers and employers compete to attract workers. For example, workers may attract potential employers by offering different skills and experience levels. Employers may attract potential employees by offering higher wages, better hours, a more convenient job location, more autonomy, more benefits, or a different set of job responsibilities. Because factors beyond price (wages) are important to both workers and employers in the job context, labor markets are 'matching markets' as opposed to 'commodity markets.'" Fed. Trade Comm'n, Analysis of Agreement Containing Consent Order to Aid Public Comment, *In the Matter of Prudential Security, Inc., et al.*, *supra* note 16, at 5-6 (citing David H. Autor, *Wiring the Labor Market*, 15 J. ECON. PERSPECTIVES 25-40 (2001); Enrico Moretti, *Local Labor Markets*, *in* 4b HANDBOOK OF LABOR ECONOMICS 1237-1313 (2011)).

[22] *See, e.g.,* Cynthia Estlund, *Between Rights and Contract: Arbitration Agreements and Non-Compete Covenants as a Hybrid Form of Employment Law*, 155 U. PA. L. REV. 379, 407-08 & nn.51, 83 (2006); Raven Molloy, Christopher Smith, Ricardo Trezzi & Abigail Wozniak, *Understanding Declining Fluidity in the U.S. Labor Market*, BROOKINGS

they can, in a competitive market, seek employment elsewhere. And the ability to seek employment elsewhere can be important to labor productivity for low-wage workers[23]—workers with more options may be happier and more productive than workers with fewer options.[24]

The Section further notes that there may be other harms from non-competes for low-wage workers, who, unable to move to another job, may suffer from harassment, threats to their safety, or other threats to their dignity. Such work environments may adversely impact labor productivity as well.[25]

PAPERS ON ECONOMIC ACTIVITIES, at 183-84 (Spring 2016), https://www.brookings.edu/wp-content/uploads/2016/03/molloytextspring16bpea.pdf.

[23] Raven Molloy, et al., *supra* note 22, at 183-84. "Labor productivity is a measure of economic performance that compares the amount of goods and services produced (output) with the number of labor hours used in producing those goods and services . . . Labor productivity growth is vitally important to present and future prospects for economic growth, because it represents the only path by which economic growth can rise above what would be possible by simply increasing labor hours (as, by definition, economic growth can only come from either hours growth or labor productivity growth). The economic gains brought about by labor productivity growth make it possible for an economy to achieve higher growth in labor income, profits and capital gains of businesses, and public sector revenue; these economic gains also hold the potential to lead to improved living standards for those participating in an economy, in the form of higher income, greater leisure time, or a mixture of both. In addition, as labor productivity rises, all of these factors may increase simultaneously, without gains in one coming at the cost of one of the other." U.S. Bureau of Labor Statistics, *The U.S. productivity slowdown: an economy-wide and industry analysis*, MONTHLY LABOR REVIEW, at 3 (Apr. 2021), https://www.bls.gov/opub/mlr/2021/article/the-us-productivity-slowdown-the-economy-wide-and-industry-level-analysis.htm.

[24] *See, e.g.,* Fed. Trade Comm'n, Analysis of Agreement Containing Consent Order to Aid Public Comment, *In the Matter of Prudential Security, Inc., et al.*, *supra* note 16, at 7 ("At the individual level, a Non-Compete Restriction forces a worker who wishes to leave a job into a difficult choice: stay in the current position despite being able to receive a better job elsewhere, take a position with a competitor at the risk of being found out and sued, or leave the industry entirely."); *id.* ("In this way, Non-Compete Restrictions tend to leave workers with fewer and lower-quality competing job options, thereby reducing workers' bargaining leverage with their current employers and resulting in lower wages, slower wage growth, and less favorable working conditions.") (cleaned up) (citing Jessica Jeffers, *The Impact of Restricting Labor Mobility on Corporate Investment and Entrepreneurship* 21-22 (Dec. 24, 2019), https://ssrn.com/abstract=3040393; Matthew S. Johnson, Kurt Lavetti & Michael Lipsitz, *The Labor Market Effects of Legal Restrictions on Worker Mobility* 2 (2020), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3455381; and David J. Balan, *Labor Practices Can be an Antitrust Problem Even When Labor Markets are Competitive*, CPI ANTITRUST CHRONICLE, at 8 (May 2020)). More generally, both a general economy-wide slow-down, and industry-specific slow-downs, in labor productivity in the U.S. have been reported. *See, e.g.,* U.S. Bureau of Labor Statistics, *The U.S. productivity slowdown: an economy-wide and industry analysis*, *supra* note 23, at 1, 9, 25-26. In turn, enhancing labor productivity in American industries specifically, and more generally in the American economy as a whole, is a desirable outcome.

[25] *See, e.g.,* FTC Forum Examining Proposed Rule to Ban Noncompete Clauses at 9 (Feb. 16, 2023) (testimony from caretaker of residential building about employer firing him, enforcing non-compete and forcing him out of his home until media reports prompted employer to rescind non-compete), /www.ftc.gov/system/files/ftc_gov/pdf/FTC-Forum-Examining-Proposed-Rule-to-Ban-Noncompete-Clauses-February-16-2023.pdf; Chris May, *U.S. FTC Rulemaking on Noncompetes draws jeers, cheers from workers and employers,* https://mlexmarketinsight.com/news/insight/us-ftc-rulemaking-on-noncompetes-draws-cheers-jeers-from-workers-employers (Feb. 14. 2023) ("'This is not about trade secrets. This is about holding people hostage,' said a sales representative who described being 'forced to work in a toxic environment.'"); *see also* NPRM Comment in Response to NPRM (FTC-2023-0007-5011) ("I worked for a toxic hair salon for 6 years with a non compete . . . . The owner uses this to bully people into staying by using the non compete as a scare tactic."), https://www.regulations.gov/comment/FTC-2023-0007-5011; *see also* Comment in Response to NPRM (FTC-2023-0007-3751) ("Non-[c]ompete clauses make it next to impossible to leave a gym that has a toxic work environment and management" and negatively impacts coaching services provided to clients, said a

B. The economic literature, though limited, mostly supports the view that non-competes for low-wage workers are common and generally harmful.

The Section recognizes the NPRM's significant effort to review the existing literature on the impact of non-compete agreements and to provide descriptions that appear to be representative of the existing research. Virtually all research cited indicates that non-compete clauses reduce labor mobility and job turnover. With a few exceptions, the research supports the Commission's conclusions that non-compete clauses for low-wage workers result in lower wages and earnings. It should be noted, though, that some research finds that non-compete clauses can have beneficial effects, namely with respect to increasing employee training and investment.[26] Moreover, relatively little of the empirical research systematically evaluates how non-competes affect low-wage workers, specifically.

However, balancing the empirical evidence of potentially beneficial and adverse effects from non-compete clauses, the available evidence suggests that non-competes for low-wage workers are not justified or beneficial. For low-wage workers, we have not seen evidence that lower wages associated with non-compete clauses are generally offset by substantial increases in training or investment.

Prevalence of Non-Compete Agreements

Non-competes are common, even in states that otherwise bar such non-competes.[27] One estimate is that "somewhere between 27.8% and 46.5% of private-sector workers are subject to non-competes."[28] Moreover, "[a]pplying this share to today's private-sector workforce of 129.3 million means that somewhere between 36 million and 60 million private-sector workers are subject to noncompete agreements."[29]

Non-competes can be pervasive at low-wage levels[30] and can involve employees with a high school (or less) education.[31] They have appeared in such low-wage occupations as sandwich

personal trainer who has worked in the fitness industry for ten years), https://www.regulations.gov/comment/FTC-2023-0007-3751.

[26] The NPRM has specifically requested more information on this impact, *see* Non-Compete Clause Rule, *supra* note 1, at 48.

[27] *Cf.* Starr, Prescott & Bishara, *supra* note 18, at 81 ("But the frequency of non-competes among low-wage employees without access to trade secrets and the lack of negotiation in the contracting process hint at more anticompetitive rationales for the use of non-competes by employers. We observe, for instance, that late-notice non-competes are not associated with any additional compensation or training but instead appear to be linked to lower job satisfaction. Heterogeneous associations by enforceability further challenge the traditional economic perspective. The ability to enforce non-competes should encourage more frequent non-competes use, more investment, and higher wages, but employers use non-competes virtually as often in states where such restrictions are clearly unenforceable.").

[28] Alexander Colvin & Heidi Shierholz, *Noncompete agreements*, ECONOMIC POLICY INSTITUTE at 1 (Dec. 10, 2019), https://files.epi.org/pdf/179414.pdf.

[29] *Id.*

[30] *Id.* at 8.

[31] *Id.* at 9.

makers, delivery drivers, janitors, manual laborers, and security guards.[32] Other studies similarly reflect the pervasiveness of non-competes for low-wage workers, including those with less education.[33] And non-compete clauses can often be found in contracts even in states like California that generally bar non-competes.[34]

Studies that assess effects on wages for low-wage workers

The NPRM cites several studies specific to low-wage workers. For example, one of the studies frequently cited, Starr and Lipsitz (2020), looks specifically at hourly and low-wage workers by comparing variation over time in policies allowing non-compete clauses. The authors of this study find that wages of hourly and low-wage workers rose 2-3% when non-compete clauses for that group were banned, and if all of the effect had been isolated to the workers who had been actually bound by such agreements, the increase in their wages would have been 14-21%, since only a subset of hourly workers were actually bound by non-competes.[35] In a separate study cited in the NRPM, a switch from no enforcement of non-competes to enforcement is associated with a 4% decrease in wages for workers earning an hourly wage.[36]

Another study cited in the NPRM evaluates non-competes for low-wage workers in terms of costs and benefits. Using a survey related to low-wage workers in the salon industry, Johnson and Lipsitz (2022) find that "employers leverage weak labor markets to use [non-competes] to extract additional utility from workers, even if workers incur a cost greater than the benefit that accrues to the employer. At the same time, even within a narrowly defined industry, we find [non-

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[32] *See, e.g.,* Jane Flanagan, American Const. Society, "No Exit: Understanding Employee Non-Competes and Identifying Best Practices to Limit Their Overuse," at 2 (Nov. 2019), https://www.acslaw.org/issue_brief/briefs-landing/no-exit-understanding-employee-non-competes-and-identifying-best-practices-to-limit-their-overuse/.

[33] *See, e.g.,* Starr, Prescott & Bishara, *Noncompete Agreements in the U.S. Labor Force*, *supra* note 18, at 60 ("Overall, our weighted estimates indicate that 38.1% of U.S. labor force participants have agreed to a noncompete at some point in their lives, and that 18.1%, or roughly 28 million individuals, currently work under one.") (cleaned up); *id.* at 63 ("Noncompetes are still prevalent among less-educated and lower-earning employees. For example, among those without a bachelor's degree, 34.7% of our respondents report having entered into a noncompete at some point in their lives, while 14.3% report currently working under one. Similarly, of those earning less than $40,000 per year, 13.3% are currently subject to a noncompete, with 33% reporting that they have acquiesced to one at some point.") (cleaned up); *id.* at 64 ("Importantly, these figures and Table 4 also demonstrate that a disproportionate share of the 'maybe' category are low-earning with lower levels of education.").

[34] *Id*. at 68 ("Finally, we find very little difference in (unconditional) noncompete incidence between states that will and will not enforce these provisions (Figure 8). This is true even among single-location employers, where we find that the unconditional use of non-competes in nonenforcing states is only slightly lower than in states that enforce noncompete agreements most zealously (14% vs. 16.5%). By comparison, multivariate results in Table 6 indicate that, comparing two observationally equivalent employees, non-competes appear to be somewhat more common (4 to 5 percentage points) in the most vigorous enforcing states relative to nonenforcing states."); Colvin & Shierholz, *Noncompete agreements,* ECONOMIC POLICY INSTITUTE at 2, 6 (Dec. 10, 2019), https://files.epi.org/pdf/179414.pdf; Non-compete Contracts: Economic Effects and Policy Implications, *supra* note 18*,* at 4; *see also, e.g.,* Flanagan, *supra* note 32, at 7 ("This very real effect on behavior makes employers more likely to 'overreach under the radar' based on the logical assumption that doing so 'might have the benefit of keeping employees from leaving and moving to competitors [even] when they are [legally] entitled to do so.'") (alterations in original)).

[35] Michael Lipsitz & Evan Starr, *Low-Wage Workers and the Enforceability of Noncompete Agreements*, 68 MGMT. SCI. 143, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3452240 (2020).

[36] Evan Starr, *Consider This: Training, Wages, and the Enforceability of Non-Compete Clauses*, 72 I.L.R. REV. 783, 799 (2019).

competes] are actually beneficial contracts for a subset of firms (*i.e.*, for some firms, the benefits of [non-competes] exceed the cost to employees)."[37] In other words, some firms may benefit financially more than their workers lose with non-competes, but that does not appear to be the case across the board.

Studies that assess effects on labor mobility for low-wage workers

There are several studies that measure non-compete clauses' effects on job mobility for low-income workers. The NPRM cites a study that finds an Oregon ban on non-competes is associated with a 12%-18% increase in monthly job mobility for hourly workers.[38] Similarly, in a study, which was not cited by the NPRM, the effect of Austria's ban on non-compete agreements for low-wage workers was associated with a 2% increase in workers' annual job-to-job transition rate.[39]

Studies that assess effects on entrepreneurial activity for low-wage workers

The existence of within-industry mobility friction in the form of non-compete agreements prohibits individuals from leaving firms to establish new businesses to compete in the same industry.[40] Investigating effects on levels of entrepreneurship, a study, which was not cited in the NPRM, by Can and Fossen (2022) analyzed decreases in the enforceability of non-competes in Massachusetts and Utah and concluded that the policy change increased entrepreneurial activity among low-wage workers.[41]

Studies that assess the effects on investment in training for low-wage workers

Similarly, there are few studies that look at the effect of non-compete agreements on employer investment in training specifically for low-wage workers. For example, Johnson and Lipsitz (2022) examine investments in training for low-wage workers in the hair salon industry. They find that firms that use non-compete agreements increase training rates by 11%,[42] although the authors warn that these results do not necessarily indicate a causal relationship.[43] There is no estimate of whether increased training benefits workers or firms more than the general finding of

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[37] Matthew S. Johnson & Michael Lipsitz, *Why Are Low-Wage Workers Signing Noncompete Agreements?* 57 J. HUM. RESOURCES 689, 692 (2022).

[38] Michael Lipsitz & Evan Starr, *Low-Wage Workers and the Enforceability of Noncompete Agreements*, 68 MGMT. SCI. 143, 144 (2022) (analyzing data from the Starr, Prescott & Bishara survey, *supra* note 18).

[39] Samuel G. Young, *Noncompete clauses, job mobility, and job quality: Evidence from a low-earning noncompete ban in Austria,* Job Mobility, and Job Quality: Evidence from a Low-Earning Noncompete Ban in Austria (2021).

[40] Matt Marx, *Employee Non-compete Agreements, Gender, and Entrepreneurship,* ORG. SCI., https://pubsonline.informs.org/doi/epdf/10.1287/orsc.2021.1506 (2021); Sampsa Samila & Olav Sorenson, *Noncompete Covenants: Incentives to Innovate or Impediments to Growth*, 57 MGMT. SCI. 425, 432 (2011).

[41] Ege Can & Frank M. Fossen, *The enforceability of non-compete agreements and different types of entrepreneurship: evidence from Utah and Massachusetts*, 11 J. ENTREPRENEURSHIP & PUB. POL'Y (2022).

[42] Johnson & Lipsitz, *supra* note 37, at 27.

[43] *Id*.

a reduction of earnings for low-wage workers with non-compete agreements, or whether it could be addressed by less-restrictive alternatives.[44]

IV. WORKABLE CRITERIA EXIST FOR DIFFERENTIATING "LOW-WAGE" WORKERS FROM OTHER CATEGORIES OF WORKERS

The Section believes that there are workable and potentially administrable ways to differentiate "low-wage" workers from other categories of workers. Indeed, existing state legislation is a source of guidance on the appropriate demarcation between "low" and "high" wage workers.

Several states that have banned the enforcement of non-competes have done so by setting qualifying thresholds based on annual income of affected employees. While the Section does not take a position as to an appropriate threshold, the fact that a number of states have arrived at a specified number suggests that it is possible to do so.[45] There is a range of statutory thresholds that have been enacted: New Hampshire's level, on the lower end, is set at twice the federal minimum wage (roughly $30,000 annually), whereas Oregon and Washington have set their thresholds at $100,533 and $100,000 per year, respectively. Illinois, by way of example, is roughly in the middle, with its recently amended Freedom to Work Act prohibiting employers from entering into a "covenant not to compete" with any employee unless "the employee's actual or expected annualized rate of earnings exceeds $75,000."[46]

Additionally, there are qualitative criteria that could be used in a definition of "low wage" workers. As the Section has previously observed, the vast majority of low-wage, low-skill jobs are ones in which there is an absence of bargaining over the inclusion or content of the non-compete

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[44] Given the harmful impact of non-competes on low-wage workers, and the structural impediments to low-wage workers being able to bargain for compensation for non-competes, it is important to rule out less restrictive alternatives. *See, e.g.*, Fed. Trade Comm'n, Analysis of Agreement Containing Consent Order to Aid Public Comment, *In the Matter of Prudential Security, Inc., et al.*, *supra* note 16, at 7 ("Finally, as the complaints allege, any legitimate objectives of Respondents' use of Non-Compete Restrictions could be achieved through significantly less restrictive means, including, for example, by entering confidentiality agreements that prohibit employees and former employees from disclosing company trade secrets and other confidential information."); *id.* (citing and quoting *Prudential Security, Inc. v. Pack*, No. 18-015809-CB (Mich. Cir. Ct. Dec. 13, 2018) ("As a Michigan state court concluded in 2019, there was 'nothing in the employment, training or knowledge of [Respondents' security guards] which would warrant enforcement of a non-compete.'")); Fed. Trade Comm'n, Analysis of Agreement Containing Consent Order to Aid Public Comment, *In the Matter of O-I Glass, Inc.*, *supra* note 16, at 6-7 (noting that legitimate objectives of the non-competes could be achieved through less restrictive means); *but cf. id.* Dissenting Stmt. of Comm. Wilson, at 4 (noting that there were no findings regarding less restrictive alternatives for firm-sponsored training). Insofar as the Section is aware, no study of non-competes involving low-wage workers has found, or suggests, that any justification for non-competes involving low-wage workers could not be achieved through less restrictive means.

[45] The Section recognizes that any definition of low-wage workers may need to account for the fact that what may be viewed as a low-wage worker in a large city may be different from one in, say, a rural town.

[46] 820 ILL. COMP. STAT. 90/10(a) (2017). The $75,000 per year earnings threshold, which went into effect on January 1, 2022, will be increased by $5,000 every five years. *Id. See, e.g.*, *supra* note 13.

clause and the absence of significant investment in human capital.[47] Another criterion, as Nevada has concluded, simply could be any workers that are paid solely on an hourly basis.[48]

V. CONCLUSION

In conclusion, the Section believes that non-compete agreements for low-wage workers are generally harmful and not justified. In addition, we believe there are workable standards for differentiating low-wage workers from other categories of workers.[49]

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[47] *See* Comments of the American Bar Ass'n Antitrust Law Section, *supra* note 2, at 5.

[48] *See, e.g.*, NEV. REV. STAT. ANN. 613.195(3) (2021).

[49] The Section is mindful of the role that small businesses play in the United States economy and in our markets. "Small businesses employ millions of Americans and represent most businesses in the United States." *See, e.g.,* Tina Highfill et al., *Measuring the Small Business Economy* at 1, (BEA Working Paper Series, Working Paper No. 2020-04, 2020) (Mar. 2020), https://www.bea.gov/system/files/papers/BEA-WP2020-4_0.pdf. As the economic studies above show, low-wage workers are hurt by non-competes in forming new, presumably small firms, even as some firms may benefit from them. However, as noted above, to the extent that small businesses may benefit from non-competes in training or investment for new low-wage workers, beyond what is legally required, there is no evidence that less restrictive alternatives cannot achieve those goals while avoiding the harms to wages, labor mobility, and labor productivity that appear to result from pervasive use of non-competes among those workers.