



April 19, 2023

Federal Trade Commission
Office of the Secretary
600 Pennsylvania Avenue NW
Suite CC-5610 (Annex C)
Washington, DC 20580

Comment submitted electronically via <https://www.regulations.gov>

Re: Non-Compete Clause Rulemaking, Matter No. P201200

On behalf of our members and supporters, including more than 100,000 individuals who joined our online petitions calling for a ban on non-competes, Demand Progress Education Fund submits this public comment letter to express strong support for the Federal Trade Commission's proposed rule¹ on non-compete clauses and to urge the Commission to improve it even further.

The Commission's proposal would prohibit non-compete clauses, which harm workers by preventing them from taking a new job or launching their own company and stifle fair competition and socially beneficial innovation. As explained in the petition for rulemaking that we joined in 2019,² non-compete agreements are an unfair competitive practice exploited by corporations to trap workers in poor working conditions, to suppress worker wages, and to avoid the need to compete with other businesses to attract and retain talent. These non-compete clauses should be banned categorically nationwide as *per se* illegal under the FTC Act, without exemptions based on worker income, occupation, or industry.

We also reiterate the public comment letter that we and other civil society organizations submitted jointly³ that calls on the Commission to avert other loopholes by prohibiting labor contracts that functionally operate as *de facto* non-compete clauses or equivalents, such as

¹ Non-Compete Clause Rule, 88 Fed. Reg. 3482, § 910.2(b)(2)(A)-(C).

² Petition for Rulemaking to Prohibit Worker Non-Compete Clauses (Mar. 20, 2019), <https://static1.squarespace.com/static/5e449c8c3ef68d752f3e70dc/t/5eaa04862ff52116d1dd04c1/1588200595775/Petition-for-Rulemaking-to-Prohibit-Worker-Non-Compete-Clauses.pdf>.

³ A copy of this letter, led by the Open Markets Institute and submitted Apr. 19, 2023, is available at <https://www.openmarketsinstitute.org/publications/50-labor-public-interest-groups-led-by-open-markets-support-a-complete-ban-on-non-competes-similar-contracts>.

training repayment agreement provisions (TRAPs) and liquidated damages clauses.⁴ Given the risk of employers shifting tactics to circumvent the final rule, the Commission should prohibit these and other non-compete-like contracts and practices that impair worker mobility—such as vertical no-poaching clauses imposed by a fast-food franchisor on franchisees and the use of third-party entities to effectuate the same anti-worker goals.

Enforcement and notice to all workers about their new workplace rights under the final rule will be crucial as well. Knowing that defending against even a frivolous lawsuit filed to enforce a null and void contract is financially, emotionally, and reputationally costly, corporate employers often rely on workers' fear of being taken to court to maintain non-compete clauses even in states where they are already banned. Accordingly, we ask the Commission to bolster the rescission and notice requirements in the final rule to require supplemental language explaining the new rule in concrete, lay-friendly terms and to equip workers to effectively exercise their rights.

The stakes are enormous. Non-competes are estimated to affect up to 60 million Americans working in private sector jobs.⁵ When functional equivalents to non-competes are taken into account, the true number of Americans under the oppressive thumb of an employer infringing on their freedom to change jobs or to start their own business is likely even higher. The damage is not limited to individual breadwinners or their families either: nearly half of small businesses report that non-compete agreements prevented them from starting or expanding their business.⁶ The state-level experience further shows that restricting non-competes meaningfully spurs new businesses to form, benefiting everyone and the economy as a whole,⁷ and that the purported downsides are illusory or overblown.⁸

⁴ See, e.g., Sandeep Vaheesan, Beyond noncompetes, firms use these tactics to stop workers from leaving, Wash. Post (Apr. 13, 2023), <https://wapo.st/3AsmL7D>.

⁵ Alexander J.S. Colvin & Heidi Shierholz, Noncompete agreements: Ubiquitous, harmful to wages and to competition, and part of a growing trend of employers requiring workers to sign away their rights, Economic Policy Institute (Dec. 10, 2019), <https://www.epi.org/publication/noncompete-agreements/>.

⁶ Small Business Majority, Opinion Poll: Small Business Owners Support Banning Non-Compete Agreements (Apr. 13, 2023), <https://smallbusinessmajority.org/our-research/fair-competition/opinion-poll-small-business-owners-support-banning-non-compete-agreements>.

⁷ See, e.g., Economic Innovation Group, The Effects of Noncompete Agreement Reforms on Business Formation: A Comparison of Hawaii and Oregon (Mar. 29, 2023), <https://eig.org/noncompetes-research-note/>.

⁸ For example, the Commission's notice on Apr. 6, 2023 of an extension in the public comment deadline, available at <https://www.regulations.gov/document/FTC-2023-0007-12436>, invites comment on a specific research study by Takuya Hiraiwa, Michael Lipsitz, and Evan Starr: "Do Firms Value Court Enforceability of Noncompete Agreements? A Revealed Preference Approach" (Feb. 24, 2023), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4364674. This study shows that in Washington state, which banned non-competes for workers earning less than a specific threshold, employers declined to raise pay to slightly bump workers above that threshold in order to subject them to non-compete agreements—a finding indicating that the employers did not value non-competes as claimed.

Thus it is no surprise that the idea of a ban on non-competes is hugely popular: most American workers support the FTC proposal in concept.⁹ Among grassroots members and supporters, more than 100,000 people have signed Demand Progress's petitions calling for a robust ban on non-competes—many of whom also submitted their own comments directly with the Commission, citing their personal experiences with non-competes to insist on a strong ban.

These signers are Americans from all walks of life—the same public served by the Commission. On their behalf, we urge the Commission to eliminate the kind of unfair, deceptive, or abusive workplace practices that are represented by non-compete clauses and non-compete-like labor contracts. The call to action is clear: rather than merely resisting self-interested industry demands to water down the regulation, the Commission must strengthen the proposal further to avoid the final rule being rendered weak or ineffective due to loopholes.

Sincerely,

David Segal
Executive Director
Demand Progress Education Fund

Kate Oh
Special Advisor
Demand Progress Education Fund
kate@demandprogress.org

⁹ Ipsos, Most Americans support banning non-compete agreements for workers (Jan. 6, 2023), <https://www.ipsos.com/en-us/news-polls/most-americans-support-banning-non-compete-agreements>.