JOINT PUBLIC HEARING

Impacts of non-compete agreements on the labor market and economic development and possible legislative solutions such as S.3100 (Ryan)

SENATOR SEAN M. RYAN
Chair
Senate Standing Committee on Commerce, Economic Development and Small Business

SENATOR JESSICA RAMOS
Chair
Senate Standing Committee on Labor

WITNESS TESTIMONY

MAY 23, 2023
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Testimony Before the Senate Standing Committee on Labor and the Senate Standing Committee on Commerce, Economic Development and Small Business

Hearing on

Non-Compete Agreements

Alexander Colvin

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May 22, 2023

Chair Ramos, Chair Ryan, and all members of the committees, thank you for the opportunity to submit this testimony about the impact of non-compete agreements on New York State workers and the economy.

My name is Alexander Colvin and I am the Kenneth F. Kahn Dean and Martin F. Scheinman Professor of Conflict Resolution at the New York State School of Industrial and Labor Relations at Cornell University. The views expressed here are my own and do not represent those of Cornell University or any other organization.

Non-compete agreements are an increasingly common practice in which provisions of employment contracts bar workers from seeking employment with other employers in the same industry or region after their employment with their current employer has ended. These non-compete agreements are often imposed as a mandatory term and condition of employment on workers who are not able to negotiate individual provisions of their employment contract.[1] In these situations, the worker is presented with a stark take-it-or-leave-it choice: refusing to sign the non-compete agreement means no job. Non-compete agreements are detrimental to competition in the economy and have negative impacts on worker wages and economic opportunity. In my testimony, I will describe the key findings from the growing body of research, both by myself and others, on non-compete agreements and their impact.

[1] A large scale national study found that 88.0% of workers subject to non-compete agreements did not negotiate the terms of the agreements presented to them and 30.0% of the agreements were presented to workers after their employment had already begun: Evan Starr, J.J. Prescott, and Norman D. Bishara, *Noncompetes in the U.S. Labor Force*, University of Michigan Law & Econ Research Paper no. 18–013, August 2019.

1) How widespread are non-compete agreements?

In a study I conducted with Heidi Shierholz, President of the Economic Policy Institute, which supported the study, we found that nationwide 49.4% of business establishments required at least some employees to sign a non-compete and 31.8% of establishments required all of their employees to sign a non-compete.[2] This represents between 36 million and 60 million workers nationally covered by non-compete agreements.

In New York State we found that 44.2% business establishments require some employees to sign non-competes and 23.3% of establishments require all employees to sign non-competes.

Non-compete agreements are used in a wide range of industries, with a quarter or more of establishments in all industries examined in our study having some workers subject to non-competes.

2) Which workers are subject to non-competes?

We find that non-compete agreements are used for workers of different wage and salary levels, ranging from 29.0% of the lowest wage establishments imposing non-competes on all their employees, to 36.5% of the highest wage establishments imposing non-competes on all employees. Non-competes are most commonly imposed on workers with higher education levels, with non-competes required of all employees in 44.8% of establishments where most workers have college degrees. But non-compete

[2] Alexander J.S. Colvin and Heidi Shierholz. 2019. *Non-compete agreements: Ubiquitous, harmful to wages and to competition and part of a growing trend of employers requiring workers to sign away their rights.* EPI Report, Dec. 10, 2019. Available at: https://www.epi.org/publication/noncompete-agreements/

agreements are also required of all employees in 27.1% of establishments where the typical worker has a high school diploma.

Our research indicates that non-competes are not just a practice affecting high wage, high education workers, who might have more ability to negotiate over their terms and receive offsetting benefits, but rather something that affects all categories of workers.

3) What is the impact of non-competes on wages?

Research from Evan Starr of the University of Maryland finds that enforceability of non-compete agreements is associated with a 4% reduction in hourly wages relative to non-enforceability.[3] Starr finds that these negative effects on wages are exacerbated for workers with lower education levels, who are less able to bargain over the imposition of non-compete agreements or receive offsetting employment benefits. In addition, Starr's study found that the normal increases in wages with longer employee tenure with a firm are also reduced where non-competes are enforceable, indicating that non-competes are interfering with the ability of workers to benefit from long service and commitment to the enterprise.

Positive impacts on wages from a state banning non-compete agreements were found in a study by Lipsitz and Starr of the effects of Oregon's 2008 ban on non-competes for hourly wage workers.[4] They found that the enactment of the non-compete ban led to a 2-3% increase in the wages of hourly workers. Similar results were found from a study of a 2015 ban on

[3] Evan Starr. 2019. "Consider This: Training, wages, and the enforceability of covenants not to compete." *ILR Review* 72(4): 783-817.
[4] Michael Lipsitz and Evan Starr. 2022. "Low-wage workers and the enforceability of non-compete agreements," *Management Science*, 68(1): 143-170.

non-compete agreements for technology workers in Hawaii, which was found to have increased worker mobility by 11 percent and new hire wages by 4 percent.[5]

The consistent finding across the research studies is that bans on the enforcement of non-compete agreements produces benefits for workers in higher wages. When workers are able to leave their current jobs to find other employment in an industry where they have experience and expertise, they benefit from the labor market competition where the employer needs to pay fair market wages for the position.

4) What is the impact of non-competes on the economy?

By their basic nature, non-compete agreements reduce competition in the economy. Non-competes hold the danger of reducing the dynamism and creativity that leads to innovation, new business growth, and job creation. Research has identified the bar on enforceability of non-compete agreements under California law as a key factor in promoting the growth of Silicon Valley as a center of technological innovation and business dynamism.[6] The problem with non-compete agreements is that they introduce a friction into the labor market that reduces employee mobility to new businesses and curtails entrepreneurial activity.[7] Research by Jessica Jeffers has found that

[5] Natarajan Balasubramanian, Jin Woo Chang, Mariko Sakakibara, Jagadeesh Sivadasan, and Evan Starr. 2020. "Locked in? The enforcement of covenants not to compete and the careers of high-tech workers," *Journal of Human Resources* 57: S349-396.
[6] Annalee Saxenian. "Regional Advantage: Culture and Competition in Silicon Valley and Route 128," Cambridge, Mass.: Harvard University Press, 1994.
[7] Evan Starr, Justin Frake, and Rajshree Agarwal. 2019. "Mobility Constraint Externalities," *Organization Science,* 30(5): 961-980: Showing that non-compete agreements result in fewer job offers and less mobility.

greater enforceability of non-compete agreements was associated with a 12% decrease in new business formation.[8]

What these studies indicate is that enforcement of non-competes creates a drag on business dynamism, hurting overall economic performance. A corporation enforcing a non-compete may well benefit from the lower wages that they can pay if workers aren't able to leave for other higher paying jobs. But there is a cost to other businesses that are seeking to hire workers to build new ventures and expand competition. The price of higher profits to corporations that enforce non-compete agreements is paid both by workers in lower wages and by the overall economy in less entrepreneurialism and new job creation.

Conclusion

Looking across the research on non-compete agreements yields the following conclusions:

- Non-compete agreements have become a widespread practice, affecting many workers.
- Non-compete agreements are being imposed on many lower wage workers and those without college education.
- Non-compete agreements reduce worker wages, particularly for those without a college education.
- Non-compete agreements harm economic dynamism, innovation, and business growth.

[8] See Jeffers, Jessica. 2019. "The Impact of Restricting Labor Mobility on Corporate Investment and Entrepreneurship" SSRN, July, 2019.

Enactment of a ban on enforcement of non-compete agreements would strength the business climate and labor market of New York State and I encourage its passage. Thank you.

My name is Alla Glasgow. I immigrated to the United States of America in 2008 when I was 20 years old. I came here alone with $300 in my pocket, hoping for a better future and to experience the American dream. I worked very hard to learn English, to obtain a good education, and to stand up from my knees for myself, and for my future children.

In 2013, I went to a community college for my nursing degree. After I graduated, I worked multiple jobs for several years. I worked at the Bellevue Hospital as a critical care nurse, and as an ICU nurse at Christ Hospital in Jersey City. At the same time, I worked at two different medical spas, which provided aesthetic medical care. I found that my true passion was working as an aesthetic nurse injector. I dedicated myself to acquiring the necessary knowledge and skills. I found great joy in helping my patients feel better about themselves, empowering them to embrace their beauty. I was a committed worker and gave everything I had to my employer and to my patients.

I worked for over seven years at one particular medical spa, investing my utmost effort. After starting as a part time worker, I decided to make this spa my full-time job because I genuinely enjoyed working with my co-workers and my patients, many of whom became my friends over the years. I routinely worked long hours without proper breaks, even when I was pregnant, never getting a paid day off for personal reasons or for poor health. If I was sick, I worked extra days to make up for the days I missed. I was going above and beyond to contribute to the success of the spa and ensure patient satisfaction.

However, despite years of full time dedication and generating millions of dollars of profits for this company, they continued to pay me and treat me as an independent contractor, despite the fact that I was an employee in every single way, including by legal definitions. I was not given any benefits, any PTO, and was told I had to work every Saturday for several years, which I did.

In 2020, while pregnant and recovering from a severe case of COVID-19, I sent an email demanding the appropriate employment status and benefits that I had never received. In response, my employer offered me a job that promised the proper employment status and benefits, including paid time off. However, there was a condition attached: I had to sign a noncompete agreement. When I was three weeks away from giving birth to my son, in the middle of a busy workday, I was abruptly pulled out of a treatment room and asked to sign the "Offer of Employment" and a noncompete agreement. Trusting my employer, I believed that signing it would lead to the fulfillment of their promises, but it did not. They never held up their end of the agreement.

Their refusal to give me proper employment for another 1.5 years even after we signed the agreement in which they promised me this, along with recurring discrepancies in my pay and tips, left me feeling betrayed and I decided to stop working for this company. I finally decided enough was enough, I found a doctor who was a friend, who agreed to be my medical director and posted on instagram that I would be seeing patients in her office suites. I also made sure that her office was outside of the areas mentioned in the noncompete I signed, even though I understood that the noncompete was breached by my former employer and thus had no power. That same week, I received a threatening email from the former boss who I had trusted and respected, warning me that if I came back to New York, I would face a lawsuit.

I immediately consulted a lawyer. She assured me that because my former employer did not provide me with what the agreement said they would, it was null and void. I wanted to get a second opinion and consulted with another attorney who spoke to my employer's lawyer after they sent me a Cist and Desist notice. After some back and forth that lawyer disappeared and did not respond to my lawyer - as a result, my attorney advised me to proceed with my work. Therefore, I began working part-time in New York while residing in Texas, relishing the opportunity to take control of my finances and run my own business.

In September 2022, despite their lawyer having failed to respond to mine months ago, my former employer blindsided me with a lawsuit that targeted me and the facility where I worked. It was baseless and filled with lies, and yet, that lawsuit had a tremendous effect on my life and the life of my entire family, including my then two-year old son. I spent months defending myself, crying every single day. I went through many panic attacks and depression. I was told by my former colleagues that my former bosses were bragging about how they will sue me for millions of dollars and "leave me in my underwear". My heart breaks when I remember the look on my little son's face when he saw me in tears and went to hug me and said "mommy don't cry".

I hired 3 lawyers. I spent over 20 thousand dollars on attorney fees. Several attorneys I consulted with told me in a matter of fact way that I would likely win the lawsuit, but that it would cost me approximately 150k, so I should settle. So I had to learn the hard way that this is how the system works. I was shocked, but this is the reality.

I could not agree to the outrageous terms of the settlement proposed to me, I kept pushing and was finally able to find an attorney who agreed to take my case without charging me a fortune I did not have on an hourly basis. Since May last year when my former boss started to threaten me, I have spent many sleepless nights worrying and crying about this, spent many hours in therapy, watched my son develop anxiety because he was seeing me crushed and in tears a lot of the time. But given all this, I feel extremely lucky to be able to find the help and the support from my attorney and my loved ones. I know of former co-workers, many of whom are immigrant women like myself, who cannot or are too afraid to stand up for themselves. I will never stop fighting for my right to work, earn a living, and practice the profession I love - that's why I came to this country and that is why I am submitting my story to this committee..

TESTIMONY BEFORE THE SENATE STANDING COMMITTEE ON Labor and SENATE STANDING COMMITTEE ON Commerce, Economic Development, and Small Business

NEW YORK STATE SENATE

May 23, 2023

Joint Hearing on S.3100, An act to amend the labor law, in relation to prohibiting non-compete agreements and certain restrictive covenants

Brian Callaci
Chief Economist, Open Markets Institute

My name is Brian Callaci. I am Chief Economist at the Open Markets Institute. We are a research and advocacy organization focused on antimonopoly policy headquartered in Washington, DC. My PhD in economics is from the University of Massachusetts Amherst, and my research focuses on the effects of restrictive contracts imposed on workers and small businesses. I would like to thank Chair Ramos, Chair Ryan, and the other members of the Committees for the opportunity to participate in this hearing.

We support S.3100 for enacting a ban on non-compete clauses and other similar provisions in labor contracts, which prevent workers from changing jobs to work for the employer of their choice or to start their own business. By limiting worker mobility, non-compete clauses drive down wages, reduce the formation of new businesses, and trap workers in jobs where they may be subject to unsafe working conditions, discrimination, and abuse. The bill would eliminate these pernicious contracts for all workers, irrespective of their income, line of work, or employment classification.

In March 2019, the Open Markets Institute led a coalition of civil society organizations, labor unions, legal experts, and economists that formally petitioned the Federal Trade Commission to use its authority under the FTC Act to issue a rule prohibiting non-compete clauses in labor contracts as an unfair method of competition that is *per se* illegal.[1] The petition called for an FTC rule that would make non-compete clauses illegal for all workers.

In January of this year, the FTC proposed a rule that would do just that. With S.3100, New York is poised to also protect workers, consumers, and small businesses from these coercive contracts, giving workers important additional protections under state law, and safeguarding the rights of workers, consumers, and small business owners in the event the FTC's final rule has any gaps or

[1] Open Markets Inst. et al., Petition for Rulemaking to Prohibit Worker Non-Compete Clauses (March 20, 2019), https://www.openmarketsinstitute.org/publications/open-markets-afl-cio-seiu-60-signatories-demand-ftc-ban-worker-non-compete-clauses.

is struck down by a court. Further, unlike the FTC rule, which only the FTC would be able to enforce, workers, under S. 3100, would be able to bring private lawsuits against employers who use non-compete clauses.

The economic research is very clear: evidence strongly supports the need for a ban on non-compete clauses. The use of non-compete clauses reduces labor market mobility and generally depresses wages, wage growth, and small business formation.[2] These contracts are in wide use, affecting as many as 60 million private-sector workers nationwide.[3] The FTC estimates that non-competes cost workers $300 billion per year.[4] These contracts are imposed on workers, not negotiated: a national survey study found that only 10% of employees negotiate over their non-competes, and one-third are presented with them after only accepting their job offers.[5]

Non-compete contracts, and similar contracts that limit worker mobility, suppress wages. A recent study exploring the 2008 Oregon ban on non-compete clauses found that banning non-competes increased wages by as much as 14%-21%.[6] Another study found that wages of technology workers rose 4% after non-competes were made non-enforceable in that sector in Hawaii.[7] The adverse effects of restrictions on labor mobility appear to be especially pronounced for women and people of color. Research has found that stronger enforcement of non-compete clauses "reduces earnings for female and for non-white workers by twice as much as for white male workers."[8]

It is not just workers who are harmed by non-competes. Employers' use of non-compete clauses also has adverse effects on competitors and consumers in product and service markets. Using non-compete clauses, employers can foreclose competitors in downstream markets. By tying up specialized workers with non-compete clauses, dominant firms can prevent new entrants and small rivals from hiring the labor they need to compete effectively and grow.[9] In other words,

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[2] *See, e.g.*, U.S. Dep't of Treasury, Non-Compete Contracts: Economic Effects and Policy Implications 20 (2016), https://home.treasury.gov/system/files/226/Non_Compete_Contracts_Econimic_Effects_and_Policy_Implications_MAR2016.pdf; Evan Starr, *Consider This: Training, Wages, and the Enforceability of Covenants Not to Compete* 17 (2018); Toby E. Stuart & Olav Sorenson, *Liquidity Events and the Geographic Distribution of Entrepreneurial Activity*, 48 ADMIN. SCI. Q. 175, 197 (2003).

[3] ALEXANDER J.S. COLVIN & HEIDI SHIERHOLZ, NONCOMPETE AGREEMENTS 2 (2019), https://www.epi.org/publication/noncompete-agreements/.

[4] Non-Compete Clause Rule, 88 Fed. Reg. 3482 (proposed January 19, 2023) (to be codified at 16 C.F.R. pt. 910).

[5] Evan Starr, Justin Frake & Rajshree Agarwal, *Mobility Constraint Externalities*, 30 ORGAN. SCI. 961 (2019).

[6] Michael Lipsitz & Evan Starr, *Low-Wage Workers and the Enforceability of Noncompete Agreements*, MANAG. SCI. (2021).

[7] Natarajan Balasubramanian et al., *Locked In? The Enforceability of Covenants Not to Compete and the Careers of High-Tech Workers*, 57 J. HUM. RESOUR. S349 (2022).

[8] MATTHEW S. JOHNSON, KURT LAVETTI & MICHAEL LIPSITZ, *The Labor Market Effects of Legal Restrictions on Worker Mobility*, (2020), https://papers.ssrn.com/abstract=3455381

[9] *See, e.g.*, BRFHH Shreveport, LLC v. Willis Knighton Med. Ctr., 176 F. Supp. 3d 606, 625 (W.D. La. 2016) ("Vantage also asserts that its allegations of Willis-Knighton's non-compete agreements with its physicians and its control of physician referrals are anticompetitive under section 2 of the Sherman Act."); Warren Greenberg, *Marshfield Clinic, Physician Networks, and the Exercise of Monopoly Power*, 33 HSR: HEALTH SERVS. RSCH. 1461, 1470 (1998) ("The Marshfield Clinic also enforced a non-compete clause with physicians who were formerly

non-competes can be used as a tool to foreclose critical inputs and cement monopoly power and market dominance.[10] This fortification of monopoly and oligopoly power can inflict significant and durable injuries on consumers who pay higher prices and are deprived of higher quality goods and services. More generally, the use of non-compete clauses by incumbent corporations for specialized workers can slow the entry and growth of new firms.[11]

It is important to ban non-competes outright, not merely make them unenforceable. S.3100, crucially, does enact such a ban. Research has found that non-competes discourage workers from leaving, even when employers cannot or do not enforce them in court.[12] This tells us that the existence of non-competes—regardless of whether employers can, or seek to, enforce them—is enough to harm workers. Employers recognize this fact and use non-competes even when they cannot enforce them through litigation.

Because many workers fear the cost and stresses of litigation and the risk of being liable for damages to their employers,[13] comparatively few non-compete clauses are tested in court. Thus, these contracts inflict harm on workers through their mere existence. As legal scholar Harlan Blake wrote, "For every covenant [not to compete] that finds its way to court, there are thousands which exercise an *in terrorem* effect on employees who respect their contractual obligations[.]"[14] This chilling effect on labor market mobility may be especially strong for women.[15]

California's experience is revealing. Under California law, employers cannot enforce non-compete clauses against workers in court.[16] This has been the law for more than 150 years.[17] Nonetheless, nearly 30% of workplaces still impose non-compete clauses on *all* employees and approximately 45% use these contracts with some of their employees.[18] Anything short of a complete ban on non-compete clauses and similar contracts is an invitation to employers to continue including these restraints in employment agreements and employee handbooks.

Whereas the harms from non-competes are real and well documented, the justification for these contracts is unpersuasive. Employers and their representatives assert that non-competes are

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employed by Marshfield. Such physicians could not practice within 30 miles of Marshfield for three years after termination from the Clinic, resulting in less competition to the Marshfield Clinic.")

[10] Jonathan B. Baker, *Exclusion as a Core Competition Concern*, 78 ANTITRUST L.J. 527, 540 (2012).

[11] Benjamin Glasner, *The Effects of Noncompete Agreement Reforms on Business Formation: A Comparison of Hawaii and Oregon*, (2023), https://eig.org/noncompetes-research-note/ (last visited Apr 5, 2023).

[12] Evan Starr, J.J. Prescott & Norman Bishara, *Noncompetes and Employee Mobility*, 2019 ACAD. MANAG. PROC. 13874 (2019).

[13] Matt Marx, *Employee Non-compete Agreements, Gender, and Entrepreneurship*, 33 ORG. SCI. 1756, 1760 (2022).

[14] Harlan M. Blake, *Employee Agreements Not to Compete*, 73 HARV. L. REV. 625, 682 (1960).

[15] Marx, *supra* note at 1769-70.

[16] CAL. BUS. & PROF. CODE § 16600.

[17] *See* Edwards v. Arthur Andersen LLP, 189 P.3d 285, 290 (Cal. 2008) ("[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.").

[18] Alexander J.S. Colvin & Heidi Shierholz, *Noncompete Agreements*, 6 (2019), https://files.epi.org/pdf/179414.pdf.

necessary for protecting trade secrets, customer lists, and other business 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. However, 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 valuable information is protected. Indeed, S.3100 makes explicit allowance for the use of such contracts. 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.[19] Such contracts characterize professional sports in the United States today. And S.3100 makes allowance for fixed-term contracts as well.

Another argument deployed by employers and the employer lobby to justify non-competes is that that they reduce employee turnover and promote employer investments in worker training, by barring workers from leaving and taking their skills to rival employers. Non-competes, in this view, give employers incentives to train workers, which ultimately benefits both parties.[20] However, by the same token, non-competes also lower workers' own incentives to invest in their own training: why try to learn new skills if you can't find a new job and get fair value for them?

The research suggests that when non-competes are banned, employers find other, better ways of retaining a loyal workforce and protecting mutual investments in training, such as higher wages, good working conditions, and the promise of future promotion and raises contingent on good performance. In other words, when prevented from using the cheap stick of non-competes, employers turn to less coercive carrots. The evidence cited earlier, showing that wages rise when employers cannot impose non-competes, suggests that turning from sticks to carrots is precisely how employers respond to noncompete bans. Indeed, research shows that employers do not even value their own non-competes very much: when Washington State banned non-competes for employees earning less than $100,000 per year, employers who really valued non-competes would have given workers just below the threshold tiny raises to make them exempt from the ban. Few did so.[21]

In contrast to these other methods of protecting proprietary information, non-competes are, in the words of University of Denver law professor Viva Moffat, "the wrong tool for the job."[22] 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 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

[19] Nickens v. Labor Agency of Metropolitan Washington, 600 A.2d 813, 816 (D.C. 1991).
[20] United States Chamber of Commerce, Comment on FTC Non-Compete Notice of Propose Rulemaking. https://www.uschamber.com/assets/documents/FTC-Noncompete-Comment-Letter_FINAL_04.17.23.pdf
[21] Takuya Hiraiwa, Michael Lipsitz & Evan Starr, *Do Firms Value Court Enforceability of Noncompete Agreements? A Revealed Preference Approach*, (2023), https://papers.ssrn.com/abstract=4364674
[22] Viva R. Moffat, *The Wrong Tool for the Job: The IP Problem with Noncompetition Agreements*, 52 WM. & MARY L. REV. 873 (2010).

provided to the worker years earlier. At the same time, non-competes are 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.[23]

Given the documented injuries to workers from non-competes and the specious employer justifications for their use, a categorical ban on these contracts is the correct policy. S.3100 does this. It should maintain this universal approach and not include any carveouts tied to income, line of work, or employment status.

Thank you for your time.

[23] Sandeep Vaheesan, *The Bogus Justification for Worker Non-Compete Clauses*, ON LABOR, Apr. 24, 2019, https://onlabor.org/the-bogus-justification-for-worker-non-compete-clauses/.

Testimony of Evan Starr for Proposed Bill to Restrict Noncompetes in New York
May 22, 2023

Thank you for the opportunity to provide testimony on the bill being proposed to restrict the use of noncompete agreements in the state of New York. I am an economist who has conducted a dozen empirical studies to understand how common noncompetes are, how they influence workers and firms, and what sort of effects their legal enforceability has on economic activity. In this testimony I would like to summarize the central economic concerns about noncompetes and share some of the broad conclusions of academic research (including my own).

A noncompete agreement is an employment provision that prohibits a departing worker from joining or starting a competing firm. While employers may have a justified economic rationale for using noncompetes in certain settings, in all settings the costs to workers, firms, and society can be severe, even if the noncompete would never hold up in court. Because noncompetes limit workers' ability to move to other jobs in their chosen industry, they may prevent workers from working where they want and earning what they could in the labor market. These restrictions can sometimes be draconian. As an example, below is the text of a noncompete signed in 2015 by a temporarily-employed Amazon packer making $12 an hour:

> *During employment and for 18 months after the Separation Date, Employee will not, … engage in or support the development, manufacture, marketing, or sale of any product or service that competes or is intended to compete with any product or service sold, offered, or otherwise provided by Amazon … that Employee worked on or supported, or about which Employee obtained or received Confidential Information.*[1]

With this backdrop, I'd like to share six findings from the academic literature on noncompetes.

First, noncompetes are everywhere. Doggy daycare workers, unpaid interns, volunteer coaches, hair stylists, and janitors are just some of the jobs in which noncompetes have been found. Nationally they cover between 15% and 28% of US workers, and are frequently used in low-wage jobs: Nearly 1 in 3 hair salons had their workers—including independent contractors—sign noncompetes, and hourly-paid workers actually make up the majority of the noncompete-bound.

Second, just 10% of noncompete-bound workers report negotiating over the terms of the contract or for additional benefits in exchange for signing. Employers regularly compel workers to sign noncompetes when the worker has limited bargaining power, such as on the first day of the job.

Third, despite arguments that noncompetes could potentially benefit workers and firms, most research suggests that the use and enforceability of noncompetes reduces wages, entrepreneurship, and job-to-job mobility, making it harder for firms to hire.

- After Oregon banned noncompetes for low-wage workers in 2008, hourly-worker wages rose up to 6% five years after the ban, while job-to-job mobility rose 17%.
- Similarly, after Hawaii banned noncompetes in 2015 for *only* high-tech workers, quarterly earnings for new hires increased by 4% and job mobility rose by 11%.

[1] See https://www.theverge.com/2015/3/26/8280309/amazon-warehouse-jobs-exclusive-noncompete-contracts.

- A broad, nationally representative study estimated that if all states banned noncompetes, the average worker's earnings would increase by 8.5%
- This research also tends to find that the enforcement of noncompetes has particularly deleterious effects on the earnings of women and racial minorities.
- Other studies also find that where it is *easier* to enforce noncompetes, entrepreneurship rates are lower—especially for women—and small businesses struggle to hire.

Taken together, these studies provide evidence that noncompetes—and laws that make them more easily enforceable—prevent low-wage, high-tech, and indeed all workers from working where they want and realizing their full earnings potential.

A recent study also suggests that, despite what some firms say, they do not really value the ability to enforce noncompetes for most workers. This study shows that that firms did not value noncompetes enough to give workers at the 80th percentile small raises to be able to enforce their noncompetes.

Fourth, in states where noncompetes are per se unenforceable, they still cover 19-23% of the workforce. Moreover, these unenforceable noncompetes also appear to chill employee mobility, in part because workers perceive them as enforceable or are scared about a lawsuit. As a result, it is important that the bill imposes some sort of cost on firms for using unlawful noncompetes (or some benefit for not using them) as a means to deter the use of unlawful noncompetes.

Fifth, the negative effects of noncompetes are borne not only by those who sign them, but also have negative "spillover" effects on the wages of other workers in the labor market. Academic studies suggest that even in the executive labor market bans on noncompetes are justified by the economic harm they do from misallocating workers, and distorting incentives to invest in innovation.

Sixth, other tools can do similar jobs for the firm without constraining worker options so severely. For example, nondisclosure agreements and trade secret laws can protect trade secrets, while nonsolicitation agreements can protect clients. Yet neither these of provisions limit job options for departing workers.

Finally, I would like to note that this is not a classic firm vs. worker issue because firms are on both sides of the equation: Firms may not want to lose workers to competitors, but they would like to hire from competitors. Furthermore, firms benefit more broadly from being integrated in a dynamic environment, and the evidence overwhelmingly shows that noncompetes reduce dynamism by chilling mobility and entrepreneurship.

5/23/23 - JSH Remarks to Honorable Members of the New York State Senate Standing Committee on Commerce, Economic Development and Small Business (Chair: Senator Sean M. Ryan) and the New York State Senate Standing Committee on Labor (Chair: Senator Jessica Ramos).

Thank you Senators Ryan and Ramos, as well as the other committee members for inviting me to speak with you today, I greatly appreciate the opportunity.

Intro/Bio:
Jonathan S. Halpert MD
Graduated from Skidmore College in 1984 and Albany Medical College in 1998
Completed emergency medicine residency at Albany Medical Center Hospital in 2001
Fellow of the American College of Emergency Physicians
Past President and current Government Affairs Chair of the North East Regional Urgent Care Association
Member of the Health and Public Policy Committee of the Urgent Care Association of America
Executive Board member of the Albany County Medical Society
Member of the Medical Society of the State of New York and the AMA
Worked as an emergency physician at St. Peter's Hospital and Albany Memorial hospital as an employed physician through 2007, then transitioned into urgent care medicine, first as the employed urgent care medical director for the now defunct Prime Care Physicians

group in Albany, then as the employed urgent care medical director for St. Peter's Health Partners.
Left St. Peter's at the end of 2017 and founded Priority Medical Services PLLC, opening Priority 1 Urgent Care.
I have continuously owned and operated Priority 1 as an independent small business located in Guilderland NY since its inception in April 2019.

Statement:
As a practicing physician and medical practice owner, I wholeheartedly support Senate Bill 3100, prohibiting non-compete clauses as they pertain to medical employment agreements, whether they be imposed by a hospital, a health system, a private equity company, or a private physician practice. My practice's physician recruitment advertising (which is not currently active), has since day 1 of our existence, proudly promoted the fact that we do not have and will not include non-compete clauses in our employment agreements.

Medical non-compete clauses are inherently unfair and are ultimately counterproductive, only serving to diminish access to a community's vital health care resources. They are based in the misguided belief that a physician's book of business in some way belongs to entities other than the doctor, whose efforts are almost solely responsible for patient recruitment and retention, and that if a doctor were to leave a practice but remain within the same geographic area, would end up "taking their patients with them". This is not a completely incorrect observation, but fails to take into account the employer's basic

obligation to strive to retain valued employees. The employer's overarching logic is that they have provided the physician the means to work, see patients, and earn income. True to a limited extent, but those aspects are fundamental to any employer-employee relationship; a physician should not be particularly penalized by virtue of their degree and license. Non-compete logic and tradition also fails to take into account that within so-called "on-demand" medical disciplines like urgent care medicine, emergency medicine, and hospitalist medicine, all of which employ a substantial number of New York's physicians, there is no subscribed patient base comprising that book of business. As such, I fail to realize any actual benefit in engaging a restrictive employment covenant when hiring a physician.

Many states prohibit non-compete clauses in physician employment agreements. It's time New York joins the ranks of other more progressive states, enacting legislation like S3100, to help turn New York from its historic place as one of the least physician friendly places to work, encouraging more doctors to come into the state, and dissuading those that are here from having to move out of New York, in order to escape the archaic, unfair, and counterproductive prohibitions of their employment agreements.

New York State Office of the Attorney General
Letitia James

Testimony Before the

New York State Senate

Standing Committee on Commerce, Economic Development and Small Business,
Chair: Senator Sean M. Ryan
Standing Committee on Labor, Chair: Senator Jessica Ramos

Impacts of non-compete agreements on the labor market and economic development, and possible legislative solutions, such as S3100/Ryan

May 23, 2023

Good morning committee chairs and members. My name is Karen Cacace, and I am the Bureau Chief for the New York State Attorney General's Labor Bureau. I have been in this position for over three years. Prior to joining the Attorney General's Office, I was the Director of the Employment Law Unit at The Legal Aid Society in New York City for over nine years.

At the outset, I want to note that Attorney General James, and the rest of our office, continues to appreciate the strong and constructive relationship between our office and the legislature. We offer our time and any relevant expertise we may have to assist with other legislative proposals.

I also want to thank you for convening this important hearing and for giving our office an opportunity to share our thoughts on the impact of non-compete provisions on the labor market and economic development, and possible solutions, including Senator Ryan's bill.

While New York's common law provides some protection for workers, it is insufficient to address the problems created by non-compete provisions. Our office routinely receives complaints from workers subject to non-compete provisions who have serious concerns, including: from workers who are being sued by a former employer; from workers whose prior employer are threatening to sue; from workers who find out after they have begun working that they unknowingly signed an agreement that includes a non-compete provision; and from workers who are about to start a job and believe the non-compete provision that their employer is requiring them to agree to is overbroad.

For most of these workers, the non-compete provision was not presented as a negotiable contract—it was presented as a requirement to keep or continue their employment or as part of the first-day pile of paperwork. And even if those workers were able to ascertain that they are being required to agree to a non-compete provision, most of them could not afford an attorney to represent them and attempt to negotiate the terms of the provision.

The businesses about which workers complain about imposing onerous non-compete provisions are of varying types and sizes, including temp agencies, janitorial services, banks, media companies, fitness companies, telecommunications companies, home health aide agencies, retailers, data analytics companies, pest control companies, legal translation services, chiropractors, and hotel operators.

Our office has investigated and settled non-compete issues at various companies, including the legal news website Law360, Jimmy John's Gourmet Sandwiches, Examination Management Services, a nationwide medical-information-services provider, and WeWork, the shared office space provider. We have also investigated and settled non-compete issues with smaller companies, such as a payment processing firm and a healthcare staffing agency that prevented its temporary and travel medical professionals from working at any competitor of its client facilities, including hospitals and nursing homes.

Historically, non-compete provisions were used sparingly for executives with trade secrets or confidential business information, and these executives were typically represented by lawyers who negotiated the terms of the agreement with the employer. However, it has become increasingly common for employees even in low-wage jobs to be subject to non-compete provisions often with little or no negotiation allowed. An ever-growing number of these agreements bear no relation to their historic purpose. And companies often impose the same, overly broad non-compete provisions on their workforces without the necessary tailoring required, leading to lower-level and higher-level, specialized and nonspecialized employees being subject to the same onerous requirements. The provisions are not necessary to protect trade secrets or proprietary information – confidentiality and non-solicitation agreements can address these issues.

New York is behind other states in enacting legislation restricting non-compete provisions. This year, Minnesota will join California, Oklahoma, and North Dakota in completely banning non-compete provisions. Maryland and Kentucky have both enacted legislation this year awaiting their governors' signatures, which will add restrictions on employers imposing non-competes. And many other states, recognizing the effects of non-competes on workers, especially lower-wage workers, have enacted legislation restricting non-competes in recent years.[1]

The Federal Trade Commission's proposed rule banning non-competes is a welcome development. Our office recently joined with the Attorney Generals of 16 states and the District

[1] These states include Washington State, Rhode Island, Maine, Massachusetts, Maryland, Oregon, Virginia, Indiana, Washington, D.C., Nevada, Colorado, Iowa, Kentucky, and Illinois.

of Columbia to file support for the Commission's proposed rule.[2] However, because it is not possible to determine when the FTC's proposed rule will take effect, it is important that the state legislature enact legislation prohibiting non-compete provisions. We, therefore, urge the New York State Legislature to enact non-compete legislation and finally end the proliferation of these abusive provisions in New York.

Senator Ryan's proposed non-compete legislation creates a uniform standard for all New York workers and businesses and reflects New York's priorities in protecting workers, wage growth, and economic development. The legislation also addresses companies' concerns regarding the protection of trade secrets and the solicitation of clients. We do, however, support proposed amendments to Senator Ryan's bill, which we believe strengthen the protections and provide important clarifications to workers and businesses.

First, the amendments would clarify that non-compete provisions currently in effect are null and void and require that employers notify their workers that any current non-compete then in effect is void. We believe that voiding non-competes currently in place is necessary to alleviate the problems this legislation is meant to address and provide all workers in New York certainty and the uniform protection of the law.

Second, the amendments require that employers notify all workers in writing or by posting in a place customarily frequented by employees that non-compete provisions are prohibited by law. It is important to inform workers of their rights and is consistent with other laws that require employers to provide workers notice of employment protections.

Third, the amendments clarify the definitions of "individual," "employer," and "employment" to ensure that the ban on non-competes applies to all workers in NY.

Fourth, the amendments prohibit workers from waiving application of the law and prohibit employment contracts from containing a choice of law or choice of venue provision that would have the effect of avoiding the ban on non-competes.

Fifth, the amendments add a prohibition against the use of TRAPs (training repayment agreement provisions) in most circumstances. TRAPs are increasingly used by employers to restrict employee mobility.[3] TRAPs are provisions that state that a worker must stay at a job for a certain amount of time, and if the worker leaves before that time, then that worker is liable to pay

[2] In addition to NY, the AGs for the District of Columbia, New Jersey, California, Colorado, Delaware, Illinois, Maine, Maryland, Massachusetts, Michigan, Minnesota, Nevada, New Mexico, Oregon, Pennsylvania, Rhode Island, and Washington signed onto the letter.

[3] Nearly 10% of American workers surveyed in 2020 were covered by a training repayment agreement, according to the Cornell Survey Research Institute. https://www.reuters.com/world/us/more-us-companies-charging-employees-job-training-if-they-quit-2022-10-17/.

the employer for the training the employee received. TRAPS have the same chilling effect as non-compete provisions. For this reason, the FTC's proposed rule prohibits TRAPs.[4]

Our office has received several complaints of TRAPS. In one egregious example, an employer had a contract requiring a tattoo apprentice to pay back training costs if the apprentice left before the end of a 2-year term expired. When that worker left four months before the contract term expired, the employer sent a bill for $15,000.

Finally, the amendments address enforcement of the legislation. In addition to the private right of action that the current legislation provides, the amendments give express enforcement authority to the Attorney General and the Department of Labor. The amendments also add mandatory fee-shifting for workers who successfully litigate a claim and a provision that allows the plaintiff to designate the venue for any actions. Banning non-competes must be paired with robust enforcement and the amendments ensure that will be the case by empowering government and encouraging private enforcement.

We very much appreciate the opportunity to share our input with you here today and welcome the chance to continue this conversation moving forward.

Thank you.

[4] Under Michigan's Payment of Wages and Fringe Benefits Act (WFBA), employees cannot be required, as a condition of employment, to reimburse an employer for employer-mandated training after he or she resigns. The Michigan Supreme Court has found that this law is designed to "prevent kickbacks or payments of any kind to an employer in return for employment or its continuation." *Sands Appliance Servs., Inc. v. Wilson*, 463 Mich. 231, 241 (2000).

ECONOMIC INNOVATION GROUP

To: New York Senate Standing Committee on Labor; Senate Standing Committee on Commerce, Economic Development, and Small Business
From: Kenan Fikri, Research Director, Economic Innovation Group
Catherine Lyons, Director of Policy, Economic Innovation Group
Subject: Written Testimony on Senate Bill S3100
Date: May 22, 2023

Introduction

Chairs Ramos and Ryan, Ranking Members Martins and Murray, and members of the Standing Committees on Labor and Commerce, Economic Development, and Small Business, thank you for the opportunity to submit written testimony in support of S3100, concerning non-compete agreements.

Non-compete agreements harm New York's economy by limiting the mobility of its workers and reducing the dynamism of its business sector. Fortunately, there is growing political and economic consensus nationwide regarding the need to restrict the use of non-compete agreements. Earlier this year, members of the U.S. Senate and House of Representatives reintroduced the *Workforce Mobility Act*, which would essentially ban the use of non-competes in most circumstances. According to our research, at the state level, 34 state governments have introduced or passed legislation reforming the use of non-compete agreements in 2023 so far.

How Non-competes Hurt Workers and Contribute to a Less Dynamic Economy

In short, non-competes hurt workers and the broader economy primarily through reduced wages and diminished entrepreneurship. Today, roughly 20 percent of U.S. workers are bound by a non-compete agreement, and nearly twice as many have signed one at some point in the past.[1] Although their use among senior executives is ubiquitous, a sizable portion of the lower-wage workforce is covered by non-competes as well. Healthy labor markets depend on vigorous competition for talent between firms and the ability of workers to freely market their skills to interested employers. Yet, non-competes often restrict workers' ability to switch jobs in their area of expertise. Here is an overview of non-compete agreement's effects on workers:[2]

- **Non-compete enforcement hurts worker wages:** Across industries and states, a growing abundance of empirical evidence finds negative effects of non-competes on wages.
- **These negative wage effects are worse for historically marginalized workers:** Research has found that stricter non-compete enforceability lowers earnings for female and nonwhite workers by twice as much as for white male workers. Other studies have shown that workers with less education experience larger negative wage impacts from non-competes.
- **Non-competes deter workers from finding better opportunities:** Workers bound by a non-compete stay in their jobs 11 percent longer. Since job mobility is key for

[1] John Lettieri, "A better bargain: How non-compete reform can benefit workers and boost economic dynamism." American Enterprise Institute (2020).
[2] Evan Starr "The Use, Abuse, and Enforceability of Non-Compete and No-Poach Agreements." Economic Innovation Group (2019).

boosting earnings, these longer tenures reinforce the negative earnings effects of non-competes.

More generally, non-competes pose threats to the broader economy. A dynamic economy depends upon knowledge spillovers—not the spilling of trade secrets that can be protected through other means, of course, but the productivity-boosting exchanges that happen when individuals collaborate, start new enterprises, or take the body of their lifetime experiences and apply them in new contexts. Non-compete agreements contribute directly to the pile of forces undermining many such processes integral to our continued prosperity (see below).[3]

- **Non-competes reduce entrepreneurship:** Greater enforceability of non-competes reduces new firm entry. The firms that do start tend to have fewer employees at launch and are more likely to die in their first three years. The ones that survive still tend to remain smaller for their first five years.
- **Like wages, these negative effects on new business growth are worse for underrepresented entrepreneurs:** The threat of non-compete enforcement appears to particularly dampen entrepreneurship among women.
- **Non-competes likely slow the pace of innovation:** Non-competes obstruct the flow of knowledge by restricting the churn of workers among firms. They make venture capital less effective in spurring new patents and job growth.

Our own research has found that states enjoy a sizeable and immediate pro-entrepreneurship boost by curtailing the use of non-compete agreements among higher-earning workers. After Hawaii banned the use of non-competes for the tech workforce, the state saw a 10 percent bump in new businesses in the sector.[4]

Why a Full Ban is Best

The approach advanced in this bill—namely, a nearly complete ban on the use of non-compete agreements—is the right policy choice for New York. It would free workers up and down the income ladder to regain control over their careers. It would ensure that would-be entrepreneurs can start and grow enterprises in New York State. And it would free New York's innovation workforce to fuel the firms—large and small, new and old—that power the state's knowledge economy.

When Washington state prohibited non-competes for workers earning less than $100,000 in 2019, employers simply let their non-competes lapse for workers just below the threshold, instead of giving them a raise to keep their non-compete in place. This behavior reveals that employers of knowledge workers in the state did not truly value their non-competes.[5] Why not? Presumably because, in reality, the vast majority of non-competes have nothing to do with protecting vital trade secrets or proprietary interests—and when they do, employers have many other legal tools to protect their legitimate interests that carry none of the personal and

[3] Ibid.
[4] Ben Glasner, "The Effect of Noncompete Reforms on Business Formation: Evidence from Hawaii and Oregon." Economic Innovation Group, 2023.
[5] Takuya Hiraiwa, et al., "Do Firms Value Court Enforceability of Noncompete Agreements? A Revealed Preference Approach," 2023.

economic harm of non-competes. While Washington's reforms were a significant step in the right direction, the state missed an important opportunity to enact a more far-reaching ban and reap the rewards for workers across healthcare, engineering, technology, and any other field where earnings and productivity are high. New York has the opportunity to learn from this and other recent state experiences.

A complete ban on non-competes is both pro-worker and pro-dynamism and a clear win-win for the state and its workers. EIG is proud to support the *Workforce Mobility Act*, a piece of legislation of similar scope at the federal level, and we are proud to support Senate Bill S3100 in New York, as well.

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Honorable Chair Jessica Ramos, Honorable Chair Sean Ryan, and other distinguished public servants, Good Morning:

I used the word public servant deliberately because too many have become corporate servants. Passing the ban of non-compete agreements and clauses is essential to serve the public interest. My client Melanie Lee and millions of other New Yorkers strive to make a living by spending the majority of their time working for businesses. The power dynamic is clear: employers have the upper hand and an ill equipped employee is vulnerable to exploitation and abuse.

Too many employees are placed in a vulnerable position when being offered employment to have to agree to terms that limit their future employment. Often times these non-compete agreement are simply unenforceable, but it creates a burden for employee to seek a declaration by the Court that is illegal and places the employer in a position of asserted a contractual claim of subservience.

I have witnessed employers use non-compete clauses as means to harass, retaliate, and abuse employees by hiring corporate attorneys who will threaten lawsuits. For an employee who is now moving on to a potential new job, they are placed in a precarious situation- on one hand the new employer may not want to be involved in litigation, and the former employer is now attempting to limit the employee's employment. Most employees do not have the ability to afford the legal fees associated with defending threatening lawyer letters from employers which could run well into 10's of thousands of dollars.

Corporations have an interest in protecting confidentiality and trade secrets- they do not have the right to limit a human being's ability to gain lawful employment. Non competes cater to abuse and exploitation because they further limit the options and cater to a deterrent. Most employees who want to leave because of toxic or abusive workplace environment, or because of failure to promote or pay more, will be stuck just because they believe they do not have an option- and the option is also limited to what they can afford.

Today we have another unique scenario where an employer uses it's position of power to take advantage of a vulnerable employee by limiting their ability to leave. This employer not only failed to legally pay my client what she was legally owed, but also placed upon her the allegedly illegal obligation to pay the employer $15,000 if she wanted to leave because they trained her. "They want to charge her for leaving because they trained her." That is wrong and any employer who thinks that they can exploit and abuse the great people of New York should be aware that

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the public servants of this great State will not sit idly. Passing this ban is about protecting the public interest and protecting employees against powerful employers.

I will now ask Melanie Lee to share her story and how the non-compete impacted her.

Thank you for your time and efforts in this matter.

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Statement

Good afternoon and thank you for your time. My name is Melanie Lee and I am a tattoo artist.

Like many people, the pandemic forced me to reconsider my passions and my values. I was unhappy in my career as a fashion designer and wanted to have the flexibility to work around my life.

So I gathered my portfolio, and with no connections or experience in the industry, I cold emailed multiple tattoo studios in New York City.

In Nov 2020, I was offered a position at studio “X”. My duties were to open and close the shop and assist other artists during the day, in exchange for having a space to practice tattooing on fake skin, unpaid. Once I was ready to work with clients, the shop would take 50% commission of each tattoo, and eventually, with more experience, 40% commission.

2 months later, I was presented with a non-compete contract for the first time. I was told that if I did not sign, I would have to leave the shop.

The contract stated that I must remain at the shop for 2 years after signing. If I left prior to those 2 years, I would owe the shop $15,000 in liquidated damages. Additionally, I was not allowed to work within a 20-miles of the shop for the next 2 years after my departure, whenever that may be.

At this point, I had started learning the basics of tattooing. I could feel my confidence growing in this new craft and was excited by the possibilities.

Afraid of losing this opportunity, I signed the contract.

Tattooing became one of the most fulfilling parts of my life. I quit my corporate job and successfully made the switch into being a full-time artist.

Unfortunately, I also realized that studio X was not a safe workplace. I want to emphasize again that the contract made it clear whether I worked there for 2 years or 20 years, moving on from this studio would result in a penalty.

After careful consideration, I quit in March 2022, a little over 1 year later.

An invoice for $15000 quickly followed, along with threats of legal action if I did not cease tattooing immediately. It claims that despite taking advantage of my free labor, taking 50% of almost every paycheck, and despite me providing many of my own supplies, I owe studio X $15000 in incurred “damages”. I have yet to see an itemized list that explains these charges.

The contract is also aggressively territorial of clients I attracted with my own art. While a client can choose to work with me, they can also choose to work with any artist at studio X or any artist in all of New York. I have not and can not coerce anyone to work with me over someone else.

In enforcing this contract, my only options are to leave this industry that I love, or to leave New York City, a place I have called home for the past 11 years.

In enforcing this contract, my livelihood is being held hostage

I started tattoing again in an entirely different borough, away from where I debuted and away from my professional network, just hoping to bounce back. This journey is still ongoing.

Since I began my career 2 years as a tattoo artist, all I’ve wanted is to support myself with my art. The financial cost and mental toll I’ve paid to fight this contract has driven me to desperation and burn-out.

This non- compete contract does not serve as protection for their business, but rather to entrap their employees and as a method of workplace retaliation.

I’m here today on behalf of all workers for protection and prevention from predatory business practices and so others never have to go through what I’m going through.

Testimony of Miriam F. Clark for National Employment Lawyers Association/New York

Good morning. Thank you for the opportunity to testify at this morning's hearing.

I am Miriam Clark, the Chair of the Legislative Committee of the National Employment Lawyers Association, New York affiliate, and partner at the firm Ritz Clark & Ben-Asher LLP.

I have been representing employees, including employees bound by restrictive covenants such as non-competes, for more than thirty years.

I know you will be receiving testimony at this hearing from NELA National, and from other organizations describing in detail the overwhelming economic data describing the negative effects of restrictive covenants on employees and worker mobility. I thought it would be helpful if you heard from me as a practitioner about the particular details of non-compete agreements, the expensive and painful litigation they result in, and the resulting chilling effect on our clients.

First, let's take a look at some employees who have been sued recently in New York. They run the gamut: a home health aide (Attentive Home Care Agency, Inc.

v. Galinkin, 2022 NY slip op. 30110(U), ¶¶ 4-6 (Sup. Ct. Kings County Jan. 13, 2022)); a nurse anesthetist (Long Island Anesthesia Physicians Llp v. Wagner, No. 608859/2020E, 2020 N.Y. Misc. LEXIS 20863, at *8 (Sup. Ct. Suffolk County Sept. 30, 2020)); a mid-level sales employee (Statista Inc. v. Gordon, 2022 NY slip op. 31505(U), ¶¶ 3-4 (Sup. Ct. N.Y. County Apr. 12, 2022)); a senior project manager (Truesource v. Niemeter, No. 605526/2021, 2021 N.Y. Misc. LEXIS 11214, at *4-9 (Sup. Ct. Suffolk County Dec. 10, 2021)); an investment banker (Jordan, Edmiston Grp., Inc. v. Wong, 2023 NY slip op. 31443(U), ¶¶ 3-5 (Sup. Ct. N.Y. County May 1, 2023)); a financial planner (AJ Wealth Strategies, LLC v. Smoose, 2022 NY slip op. 33400(U), ¶¶ 15-17 (Sup. Ct. N.Y. County Oct. 5, 2022); and a software sales person (ASAPP, Inc. v. Rowbotham, 2022 NY slip op. 30696(U), ¶¶ 1-3 (Sup. Ct. N.Y. County Mar. 4, 2022)).

A report issued this month by the Government Accountability Office (Government Accountability Office, Report to Congressional Requestors, May 2023, https://www.gao.gov/assets/gao-23-103785.pdf ("the GAO Report")) confirms that nationwide, non-competes are weaponized against employees of all income and professional levels. (GAO Report, at 7). While in some of the reported cases, the court refused to enter an immediate injunction banning the worker from taking on the new job, in each case the litigation itself was painful and costly for the worker, and in many cases by the time the case was resolved the new job was no longer available. This is just the tip of the iceberg, of course, because it does

not capture the more common unseen scenario, where prospective employers decline to even consider hiring valuable employees who are subject to non-compete agreements.

How do employees end up being bound by non-competes?

In our experience, and as confirmed by the GAO Report, many employees have no idea that they are bound by non-competes, and most have no ability to negotiate their terms. (GAO Report, at 13, 17). In many situations, employees are required to sign non-competes after they have already started new jobs. Id. Often, they are simply given non-competes to sign as part of a pile of paper or electronic documents that they are required to sign or click through as part of an "on-boarding" process. (GAO Report, at 22).

Even high-level and sophisticated employees, when faced with restrictive covenants, find they have no bargaining power when it comes to employers who insist on them. Sometimes they are told by recruiters not to worry, because employers never enforce these clauses. It would take a LEXIS search or a PACER search to find out that the opposite is true, something even the most sophisticated business person is not likely to conduct unless represented by counsel. In any event, as a client recently told me, every time an employee is offered a job, they should not have to consult with a lawyer. The unequal bargaining power is even

more acute when a non-compete agreement is demanded of an existing employee. The risk to the employee of not signing is the loss of their employment position.

What happens when a non-compete is enforced?

Typically, the former employer sues the former employee by going to court and asking the judge to issue a preliminary injunction stopping the employee from working at the new employer. The former employer also often sues the new employer. Sometimes, the former employer (or its attorney) sends a threatening letter to the employee and the prospective employer before filing the lawsuit – and that threat often works to intimidate the employee and prospective employer into submission.

In the somewhat rare case where the new employer does not back down, the case moves ahead quickly at first because the new employer is alleging that it will suffer irreparable harm if the competition occurs. But even if the former employer loses the preliminary injunction motion, it can still continue on with a lawsuit against the former employee that go on for years seeking money damages for the injury it allegedly suffered. The employee has to pay many thousands of dollars in legal fees to defend herself, even if she ultimately wins the case.

To repeat, most cases don't get this far. In a more typical situation, a new employer has no interest in being involved in this dispute and fires the employee pro-actively, once it is threatened with litigation by the former employer. Or even more likely, the potential new employer refuses to hire the employee in the first

place – or withdraws its offer - once it has learned of the non-compete. Or the employee learns she is covered by a non-compete and is afraid to leave her job at all – or she feels forced to move out of state, or to leave her field altogether. Therefore, even a patently unenforceable non-compete can have a fatally chilling effect.

How do lawyers advise clients as to whether non-competes are enforceable?

Unfortunately, we often can't, at least not with any certainty. Whether a Court will uphold a non-compete agreement or find it runs afoul of the "reasonableness" requirements under New York law is not readily predictable. The basic premise is that,

"[N]oncompete clauses in employment contracts are not favored and will only be enforced to the extent reasonable and necessary to protect valid business interests". Morris v. Schroder Capital Mgmt. Int'l, 7 N.Y.3d 616, 620-21, 859 N.E.2d 503, 825 N.Y.S.2d 697 (N.Y. 2006). Thus, enforcement of restrictive covenants has been limited to circumstances where they are found to be "reasonable in time and area, necessary to protect the employer's legitimate interests, not harmful to the general public and not unreasonably burdensome to the employee". Bdo Seidman v. Hirshberg, 93 N.Y.2d 382, 389, 712 N.E.2d 1220, 690 N.Y.S.2d 854 (1999), quoting Reed, Roberts, Assocs. v. Strauman, 40 N.Y.2d 303, 307, 353 N.E.2d 590,

386 N.Y.S.2d 677 (N.Y. 1976). Yet, "the formulation of reasonableness may vary with the context and type of restriction imposed". Id.[1]

This language leaves so much space for individual interpretation that it is safe to say that there are no hard and fast rules enabling attorneys to guide employees. For example, there is language in New York case law that the law generally disfavors non-competes that involve long periods of time or large geographic areas. However, just over a year ago a New York trial court upheld a three-year non-compete covering the entire North American continent, against an employee who was a project manager. Truesource v. Niemeter, No. 605526/2021, 2021 N.Y. Misc. LEXIS 11214, at *4-9 (Sup. Ct. Suffolk County Dec. 10, 2021).

To make matters even more confusing and unpredictable, New York judges have the power to "blue-pencil" or rewrite non-competes in order to narrow them. This blue-penciling can lead to an outcome that neither party either wanted or could have predicted. For example, in Karpinski v. Ingrasci, 28 N.Y.2d 45, 52, 320 N.Y.S.2d 1, 7, 268 N.E.2d 751, 755 (1971), a dentist was told by the judge that he was barred from practicing oral surgery, but could still practice as a dentist. His patients who needed oral surgery would have to go elsewhere.

[1] The only clarity presently provided by New York law is that non-management employees in the broadcasting industry cannot be subject to non-competes. Labor Law § 202(k). And, as noted below, attorneys are ethically barred from entering into non-competes.

Who is harmed by these clauses?

First and foremost, employees. Common sense and our own experience tell us, and the GAO Report confirms (GAO Report, at 28), that these clauses negatively affect job mobility, even when the clauses are ultimately not enforceable. The GAO Report cited a study that found that technology workers tend to move away from states that allow the enforcement of non-competes. (GAO Report, at 30). Non-competes also result in increased wage disparities, especially disfavoring women and Black employees. (Id., at 33). Not surprisingly, the GAO Report cited studies that showed increased enforcement of non-competes has been shown to increase the number of employees in the tech industry choosing to switch fields. (Id., at 30). And of course, individual employees can suffer devastating economic consequences as a result of being banned from their fields for months or years – typically with no compensation from the former employer during the term of the non-compete. This creates enormous economic hardship on employees – and on their careers.

Who else is harmed? Consumers – because non-compete agreements often result in doctors and dentists, for example, having to abandon their patients and neighborhoods in order to continue practicing. In this regard, it is instructive (and ironic, given that non-competes are enormous fee-generators for lawyers) to note that lawyers themselves are ethically barred from demanding non-competes from

other lawyers, and from entering into them themselves[2] – because the lawyer-client relationship is deemed to be so sacrosanct that it should not be interfered with merely because a lawyer switches law firms. There is no reason why a doctor's relationship with her patients, or a financial advisor's relationship with her clients, or a home health care worker's relationship with her client families, should be considered any less sacrosanct.

The economy of the State of New York is also harmed because non-compete agreements undermine the mobility of the most productive and dynamic employees who are the engines of economic growth. California has successfully grown its economy while imposing a ban on non-compete agreements and its high technology sector has been the model of growth over the past fifty years, growth that many economists attribute to its ban on non-compete clauses.[3] By limiting the movement of our most productive employees, we stifle the growth of the New York economy that comes along with such mobility.

[2] New York Rule of Professional Conduct 5.6(a)(2)

[3] *See generally* ANNALEE SAXENIAN, REGIONAL ADVANTAGE: CULTURE AND COMPETITION IN SILICON VALLEY AND ROUTE 128 (1994); Ronald J. Gilson, *The Legal Infrastructure of High Technology Industrial Districts: Silicon Valley, Route 128, and Covenants Not to Compete*, 74 N.Y.U. L. REV. 575, 627 (1999); Jason S. Wood, *A Comparison of the Enforceability of Covenants Not To Compete and Recent Economic Histories of Four High Technology Regions*, 5 VA. J.L. & TECH. 14 (2000), cited in *NELA and NIWR Comments on Proposed FTC Noncompete Rule*, April 2023. (Attached as Exhibit A).

How does the law need to change?

It should be clear from the above that no halfway solution to this problem is workable. We need to end once and for all the senseless, expensive, and often economically devastating litigation factory that is the result of our current law. All non-competes should be banned across the board, for workers of all income levels.

Non-competes currently in place should be unenforceable. Without this provision, the non-compete litigation machine will continue on for years, even decades.

Employers should be required to notify employees that non-competes are not enforceable. Otherwise, "ghost" non-competes will continue to chill employee mobility and weaken the economy.

Quasi-noncompete agreements, such as agreements known as TRAPS, under which employers demand that departing employees pay back large amount of money to reimburse them for training costs, should also be banned. Likewise, employer requirements that former employees must forfeit substantial earned but unvested deferred compensation if they go to work for a competitor should be banned, as well as broad nondisparagement clauses, which also often act as competition restrictions.

Employers also should not be allowed to circumvent this fundamental policy banning non-competes through the use of choice of law provisions applying another state's non-compete law to a New York employment contract.

The Attorney General should be empowered to enforce the law, so that workers no longer have to engage lawyers to defend themselves against actions brought by employers.

CONCLUSION

The time has come for New York to protect its workers and consumers and to grow its economy by enacting a complete ban on post-employment non-competes. These restrictions can cause catastrophic harm to workers at all levels of the economy, while protecting only those employers who fear that they cannot otherwise compete in an open and fair job market.

Exhibit A

April 19, 2023

Submitted via: https://www.regulations.gov/commenton/FTC-2023-0007-0001

Lina M. Khan
Chair
Federal Trade Commission
600 Washington Avenue, N.W.
Suite CC-5610 (Annex C)
Washington, D.C. 20580

Re: Comments on Non-Compete Clause Rule,
16 C.F.R. Part 910, RIN 3084-AB74, Matter No. P201200

Dear Chair Khan:

The National Employment Lawyers Association (NELA) and the National Institute for Workers' Rights ("Institute") submits these comments in support of the Federal Trade Commission's Notice of Proposed Rulemaking, entitled, "Non-Compete Clause Rule."

NELA is a national professional membership organization of and for lawyers who represent employees in all aspects of employment law. The largest organization of its kind in the country, NELA, together with its 69 circuit, state, and local affiliates, has more than 4000 members nationwide who variously represent employees in discrimination, whistleblower, wage and hour, health and safety, and contract disputes and who advise employees, partners, and independent contractors on employment-related agreements. NELA's mission is to serve lawyers who represent employees, advance employee rights, and advocate for equality and justice in the workplace. NELA has filed numerous amici curiae briefs before the United States Supreme Court and other federal appellate courts on a wide range of employment law issues as well as comments on relevant Notices of Proposed Rulemaking. The mission of the National Institute for Workers' Rights is to advance workers' rights through research, thought leadership, and education for policymakers, advocates, and the public. As the nation's employee rights advocacy think tank, the Institute influences the broad, macro conversations that shape employment law.

NELA members are the lawyers who represent employees with respect to the non-compete and de facto non-compete clauses covered by the Proposed Rule. Because our members variously represent clients in these matters across industries, functions, and economic levels, from hourly-paid workers to high-level executives, NELA has deep experience with non-compete clauses and a panoramic view of the ongoing harmful anti-competitive effects they impose on workers, the public, and markets. Based on our members' vast experience with non-compete disputes and clauses as unfair methods of competition, NELA and the Institute urge the Commission to issue its Proposed Rule, as drafted, with certain modifications, and to reject the

fallacy cited by opponents of the Proposed Rule that non-compete clauses are necessary to protect trade secrets and other legitimate employer interests.

I. NON-COMPETE CLAUSES ARE UNFAIR METHODS OF COMPETITION.

A. How Non-Competes Unfairly Limit Competition, Harming Workers and Consumers.

NELA supports the Commission's finding that non-compete clauses are unfair methods of competition because they negatively impact mobility in the labor market and are often coercively imposed. Non-compete clauses unfairly tether employees to their jobs and restrain competition by preventing employees from leaving their employment for better or even comparable opportunities within their relevant field of experience or industry. Employees who do leave are forced to sit out from their field for a prolonged period of time, something few workers can afford to do. This leaves the vast majority of workers with no choice but to stay in jobs that may be stagnant and/or underpaying at best, and abusive, intolerable, and/or rife with unlawful treatment, at worst.

For employers, this is a win-win. Non-compete clauses provide them with an inexpensive and easy way to retain talent without having to compete for employees with better pay and working conditions. Meanwhile, the costs and risks of this anti-competitive behavior are shifted to workers, consumers, and the public. Employees must forego opportunities for better pay, better working conditions, and/or career advancement in their chosen field. Even more troubling, many of our members have clients who have experienced unlawful harassment, discrimination, and/or retaliation, wage-and-hour violations, and/or unsafe conditions at the hands of an employer but who cannot escape this mistreatment unless they are willing to change fields or move substantially farther away.[1] More generally, as stated in the Proposed Rule, non-compete clauses depress wages in the geographical areas where they are used both for the employees who are subject to them and those who are not. Non-Compete Clause Rule, 88 Fed. Reg. 3482, 3488 (proposed Jan. 19, 2023) (to be codified at 16 CFR Part 910).

Moreover, because most employers also insist on employment at-will, they are able to both freeze employees in their jobs and retain the option to terminate employees when they choose. Many of the non-compete agreements encountered by our members make no exception

[1] The ability to even work in the same field in another geographic area assumes that the non-compete clause has a geographic limitation; employers have imposed non-compete clauses that are national or global in scope, further drastically limiting the worker's options. *See Ainslie v. Cantor Fitzgerald, L.P.*, Consol. C.A. No. 9436-VCZ, 2023 WL 106924, *17 (Del. Ch. Jan. 4, 2023) (holding that worldwide geographic scope of non-competition, non-solicitation, and no-business provisions was unreasonable and noting that the absence of a geographical limitation does not render the restrictive covenant unenforceable per se, but such clause must be "'narrowly tailored to serve the employer's interests in the circumstances of the case.'" [internal citations omitted]).

to the non-compete if the employee is terminated without "cause," and, although some states will not enforce non-competes against employees terminated without cause,[2] some states will,[3] and others have not decided the issue.[4]

Too often, consumers lose the freedom to choose their professional service providers and other market providers due to non-competes that prohibit the providers from working in the same geographic area after their employment ends. The non-compete clauses deprive or interfere with the public's ability to choose their own professional advisers, because it is usually not feasible for those clients to travel outside the relevant geographic area to maintain the professional relationship during the period of the non-compete. Some states have laws prohibiting or limiting use of non-competes against certain professionals, such as medical professionals, social workers, accountants, and/or broadcasters but these exclusions are not consistent across state lines. Non-Compete Clause Rule, 88 Fed. Reg. 3482, 3494 (proposed Jan. 19, 2023) (to be codified at 16 CFR Part 910).

Similarly, no-service or no-business clauses function as non-competes by prohibiting employees from servicing or accepting business from clients or customers at future employers, even if the employee has not solicited the client or customer. The clients and customers are therefore prohibited from moving their business to their provider of choice.

As the Notice of Proposed Rule-Making aptly notes, non-compete clauses also negatively impact the public by restricting innovation. New entrants to the markets are prevented from recruiting the talent that they need to provide innovative goods and services, and workers subject to non-compete clauses are nearly always prevented from starting competitive businesses, even though they cannot use the employer's trade secrets or confidential information to do so. Rather, they must continue to work for their existing employer or leave the industry for a lengthy period of time before striking out on their own. This also causes harm to the market and the public by delaying or eliminating the introduction of superior products and services.

The cost of litigation means that these negative impacts on competition exist regardless of whether the non-compete is "reasonable" under state law. This is because, regardless of whether a non-compete is enforceable, its very existence creates a chilling effect on worker

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[2] See, e.g., New York, *Kolchins v. Evolution Markets, Inc*., 122 N.Y.S. 3d 288, 290 (1st Dep't 2020); *Buchanan Capital Markets, LLC v. DeLucca*, 41 N.Y.S.3d 229 (1st Dep't. 2016); Massachusetts (as to agreements signed on or after October 1, 2018), Mass Gen. Laws c. 149 § 24L, and Montana, *Wrigg v. Junkermier, Clark, Campanella, Stevens, P.C*., 265 P.3d 646 (Mont. 2011).

[3] See, e.g., Connecticut, *Gartner Group Inc. v. Mewes*, 1992 WL 4766, at *2 (Conn. Super. Ct. Jan. 3, 1992), Idaho, and Indiana, Leiza Dolghih, *Are Non-Compete Agreements Enforceable if the Employee is Terminated?,* N. TEXAS LEGAL NEWS, Feb. 21, 2021, https://northtexaslegalnews.com/2021/02/22/are-non-compete-agreements-enforceable-if-the-employee-is-terminated/.

[4] See, e.g., Vermont, Florida, Hawai'i. Dolghih, "Are Non-Compete Agreements Enforceable if the Employee is Terminated?", *supra* note 3.

mobility.[5] Many workers are afraid to leave a job, let alone one that is unfulfilling, underpaying, or abusive, for fear of being sued. The cost to litigate a claim arising out of a non-compete clause can run into five and six figures, a prohibitive amount for the vast majority of employees, whether an hourly worker, mid-level manager, or even a doctor or engineer. A victory in such a case would be pyrrhic at best and financially ruinous at worst. Faced with this impossible choice, in our members' vast experience, many employees rationally resign themselves to complying with the non-compete, even a patently unenforceable one.

The chilling effect also spills onto competitors and other employers, many of whom are deterred from hiring workers bound by non-competes, no matter how unreasonable or unenforceable that non-compete might be, for fear of being swept up in litigation between the employee and former employer and possibly even sued for tortious interference with contractual relations. Competitors seeking to recruit talent are often faced with the challenging choice to forego a desirable job candidate or to pay the cost of litigation or settlement in order to seek closure on a restriction, even when unenforceable.[6]

In our members' experience, clients' former employers, aware that new employers are reluctant to get involved in a potential non-compete dispute, have wielded non-compete clauses like a cudgel, using the clause to improperly interfere in a former employee's ability to obtain a new job by scaring the new employer off. Some employers are willing to hire an employee with a non-compete, only to fire that employee at the first sign of litigation. We have attached a document that collects stories of workers in this and other difficult situations because of non-competes.

Although opponents of the Proposed Rule have attempted to minimize these impacts by arguing that non-compete clauses are imposed selectively to protect trade secrets and similar information and then negotiated between parties of comparable bargaining strength, that position is pure fallacy. First, non-competes are unfair methods of competition no matter how widely used. Second, our members' experience is that many employers, especially larger ones, reflexively use non-competes as invidious boilerplate, imposing them sweepingly throughout

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[5] This *in terrorem* effect means that:

> "[f]or every covenant that finds its way to court, there are thousands which exercise an *in terrorem* effect on employees who respect their contractual obligations and on competitors who fear legal complications if they employ a covenantor, or who are anxious to maintain gentlemanly relations with their competitors. Thus, the mobility of untold numbers of employees is restricted by the intimidation of restrictions whose severity no court would sanction."

Harlan M. Blake, *Employee Agreements Not To Compete*, 73 HARV. L. REV. 625, 682-83 (Feb. 1960).

[6] *See* Non-Compete Clause Rule, 88 Fed. Reg. 3482, 3501, at Part IV.A.1.a.ii (proposed Jan. 19, 2023) (to be codified at 16 CFR Part 910).

their organizations without regard to function and/or responsibilities, out of a generalized desire to prevent competition and retain employees and not due to any bona fide threat to a legitimate protectible interest.

Non-competes are rarely negotiated as part of an overall bargained-for employment agreement. In fact, employees are often presented with a non-compete agreement as though it were a routine administrative form and told to sign it in order to accept or start a job. Many workers do not know that they can have a lawyer review and explain the often convoluted and vague language of non-compete clauses or, if they are aware, they cannot afford to hire a lawyer to do so. Even when employees try to negotiate the language, which is often overly broad and/or ambiguous, employers often say that the clause is take-it-or-leave it because it is "standard" in the organization.

Very few employees, whether an hourly worker or an executive, have the luxury of walking away from a job. The reality is that many are forced to accept the non-compete in order to be able to work. Thus, in the vast majority of situations, the notion that non-compete clauses are the product of meaningful negotiations between parties of equal bargaining power is simply not true. While we thus agree with the Proposed Rule that non-compete clauses are coercively imposed on low-wage and middle-income workers, as described further below, our experience is also that such clauses are coercively imposed with respect to employees at more senior levels of employment as well.

Of course, for an employee to even contemplate negotiation of a non-compete assumes that the employee has been provided with the non-compete clause *before* accepting a job. But, some employers spring non-compete clauses on unsuspecting employees at the start of the employment – after the employee has already resigned from a prior position and possibly turned down alternative offers – or impose a new or more onerous non-compete clauses on employees who are mid-tenure, on tight deadlines, upon risk of termination. As the employees typically cannot obtain alternative employment quickly, they are forced to accept the non-compete to keep his or her job, usually without additional compensation or benefits. Although, as described below, some states require employers to provide new consideration to impose a non-compete on an existing at-will employee, other states do not and hold that continued employment of an at-will employee is sufficient consideration for a post-hire non-compete agreement.

While some states have banned or limited the use of non-compete agreements, the complex patchwork of state laws adds to the uncertainty and risk with respect to enforcement of non-compete clauses and highlights the need for a single national standard, especially as employers increasingly impose non-compete clauses without national or even geographic limitations. Below are just a few examples of how non-competes vary by state:

- Three states -- California, North Dakota, and Oklahoma -- ban non-competes altogether, with very limited exceptions like the sale of a business. *See* Cal. Bus. & Prof. Code § 16600; N.D. Cent. Code sec. 9-08-06; Okla. Stat. Ann. tit. 15, sec. 219A.

- Some states, like Colorado, Maryland, Maine, New Hampshire, and Illinois, have banned non-competes for workers below a specified income threshold. *See* Colo Rev. Stat. Ann. § 8-2-113; Md. Code, Lab. & Empl. § 3-716; 26 M.R.S. § 599-A; N.H. R.S.A. § 275:70-a; 820 ILCS 90.

- Some states, like Pennsylvania, Texas, and Montana, require independent consideration, like a raise or promotion, before a non-compete will be imposed on an existing at-will employee. *See Socko v. Mid-Atlantic Sys. of CPA, Inc.*, 126 A.3d 1266 (Pa. 2015); *Martin v. Credit Protection Assoc., Inc.*, 793 S.W.2d 667 (Tex. 1990); *Access Organics, Inc. v. Hernandez*, 175. P.3d 899 (Mont. 2008).

- In other states, like Delaware, Ohio, and Alabama, a non-compete can be imposed on an employee at any time, even after years of service. *See Research & Trading Corp. v. Powell*, 468 A.2d 1301, 1305 (Del. Ct. Ch. 1983); *Lakeland Gp. of Akron, LLC v. Columber*, 804 N.E.2d 27, 32 (Ohio 2004); *Daughtry v. Capital Gas Co.*, 229 So.2d 480, 483 (Ala. 1969).

Employers with workers in states with more restrictive non-compete laws will often exploit more employer-friendly state laws by including foreign choice of law clauses in non-compete agreements. Relatedly, employers may include use choice of forum clauses to require cases to be litigated in venues that employers perceive to be more employer-friendly. The result is often that workers are sued in courts across the country under the laws of states in which they have never worked or lived. Courts will rarely disturb a contractual choice of law provision unless the chosen state's law conflicts with a fundamental policy of a state with a materially greater interest. Even when a court ultimately refuses to enforce another contract-designated state's law,[7] workers are still required to undergo significant litigation expenses, and are likely to have interruptions their new employment relationships while litigation is pending. A single federal standard would eliminate this problem.

[7] *See, e.g., Cabela's LLC v. Highby*, 801 Fed. Appx. 48, 49 (3d Cir. 2020) (declining to apply Delaware non-compete law against Nebraska employee given "a conflict between Delaware's fundamental policy in upholding the freedom of contract and Nebraska's fundamental policy of not enforcing contracts that prohibit ordinary competition"); *Nuvasive, Inc. v. Miles*, No. 2017-0720-SG, 2019 WL 4010814 at *7 (Del. Ct. Ch. Aug. 26, 2019) (declining to apply Delaware non-compete law against California employee because "Delaware's interest in freedom of contract is a fundamental but general interest, and is manifestly outweighed by California's interest in overseeing conditions of employment relationships in that State");

B. Non-Competes Are Not Necessary To Protect Employers' Interests.

1. Employers Have Ample Alternative Protections for Trade Secrets and Confidential Information.

Opponents of the Proposed Rule attempt to depict a bleak picture by claiming that the Proposed Rule will effectively eliminate their ability to protect their confidential information and trade secrets. This argument should be rejected. The notion that an employee should pre-emptively be forced to remain tethered to a job or benched from their field because of the potential for disclosure of confidential information and/or trade secrets is a harmful overreach that would allow employers to use unfair methods of competition to protect a much narrower set of already-amply protected interests.

At the outset, the opponents' argument is in part belied by the way many employers, especially larger ones, themselves use non-competes as invidious boilerplate – imposing them reflexively and sweepingly, without relation to an employee's actual responsibilities, place within the organization, and/or receipt of trade secrets or sensitive confidential information, as stated above. In our members' experience, and as examples provided above and shared during the Commission's February 16, 2023 public hearing session demonstrate, employees across the economic spectrum are frequently subjected to non-compete clauses even though they do not receive trade secrets or competitively sensitive confidential information in performing their job.

Moreover, employers have ample ability to protect trade secrets and confidential information. The Uniform Trade Secrets Act, which has been adopted by forty-seven states and the District of Columbia, and the federal Defend Trade Secrets Act of 2016, separately provide for a civil cause of action for trade secret misappropriation. Non-Compete Clause Rule, 88 Fed. Reg. 3482, 3505, at Part IV.B.1. Trade secret theft is also a federal crime under the Economic Espionage Act of 1996. *Id*. Intellectual property law also provides significant legal protections for an employer's trade secrets. *Id.*

Employers also can protect trade secrets, inventions, and confidential information contractually, through non-disclosure, intellectual property, and/or confidentiality agreements. In fact, it has never been easier for employers to protect their confidential information, as they have found ever more ways to electronically track employees' work emails, downloads, and other transactions on work platforms. Moreover, employers can protect client lists through contractual non-solicitation clauses that prohibit an employee from soliciting a client's business after employment with the employer ends.

The Notice of Proposed Rule Making makes clear that the Proposed Rule will not eliminate any of these protections. Non-Compete Clause Rule, 88 Fed. Reg. 3482 (proposed Jan. 19, 2023).

2. California: Where Business Not Only Survives but Thrives.

We need only look to California's long statutory history and public policy prohibiting non-competes for assurance that prohibitions on non-competes have not caused employer chaos or economic decline.

California Business and Professions Code and relabeled as section 16600 provides: "Except as provided in this chapter, every contract by which anyone is restrained from engaging in a lawful profession, trade, or business of any kind is to that extent void." Cal. Bus. & Prof. Code § 16600; see *Edwards v. Arthur Andersen LLP,* 44 Cal. 4th 937 (2008).[8] California has effectively had a ban on non-competes for over 150 years, yet the California economy—and in particular, its technology sector—has flourished. The California economy is thriving. It has the largest economy in the U.S. and is poised to overtake Germany as the world's 4th largest economy.[9]

Many economists have suggested that its ban on non-competes has played a key role in the development of its technology sector.[10] Many scholars and commentators have posited that the success of Silicon Valley, the heart of California's technology industry, is precisely *because of* California's statutory bar on non-competes.[11] This prohibition has led technology employers to cooperate and compete, generating a "dynamic process leading to Silicon Valley's characteristic career pattern, lack of vertical integration, knowledge spillovers, and business culture."[12] In an influential book, AnnaLee Saxenian compared the technology industries of Silicon Valley in California with Route 128 in Massachusetts, crediting California's ban on non-competes as a key factor explaining Silicon Valley's far superior rates of growth and innovation to Route 128.[13]

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[8] In 1872, California first codified its prohibitions on non-competition by enacting Section 1673 of its Civil Code, which read: "Every contract by which any one is restrained from exercising a lawful profession, trade, or business of any kind, otherwise than is provided by the next two sections, is to that extent void." Cal. Civ. Code § 1673 (1872). In 1937, this code section was moved to the California Business and Professions Code.

[9] "ICYMI: California Poised to Become World's 4th Biggest Economy," Office of Governor Gavin Newsom, Oct. 24, 2022 https://www.gov.ca.gov/2022/10/24/icymi-california-poised-to-become-worlds-4th-biggest-economy/.

[10] *See, e.g.*, ANNALEE SAXENIAN, REGIONAL ADVANTAGE: CULTURE AND COMPETITION IN SILICON VALLEY AND ROUTE 128 (1994); Ronald J. Gilson, *The Legal Infrastructure of High Technology Industrial Districts: Silicon Valley, Route 128, and Covenants Not to Compete*, 74 N.Y.U. L. REV. 575, 627 (1999).

[11] *See e.g.* Jason S. Wood, *A Comparison of the Enforceability of Covenants Not To Compete and Recent Economic Histories of Four High Technology Regions*, 5 VA. J.L. & TECH. 14 (2000).

[12] Gilson, *supra* note 20, at 609.

[13] SAXENIAN, *supra* note 20.

Economic research has found that technology workers in California move jobs more frequently than in other states, leading to more rapid knowledge diffusion and innovation.[14] Another economic study found that bans on non-competes are associated with increased job mobility and higher employee wages.[15] Numerous studies have found that non-competes stifle the creation of new businesses;[16] startups are more likely to be successful and to grow larger in states like California that ban non-competes.[17] States that ban non-compete clauses tend to show greater innovation, more entrepreneurship, higher job growth, and greater venture capital investment.[18]

Thus, the weight of the empirical evidence unambiguously not only refutes arguments about the illusory parade of horrors that would be caused by a ban on non-competes but also demonstrates that banning noncompete agreements, as exemplified by California's experience, fuels greater innovation, entrepreneurship, higher wages and job mobility, and greater higher economic growth, making a compelling case for their prohibition nationwide.

Although the sentiment runs counter to the current loud protestations from Chamber of Commerce groups, many employer-side attorneys in California generally agree that the state's ban on non-compete agreements is a good thing. "It's bad for business and bad for morale," reported one in-house attorney, "if you're an employer, you want the people working for you to *want* to work for you." She reasoned that if employees feel trapped, the employer ends up with a very disenchanted and unmotivated workforce. This attorney also previously worked in-house for a national company that used non-compete agreements with its employees in states which allowed them. She reported that the threatened litigation between companies over these agreements created "make-believe work" for legal departments. She also pointed out that employers still have a solid backstop of trade secret protection agreements, which are fully enforceable in California.

Venture capitalist Bijan Sabet has stated that he does not require noncompete agreements from companies he invests in, and that he asks other companies to abandon them too, because

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[14] Bruce Fallick, Charles Fleischman, and James Rebitzer, *Job-Hopping in Silicon Valley: Some Evidence Concerning the Microfoundations of a High-Technology Cluster*, 88 REV. ECON. AND STATS. 471 (2006).
[15] Natarajan Balasubramanian, Jin Woo Chang, Mariko Sakakibara, Jagadeesh Sivadasan, and Evan Starr, *Locked In? The Enforceability of Covenants Not to Compete and the Careers of High-Tech Workers*, 57 J. HUMAN RESOURCES 2349 (Apr. 2020).
[16] EVAN STARR, THE USE, ABUSE, AND ENFORCEABILITY OF NON-COMPETE AND NO-POACH AGREEMENTS, ECON. INNOVATION GROUP, Feb. 2019, https://eig.org/wp-content/uploads/2019/02/Non-Competes-2.20.19.pdf.
[17] Evan Starr, Natarajan Balasubramanian, and Mariko Sakakibara, *Screening Spinouts? How Noncompete Enforceability Affects the Creation, Growth, and Survival of New Firms*, 64 MANAGEMENT SCIENCE 552 (2017).
[18] Sampsa Samila and Olav Sorenson, *Noncompete Covenants: Incentives to Innovate or Impediments to Growth*, 57 MANAGEMENT SCIENCE 425 (2011).

they do more harm than good.[19] Another Silicon Valley-based investor has cited noncompete agreements as a major impediment to hiring talent to promising new startup ideas. Oftentimes, they identify strong candidates who are interested in the job, but do not accept because they are too afraid to take a job because they are bound by a noncompete. This slows down the pace of innovation and hinders the flow of talent to the best ideas.[20]

I. NELA SUPPORTS THE PROPOSED RULE BUT RECOMMENDS MODIFICATIONS TO STRENGTHEN ITS POWER AGAINST UNFAIR METHODS OF COMPETITION.

A. Definitions of Non-Compete and De Facto Non-Compete in Section 910.1(b)(1) and (2).

Section 910.1(b)(1) defines "non-compete clause" as "a contractual term that prevents a worker from seeking or accepting employment with a person, or operating a business, after the conclusion of the worker's employment with the employer." 88 Fed. Reg. 3535 (proposed Jan. 19, 2023). Importantly, Section 910.1(b)(2) of the Proposed Rule uses a functional test to determine whether a contractual term is prohibited and states that a contractual term may be a "*de facto* non-compete clause because it has the effect of prohibiting the worker from seeking or accepting employment with a person or operating a business after the conclusion of the worker's employment with the employer."

NELA supports this broad definition and use of a functional test. This aspect of the rule reflects the common principle in employment law that what matters is the reality of the worker's situation, not the words and labels used to describe it. Employers might not always cleanly and clearly label as "non-competes" contractual obligations that have the effect of imposing a non-compete. A rule that permits employers to limit employees' freedom to seek other employment by simply using a different label would eviscerate the purpose and efficacy of the Proposed Rule.

We are concerned, however, that the use of the words "prevents" and "prohibiting" in Section 910.1(b)(1) and (2), respectively, could be construed more narrowly than the Commission intends by failing to capture the types of de facto non-compete clauses that the Proposed Rule intends to proscribe. The Restatement (Second) of Contracts § 186(2)(1981) uses a more expansive definition: "A promise is in restraint of trade if its performance would limit competition in any business or restrict the promisor in the exercise of a gainful occupation." Likewise, the Uniform Restrictive Employment Agreement Act (UREAA) drafted by the

[19] Matt Marshall, *Case closed: Non-competes aren't good*, VENTURE BEAT, 2007, https://venturebeat.com/business/case-closed-non-competes-arent-good/.
[20] Timothy Lee, *A little-known California law is Silicon Valley's secret weapon*, VOX, Feb. 13, 2017, https://www.vox.com/new-money/2017/2/13/14580874/google-self-driving-noncompetes.

National Conference of Commissioners on Uniform State Laws, utilizes a broader, more generalized protective focus: "Even if an agreement does not meet the definition of a non-solicitation agreement, confidentiality agreement or other named agreement, however, it is a restrictive employment agreement if it prohibits, *limits, or sets conditions* on working elsewhere after the work relationship ends or a sale of business is consummated." UREAA at 14 (Feb. 14, 2023), available at https://www.uniformlaws.org/committees/community-home?communitykey=f870a839-27cd-4150-ad5f-51d8214f1cd2 (emphasis added).

Therefore, NELA therefore recommends that, in the definition of "non-compete clause" in Section 910.1(b)(1), the Commission replace "prevents" with "**restrains or limits**," so that the definition reads: "a contractual term that **restrains or limits** a worker from seeking or accepting employment with a person, or operating a business, after the conclusion of the worker's employment with the employer." Further, NELA recommends that, in Section 910.1(b)(2), the Commission replace "prohibiting" with "restraining or limiting" so that Section 910.1(b)(2) states: "The term non-compete clause includes a contractual term that is a de facto non-compete clause because it has the effect of **restraining or limiting** the worker from seeking or accepting employment with a person or operating a business after the conclusion of the worker's employment with the employer." 88 Fed. Reg. 3482, 3509 (proposed Jan. 19, 2023).

B. The Commission Should Strengthen the Ban by Expressly Including Non-Competes with Unfair Enforcement Remedies and Providing More Examples of De Facto Non-Compete Clauses.

NELA applauds the inclusion of two non-exhaustive examples of de facto non-competes in the Proposed Rule. We do, however, believe that greater clarity by way of additional examples of prohibited clause would assure uniformity, avoid the *in terrorem* effect of any uncertainty, and preempt creative contract writing that would undermine the intent of the Proposed Rule. More specifically, NELA requests that the Commission confirm that the clauses set forth below are prohibited by the Proposed Rule because they are explicitly or functionally non-compete clauses.

1. <u>Forfeiture-for-Competition Clauses</u>: We incorporate the extensive discussion of forfeiture-for-competition clauses set forth in the Comments submitted by NELA/NY, NELA's New York affiliate, on April 19, 2023. In summary, with forfeiture-for-competition clauses, an employee who violates a non-competition obligation forfeits compensation, rather than being subjected to injunctive relief. While many jurisdictions scrutinize these provisions under the same reasonableness standards as applied to other non-competes, s*ee, e.g., Deming v. Nationwide Mut. Ins. Co*., 279 Conn. 745, 763, 905 A.2d 623, 635 (2006), several jurisdictions do not, reasoning that the employee is not prohibited from working because he or she has the "choice" of competing or accepting compensation and that such scrutiny is unnecessary.

In reality, such choice is illusory. Often, the employee risks forfeiting meaningful compensation for work performed, while the employer stands to receive a liquidated remedy that may bear little, if any, relation to the damages actually incurred as a result of the alleged breach. *See, e.g., Ainslie*, Consol. C.A. No. 9436-VCZ, 2023 WL 106924, *17, 22-24 (analogizing the forfeiture for competition clauses at issue to liquidated damages provisions and noting that such provisions create the same "undue chilling effect on employment and upward mobility as a restrictive covenant" where the liquidated damages have no relation to actual harm suffered). Thus, forfeiture for competition clauses deter competition and worker mobility just like other non-compete clauses; they simply provide the employer with a pre-determined economic remedy. The Commission should explicitly clarify that forfeiture for competition clauses are non-compete clauses prohibited by the Proposed Rule.

2. <u>Liquidated Damages Clauses:</u> Like forfeiture for competition clauses, restrictive covenants with liquidated damages provisions are enforced through payment of a fixed amount of damages rather than through injunctive relief. Such clauses restrain competition and limit mobility like other non-competes; they simply allow the employer to avail itself of a preset amount of damages that may bear no relation to the damages actually incurred as a result of an alleged breach. *See generally Ainslie*, Consol. C.A. No. 9436-VCZ, 2023 WL 106924, *22-24.

As with forfeiture-for-competition clauses, however, some courts hold that liquidated damages provisions are not restraints of trade. In *Eastern Carolina Internal Medicine, P. A. v. Faidas*, 149 N.C. App. 940, 564 S.E.2d 53 (2002), for instance, the court ruled that a physician's contract which required payment of liquidated damages in the amount of $109,000 in the event the physician worked for another healthcare provider within a three-county territory, was not a non-compete and thus not "subject to strict scrutiny as to reasonableness and public policy required with a covenant not to compete," because the clause did not forbid competition but instead required payment of a fee. *Id.* at 945, 56. The Commission should, with clarity, debunk and invalidate this type of reasoning that is still upheld in parts of the country and confirm that liquidated damages provisions are prohibited under the Proposed Rule.

3. <u>No-Service/No-Business Agreements</u>: Often misnamed "non-solicitation" clauses, no-service/no-business agreements prohibit former employees from servicing or accepting business from customers or clients of their former employer after employment ends, even where the employee does not solicit the business. These clauses have the same impact as a non-compete clause, especially as to salespersons and licensed professionals, as they eliminate consumers' market choice and impede worker mobility, particularly where such clauses are drafted so broadly as to apply to clients with whom the employee had no direct contact and/or contain no exception for an employee's pre-existing clients. Courts have rejected attempts to pass off as "mere…non-solicitation provision[s]" covenants that prevent former employees from engaging in business with customers and recognized that such clauses constitute non-compete clauses. *Dent Wizard Int'l Corp. v.*

Andrzejewski, 2021 IL App (2d) 200574-U, ¶ 35, 2021 Ill. Ap. Unpub. LEXIS 687, *18 (IL App. April 23, 2021) (citing *Zabaneh Franchises, LLC v. Walker*, 2012 IL. App (4th) 110215, P21, 972 N.E.2d 344, 361 Ill. Dec. 859 (2012)).

Accordingly, NELA proposes that no-service/no-business agreements be included among the examples of de facto non-competes in Section 910.1(b)(2) of the Proposed Rule. This addition would be particularly helpful in order to distinguish these no-service agreements from actual non-solicitation agreements, which are not prohibited by the Proposed Rule.

4. No-S h op / "Forward " Contracts. We incorporate the NELA/NY Comments with respect to no-shop or "forward contract" clauses, which prohibit employees
from accepting an offer for future employment while still employed by the current employer. By putting employees in this professionally and economically untenable position, i.e., requiring an employee to be unemployed before accepting a new position, these clauses restrain employee mobility and decrease the employee's bargaining position with a new employer for wages and other benefits. NELA thus requests that no-shop/forward contract clauses be included as examples of de facto non-competes.

5. Non-Disparagement Clauses. We incorporate the discussion set forth in the NELA/NY Comments with respect to non-disparagement clauses that function as non-competes, insofar as they prohibit a former employee from making otherwise lawful statements in the normal course of competition on behalf of a future employer or engagement. We request that the Commission include as an example of a de facto non-compete an agreement prohibiting a former employee from making otherwise lawful statements in furtherance of lawful competition.

C. Section 910.1(c): Definition of Employer.

Section 910.1(c) of the Proposed Rule defines "employer" to mean a "person, as defined in 15 U.S.C. § 57b-1(a)(6), that hires or contracts with a worker to work for the person." 88 Fed. Reg. at 3510 (proposed Jan. 19, 2023) ("Person" under 15 U.S.C. § 57b-1(a)(6) means: "any natural person, partnership, corporation, association, or other legal entity, including any person acting under color or authority of State law." 15 U.S.C. § 57b-1(a)(6)).

NELA generally supports the FTC's proposed definition of "employer," but believes that the Commission should adopt a more expansive definition to ensure that no worker falls through the cracks as a result of complex arrangements by which a worker is subject to control by multiple entities or employed by one entity while subject to a non-compete clause through a compensation or equity agreement with a different entity, such as a parent, affiliate, or subsidiary of the employer. Non-competes are deployed to the detriment of workers and fair competition not just by traditional employers but across an array of opaque relationships whereby multiple entities act variously or in concert to constrict worker freedom. Thus, we propose that the

definition of employer apply to an employer's affiliates, parents, subsidiaries, persons or entities under common control, and joint employers.

This definition would better ensure that employers do not escape the rule's proscriptions through various affiliated or shell entities not arguably otherwise covered by the Rule's definition of employer. Such an approach is in keeping with the Commission's broad definition of "worker" to mean workers classified as independent contractors, as well as externs, interns, volunteers, apprentices, or sole proprietors providing service to a client or customer.

D. The Proposed Requirements of Retroactive Application and Rescission Are Critical to Curtail the Harms Imposed by Non-Competes.

The Commission has identified a number of economic and market-based harms that result from the use and abuse of non-compete provisions. These harms continue at least through the life of the contract and the term of the non-compete period and, in some cases, longer. The depression of wages, limits on career progression, and lack of market choice for consumers caused by non-competes can be reasonably be viewed as cumulative and extending beyond the term of the non-compete clause.

A rule that only banned future non-compete clauses would leave these existing harms and their *sequella* in place and unchecked. Employees who have already entered into non-competes would still be prevented from switching jobs. Entrants into the job market would still be precluded from positions filled by dissatisfied workers whose mobility is limited by non-competes. Consumers would still lose their ability to choose. Innovation would continue to be stymied to the extent would-be entrepreneurs are subject to non-competes.

A rule that only applies on a going-forward basis would have at least two detrimental effects. It would create a perverse incentive for employers to enter into non-compete provisions with employees before the Proposed Rule's effective date and create two classes of workers arbitrarily: those who are subject to a non-compete provision and those who are not. This would result in depressing employee mobility – and, as a result, earnings potential – for the more senior members of the labor market, with a disparate impact on our nation's oldest workers. While we already see hiring preferences for younger workers, we would undoubtedly see more of this preferential treatment where employers view younger job candidates as being presumptively more mobile and thus attractive, given that they would be less likely to be subject to restrictive non-competes.

But the retroactive application alone will not be enough. A change in enforceability is not self-enforcing: it requires the parties to each individual contract to understand the change and to conduct themselves accordingly. Based on the experiences of our members as representatives of employees, many workers who are subject to unenforceable non-competes are not aware of

their unenforceability.[21] As stated above, whether and to what extent a contractual provision is enforceable has become increasingly challenging for a layperson to understand as the patchwork of state laws has become more complex and divergent over the past decade.[22] Moreover, most workers lack the means to seek legal counsel as to the enforceability of a non-compete and, if determined to be unenforceable, to mount a costly legal challenge to declare the non-compete unenforceable or to defend a suit against enforcement of such a restriction.[23]

In this regard, the Proposed Rule's rescission requirement, as set forth in Section 910.2(b), provides for an elegant and impactful solution. Employees would be provided an individual, written notice that their restriction is no longer in effect. This written rescission would make the employee more aware of their rights and therefore increase employee mobility within the labor market.[24] Further, the ability to provide a prospective employer with a written rescission of a non-compete provision would give job-seekers the ability to assuage any concerns of litigation risk held by a prospective employer.

E. The Proposed Rule Should Have A Clear Sale-of-Business Exception for a *Bona Fide* Corporate Transaction.

The Commission's Proposed Rule's single exception, as outlined in Section 910.3, as applicable to the sale of an ownership interest by a substantial owner, substantial member or substantial partner should be further limited to apply to those corporate transactions that constitute a *bona fide* transfer of assets or ownership interests to an independent third party. As drafted, the Proposed Rule would permit a non-compete with a substantial owner, member or partner in the context of a repurchase right or a mandatory stock redemption program that is triggered upon the termination of the service relationship. These terms are particularly common in the context or private companies' equity incentive plans, which have become increasingly common terms and conditions of employment in light of the increased of venture capital-backed employers.

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[21] *See also* J.J. PRESCOTT AND EVAN STARR, SUBJECTIVE BELIEFS ABOUT CONTRACT ENFORCEABILITY 2 (2022) (finding that "70% of employees with unenforceable non-competes mistakenly believe their non-competes are enforceable").

[22] *See generally* Non-Compete Clause Rule, 88 Fed. Reg. 3482, 3494 at Part II.C.1 (proposed Jan. 19, 2023) (outlining the landscape of state law governing non-competes, including recent legislative changes).

[23] *Id.* at 3489 (noting that employees who believe their non-competes are unenforceable are still less likely to breach their terms, seemingly to avoid the specter of a lawsuit or risk the reputational harm associated with breaching a contract).

[24] PRESCOTT AND STARR, *supra* note 21, at 26 (concluding that information campaigns, such as individualized notice to workers, regarding the unenforceability of a non-compete will likely improve an employee's ability to take a competitive job).

Although the threshold ownership percentage of 25% does require that the person hold a truly substantial ownership in the selling entity,[25] we fear that employers will use wholly-owned subsidiary entities to create an ownership on paper that might meet this threshold percentage, but that is considerably less than the ownership in the parent or holding entity where the actual assets of the company lie. We believe that limiting Section 910.3 to a *bona fide* corporate transaction with an independent third party, would prevent employers from creating a large loophole out of this exception.

In addition, we propose that the Commission further clarify that any non-compete permitted under the exception outlined in Section 910.3 must run from the consummation of the transaction and not the termination of a worker's service relationship (*e.g.* employment or contracting). This would prevent companies from using restrictions to be an end-run around the ban on post-employment non-competes. Non-competes in the context of a corporate transaction are intended to provide the seller the benefit of the goodwill they have just purchased. To permit a non-compete to run post-employment rather than post-transaction does not serve to protect that legitimate business interest, [26] and also has the harmful economic effects outlined by the Commission with respect to the labor market. [27]

III. NELA STRONGLY OPPOSES THE COMMIS S ION' S PROPOSED ALTERNATIVES.

NELA strongly opposes the three potential alternatives to a complete ban identified by the Commission because the alternatives would unjustifiably leave the economic and market-based harms caused by non-compete agreements intact, create uncertainty, and allow for easy evasion.

A. NELA Opposes Exceptions and Separate Rules for Senior Executives.

The Notice of Proposed Rule Making seeks comments on whether "senior executives" should be subject to different rules or carved-out from the non-compete ban. At the outset, as the Commission itself noted, there is no agreed-upon definition of "senior executive." 88 Fed. Reg. 3482, 3520 at Part IV.C (proposed Jan. 19, 2023). It is an amorphous category that can expand and contract depending on usage and context and is not an appropriate basis on which to determine eligibility for workplace protections. Creating exceptions or separate rules for senior executives would invite arbitrary distinctions that are unrelated to any legitimate protectible employer interest, be ripe for abuse, and perpetuate the unfair competition targeted by the Proposed Rule.

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[25][25] We support the use of a clear threshold percentage rather than a more vague definition that would require adjudication and interpretation by courts.

[26] *See Reed Mill & Lumber Co., Inc. v. Jensen*, 165 P.3d 733, 737-38 (Colo. Ct. App. 2006).

[27] *See* Non-Compete Clause Rule, 88 Fed. Reg. 3482, 3484 at Part II.B (proposed Jan. 19, 2023).

A carve-out or separate rule for senior executives would still deprive competitors, consumers, and the public of the ability to fairly compete for the executive's talent or benefit from their innovation. Moreover, that someone is a senior executive or highly compensated does not insulate him or her from the untenable choices that other workers who are subject to non-competes face; they too need to earn a livelihood and pursue their careers. Although the Commission preliminarily notes that non-competes are not exploitative and coercive for senior executives, most high earners and/or senior executives do not have the bargaining power to avoid a non-compete. More generally, the fact that an employee was highly paid or advanced in their career to hold a senior position for the work they performed for a former employer is simply not a legitimate protectible reason to force them to remain tethered to a job or to force them to sit out of their career after the employment ends. As stated above, to the extent that employers need to protect trade secrets and the like, they have ample alternative options for protecting those interests.

In fact, given that senior employees tend to be older than junior employees, saddling only senior executives with non-compete agreements can make them less attractive to potential employers in favor of younger and more junior employees, and forcing senior executives to sit-out of their fields can deprive them of their livelihoods during critical earning years. Compounding this problem is that the number of available comparable jobs decreases as employees become more senior, making it that much more difficult for a high-level employee to find a comparable job after being forced to sit-out from their field.

B. NELA Opposes Exceptions and Separate Rules Based on Income Thresholds.

NELA further opposes exceptions and separate rules based on income levels because, as with separation rules for senior executives, distinctions based on income levels are arbitrary, are unrelated to any legitimate protectible interest, would be ripe for abuse, and would perpetuate the anti-competitive harms identified by the proposed rule, while there are viable alternatives for employers to protect trade secrets, confidential information, and client lists. The anti-competitive effects of non-competes occur at all wage levels – the market, consumers, and the public are still deprived of the ability to compete for the innovation and talent of high earners who can contribute to new and existing market entrants. As with senior executives, although the Commission preliminary found that non-competes are not coercively imposed on high wage earners, most high wage earners do not have the bargaining power to avoid a non-compete. In any event, the fact that someone earned a high wage for performance of their job is not a legitimate basis to limit such employees' mobility post-employment.

Using salary or wages as a metric is also inapt and unfair because doing so ignores the compensation and opportunities that can reasonably be expected to be lost during the non-compete period. An employee who earns a salary of $100,000 per year but who is required to sit out from his or her career or field for one year after employment may need to stretch his prior

earnings to cover a lack of comparable pay during the non-compete period or may have lost better-paying opportunities at the result of the non-compete. Once those costs are factored in, the employee may well have earned less than $100,000 per year for one or more years of his or her prior job but still would be deprived of the protections of a rule that only banned non-compete clauses for those paid salaries of less than $100,000 per year. The non-competes themselves would make any eligibility test based on salaries and wages inherently inaccurate and deprive intended beneficiaries of the protections of the Proposed Rule.

In addition, any threshold amount that would apply to all locations would be difficult to find. What would be high wages in some parts of the country, would not be in others. Any attempt at equalizing for cost of living would increase uncertainty and impede the goal of providing a clear rule. Further, an employer would not necessarily have to pay a worker the threshold amount for any set amount of time. At-will employees can be terminated at any time, with little, if any severance pay. Employers seeking to evade the rule could simply raise an employee's salary to meet the threshold and terminate them after they sign the non-compete.

C. NELA Opposes a Rebuttable Presumption Would Leave Intact the Harms Identified by the Commission.

The Commission's Notice of Proposed Rulemaking requests comments on a potential alternative in which a rebuttable presumption of enforceability would be used in lieu of a categorical ban. We strongly oppose a rule that would include such a presumption. For the reasons described in Part I of our comments, a rule that would require employees to both know the contours of the law and also when it is being overstepped has a chilling effect on both an employee's desire to consider new job prospects and a prospective employer's desire to hire a restricted candidate.

We need look no further than existing state laws to see that statutes with a rebuttable presumption of enforceability can still have a detrimental impact on employee mobility and, consequently, labor markets. Florida, which has a statute that sets forth presumptive enforceability standards,[28] is considered the state with the highest enforceability of non-competes and, consequently, a more depressed labor market in terms of wages for even the most senior employees.[29]

[28] FLA STAT. § 542.335.
[29] *See* Non-Compete Clause Rule, 88 Fed. Reg. 3482, 3524 at Part VII.B.1.a.iv (proposed Jan. 19, 2023).

D. Blue- and Purple-Penciling to Salvage Non-Compete Agreements Should Be Prohibited.

If the Commission ultimately permits any exceptions, however, the problem of reformation of overbroad restrictions will certainly arise. The Commission has noted that states apply a variety of approaches towards reformation of overly broad restrictive covenants:

> • Some States, like Wyoming, will not enforce or reform overbroad restrictions (red-penciling);
> • Other States, like North Carolina, permit a court to strike overly broad provisions, but do not permit the court to otherwise modify the terms (blue-penciling);
> • Other States, like Texas, allow the Court to reform or re-write overly broad provisions so the restrictions can be enforced, and sometimes only where the contract authorizes court revisions (purple-penciling).

In addition, non-compete agreements frequently contain reformation or blue pencil clauses which state that the contracting parties agree to seek reformation or permit the court to make an otherwise unenforceable contract clause enforceable.

If the Commission permits any exceptions – such as exempting professions or income categories – the Proposed Rule should also provide that contracts cannot require reformation of overbroad non-compete provisions. Contract reformation is equitable in nature. Contract re-writing is largely not countenanced in other areas of contract law. *Penn v. Standard Life Ins. Co.*, 76 S.E. 262, 263 (N.C. 1912) ("Courts are not at liberty to rewrite contracts for the parties. We are not their guardians, but the interpreters of their words."). Indeed, why should the Court invoke its equitable powers to enforce a provision disfavored under the common law, when the drafter has overstepped its bounds? They should not, particularly given the *in terrorem* effect of overly broad non-competes. That is, for each non-compete salvaged by a court's reformation, thousands more workers will be penalized by adhering to overly broad provisions, believing them to be legal, or at least not worth challenging.

As the Wyoming Supreme Court recently recognized, it does not make sense to heap these judicial benefits on an overreaching employer:

> When challenged, the employer gets the benefit of the court redrafting the agreement to make it reasonable. *Golden Rd. Motor Inn*, 376 P.3d at 158; Pivateau, 86 Neb. L. Rev. at 689-90. The employer receives what "amounts to a free ride on a contractual provision that the employer is . . . aware would never be enforced." Pivateau, 86 Neb. L. Rev. at 689-90. "'[T]his smacks of having one's employee's cake[] and eating it too.'" *Richard P. Rita Pers. Servs. Int'l, Inc. v. Kot*, 229 Ga. 314, 191 S.E.2d 79, 81 (Ga. 1972) (quoting Harlan M. Blake,

> Employee Agreements Not to Compete, 73 Harv. L. Rev. 625, 683 (1960) [hereinafter referred to as Blake]). *See also Reddy*, 298 S.E.2d at 914-15 (in rejecting the liberal blue pencil rule, the West Virginia Supreme Court reasoned it "will necessarily encourage employers to draft overly broad agreements in the belief that . . . if they [are challenged], the terms will simply be judicially narrowed").

Hassler v. Circle C Res., 505 P.3d 169, 177 (Wyo. 2022). We agree with the sound reasoning of the Wyoming court and urges the Commission that, if any exceptions to the non-compete ban are allowed, it should forbid employers from obtaining reformation, or blue-penciling, of overbroad provisions.

IV. THE FTC'S AUTHORITY TO ISSUE THE PROPOSED RULE AND THE MAJOR QUESTIONS ISSUE.

The FTC has broad authority to interpret the FTC Act's prohibition on unfair methods of competition and to issue regulations declaring practices to be unfair methods of competition. Section 5 of the FTC Act directs the Commission to "prevent persons, partnerships, or corporations … from using unfair methods of competition in or affecting commerce," 15 U.S.C. § 45(a)(2), and Section 6(g) authorizes the FTC to "make rules and regulations for the purpose of carrying out the provisions of [the FTC Act]." 15 U.S.C. § 46(g).

As the Commission stated in its NPRM, courts have long held that Section 5's prohibition of unfair methods of competition encompasses all practices that violate either the Sherman or Clayton Acts, as well as extends to incipient violations of the antitrust laws. As the Supreme Court noted in *FTC v. Texaco Inc.*, "Congress enacted § 5 of the Federal Trade Commission Act to combat in their incipiency trade practices that exhibit a strong potential for stifling competition." 393 U.S. 223, 225 (1968).

In addition to the enacting Congress' clear grant of authority to the FTC to promulgate substantive rules in 1914 with the passage of the FTC Act, the FTC's authority to issue substantive regulations proscribing unfair methods of competition was both tested and affirmed again in the 1970s. In *National Petroleum Refiners v. FTC*, the United States Court of Appeals for the District of Columbia upheld the FTC's authority to conduct substantive rulemaking under both its unfair-methods-of-competition and consumer protection mandates. 482 F.2d 672 (D.C. Cir. 1973). After the Supreme Court denied certiori and thus left the D.C. Circuit's ruling in place, Congress passed the 1975 Magnuson-Moss Warranty Act, Magnuson-Moss Warranty—Federal Trade Commission Improvement Act, Public Law 93–637, 88 Stat. 2183 (1975). The Magnuson-Moss Warranty Act put in place heightened procedural requirements for the FTC to engage in rulemaking pursuant to its consumer protection mandate. Notably, however, Congress did not disturb the FTC's authority to engage in rule-making under its unfair-methods-of-

competition mandate and thus ratified the D.C. Circuit's ruling in that regard. Non-Compete Clause Rule, 88 Fed. Reg. 3482, 3544 at Part XI.II (proposed Jan. 19, 2023).

Moreover, as UCLA law professor Blake Emerson has noted, *National Petroleum Refiners* is a bedrock holding on agency rulemaking authority by the nation's most important administrative law circuit court and is frequently taught in administrative law courses.[30] If *National Petroleum Refiners* were wrong, not only would the FTC's rulemaking power be under threat, but also those of other agencies like the EPA which have long issued substantive regulations under general grants of rulemaking authority.[31] As a result, unless administrative rulemaking writ large is on the chopping block, the FTC's authority to conduct substantive rulemaking on the basis of the FTC Act's general enabling legislation is on stable footing.

Despite the clear legal basis for the FTC's proposed rule, certain commentators might seek to argue that the FTC rulemaking against non-compete agreements runs afoul of the Supreme Court's bourgeoning "major questions doctrine," whereby the broader the authority an agency purports to exert, the more demanding the showing required that Congress intended the agency to exert that power. However, such an argument should not be reason for the FTC to shy away from fully exercising its authority under the FTC Act to promulgate a rule banning non-compete agreements as an unfair method of competition.

First, accepting the Supreme Court's "major questions doctrine" on its own terms, the FTC's proposed rule should easily pass muster. Given the FTC Act's clear grant of authority to the FTC, the 1975 Congress' implied ratification of that authority, the longstanding amenability of non-compete clauses to government regulation, and the necessary limitations on agency policies the Court is apt to declare "major," there is little reason to hesitate before concluding that Congress meant to confer on the FTC the authority it claims under Sections 5 and 6(g) of the FTC Act to promulgate its proposed rule. *Cf. FDA v. Brown & Williamson*, 529 U.S. 120, 159-60 (2000).

Unlike the bulk of the Supreme Court's "major questions" jurisprudence, where the agencies in question claimed authority to prescribe a regulation of vast "economic and political significance" based on statutory language described by the Court as "modest words," "vague terms," or subtle devices," *Whitman v. American Trucking Ass'ns*, 531 U.S. 457, 468 (2001), here the FTC Act is quite clear in conferring substantive rulemaking authority to the FTC, particularly if one reads Sections 5 and 6(g) together, in view of the canon that a statute must be construed as a whole. 15 U.S.C. Sec. 45, 46(g). Moreover, despite recent academic critiques of the reasoning employed by the D.C. Circuit in *National Petroleum Refiners* to affirm the FTC's

[30] Blake Emerson, *The Progress of FTC Rulemaking, by Blake Emerson,* Notice & Comment, YALE J. REG., Mar. 21, 2023, https://www.yalejreg.com/nc/the-progress-of-ftc-rulemaking-by-blake-emerson/.
[31] *Id.*

rulemaking authority, the fact that Congress subsequently impliedly ratified the decision via the 1975 Magnuson-Moss Warranty Act should lay such concerns to rest.

Second, on a conceptual level, the argument that the FTC's proposed rule would violate the so-called "major questions doctrine" would lead to absurd results that would likewise prevent judicial as well as administrative development of antitrust rules. The "major questions" objection is ostensibly grounded in the separation of powers, namely a protection of Congress's exclusive Article I power to legislate and a limitation on executive branch agencies' encroachment thereon. Yet if this argument were evenly applied, it would equally prohibit both the judicial as well as the executive branch from developing major antitrust rules. If the FTC as an executive agency usurps Congress' legislative power by developing "major" antitrust rules, then seemingly any such rules developed by the courts would do the same. But such an outcome would render the last century of judge-made doctrine in antitrust law invalid. Indeed, the courts' development of "per se" versus "rule of reason" tests would all presumably be unconstitutional, since these would be "major questions" of antitrust law that should have been reserved for Congress.

Unsurprisingly, the Supreme Court has already rejected this view with respect to its own authority to develop antitrust law. In *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, for example, the Court described the Sherman Act as a "common law statute" that gives courts the authority to frame and revise major antitrust rules, without having to defer until Congress takes action. 551 U.S. 877, 899 (2007). As the Court noted, "[j]ust as the common law adapts to modern understanding and greater experience, so too does the Sherman Act's prohibition on 'restraint[s] of trade' evolve to meet the dynamics of present economic conditions." *Id.*

In *Leegin*, the Court specifically supported its change of law on that major question by invoking the FTC's stated expertise: "It is also significant that both the Department of Justice and the Federal Trade Commission—the antitrust enforcement agencies with the ability to assess the long-term impacts of resale price maintenance—have recommended that this Court replace the *per se* rule with the traditional rule of reason." *Id.* at 900. This repeats the Court's consistent reliance on the FTC's lawful authority to develop antitrust policy under the fair-competition laws. Indeed, in *FTC v. Sperry & Hutchinson Co.*, the Court affirmed that the FTC, in defining "the congressionally mandated standard of fairness," can "like a court of equity, consider[ ] public values beyond simply those enshrined in the letter or encompassed in the spirit of the antitrust laws." 405 U.S. 233, 244 (1972). See also *FTC v. Ind. Fed. of Dentists*, 476 U.S. 447, 454 (1986) (noting that the standard of "unfairness" under the FTC Act encompasses "not only practices that violate the Sherman Act and other antitrust laws, but also practices that the Commission determines are against public policy for other reasons").

Yet now, the employer commenters argue the exact opposite—that the FTC's views on antitrust rules are irrelevant, because the FTC cannot displace Congress. That argument is foreclosed by *Leegin.* The Supreme Court sees no separation-of-powers issue in its own "common law" development of major antitrust rules, and justifies its own change in antitrust

rules by invoking the FTC's expertise. The employer commenters' "major questions" objection has no merit against this background.

VI. CONCLUSION

For the reasons set forth above, NELA and the Institute urge the FTC to finalize the Proposed Rule as drafted, with the modifications requested above, and prohibit the use of non-compete agreements except in the limited circumstances related to a sale of business described above.

If you have questions regarding these comments, or difficulty opening the attachment, please contact Jeffrey A. Mittman, Executive Director, jmittman@nelahq.org.

Sincerely,

Jeffrey A. Mittman
Executive Director

Attachment: Stories of Workers Harmed by Non-Compete Clauses

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APPENDIX

Stories of Workers Harmed by Non-Compete Clauses

Following are examples of the untenable choices and Kafka-esque circumstances that some of our members' clients have faced when they were forced to choose between their dignity, rights, and need to work, and compliance with a non-compete agreement.

• An LGBTQ+ traffic flagger for a traffic safety company in Ohio was required to sign a non-compete agreement when she was promoted to trainer. The non-compete agreement prohibited her from working for similar companies for 12-months within 100-miles of her employer. When co-workers started spreading rumors that she was in a relationship with a fellow LGBTQ co-worker, she complained about harassment. The employer then transferred her to a new work location, which was further from her home. Believing that the transfer was retaliatory, she resigned and filed a charge of discrimination with the EEOC. She moved to Texas in order to start a new job that was well outside the 100-mile radius of the non-compete agreement -- and her former employer sued her for violating the non-compete anyway. Her new employer laid her off because of the litigation. She was required to defend the lawsuit in Pennsylvania, where she neither lived nor worked, because of the choice of venue clause in the non-compete agreement. The Time's Up Legal Defense Fund ultimately subsidized her litigation costs, and the case eventually settled.

• A salesman with twenty years of experience in steel sales, brought a large book of business with him to his employer. He signed a non-compete that prohibited from working for competitors for 2 years "within the geographic area [employer] solicits," an area that included approximately half of the United States, and a non-solicitation agreement, which prevented him from soliciting the business's clients after leaving. Because the employer's president was abusive, the salesman decided to resign but, because of the non-compete agreement, he had to accept a job in Arizona, take a large pay cut, and rebuild his business from clients on the west coast from scratch. When he had to work from Indiana remotely during the pandemic, the former employer sued him for violating the non-compete agreement, and, after a year of litigation and more than $25,000 in (heavily discounted) attorneys' fees, the case resolved through settlement.

• A bar in a university town in Georgia required all of its managers and bartenders to sign non-compete agreements preventing them from working for any bars within two miles of the bar for two years, even though the bartenders had no specialized training or trade secrets from the bar. Those who violated the non-compete clause were required to pay a penalty of $5,000 to the bar, disguised as reimbursement for "training costs." The non-compete functionally prevented the bartenders and managers from working for any other bar in the town, yet the bar also failed to pay employees for all their hours of work. When one employee quit and went to work for another bar in the town because she was not being paid properly, the employer threatened to seek

a temporary restraining order against her. She had to take an advance of salary from her new employer in order to pay her former employer and end the risk of protracted litigation.

• A children's gymnastic coach at a local gym, was subject to a non-compete prohibiting her from working as for *any* gymnastics, dance, tumbling, or movement education organization within 30 miles of the gym for a year after her employment ended. Because the gym owners were disrespectful and abusive to her and the students, she quit and took a job as an assistant coach at another gym several miles away. The former employer sued her, seeking a temporary restraining order blocking her employment at the new gym and seeking damages.

• Two women worked for a small housekeeping business in Utah, cleaning approximately ten houses per week, were laid off after less than one year of tenure. They had signed non-compete agreements prohibiting them from working for a competing business for one year in the county where the business operating *plus a neighboring county where the business did not conduct any work.* When they were laid off, the former employer threatened them with a lawsuit and withheld their final pay based on a "liquidated damages" clause in the contract (even though they had not violated the non-compete). The women were afraid to continue working in the area covered by the non-compete, even though the business had not even operated in one of those counties.

• A project manager for a construction company in Utah had a non-compete agreement that prohibited him from working on any construction projects *in five states for two years* post-employment, even though the company did not work at all in two of the five states (and was not even licensed to work in those states) and never took jobs below a certain dollar value in Utah. After the project manager was fired, he took on some small construction jobs in Utah – jobs that were too small for his former employer to take. The former employer sued the project manager for violation of the non-compete. The litigation costs forced him out of business and put him on the brink of bankruptcy.

• A salesperson for a large national construction supply company, was subject to a non-compete preventing him from working for a competitor *within 100 miles for two years* post-employment, even though his sales territory was smaller than the area covered by the 100-mile radius. When the salesperson was hired by a small competing company within the 100-mile radius (but outside his former sales territory), the former employer sued. Although the salesperson was able to continue working for his new employer, he was forced to engage in expensive litigation to challenge the overly broad non-compete.

• An online content writer in New Jersey for an online medical website had a non-compete agreement prohibiting her from working for a competitor of the website and its parent for one-year post-employment. The non-compete clause effected prevented the writer from working for *any medical publishing company*, even though she was not involved in strategic decision-making for the website in any way. She had the opportunity to move to a much better

paying job with more potential advancement with a large company, which wanted to hire her, but the company would not proceed with her offer unless she obtained a waiver of the non-compete clause from her employer. The employer refused. Only after she filed a lawsuit seeking a declaratory judgment and preliminary junction to invalidate the non-compete did her former employer agree to negotiate the non-compete clause, and she was ultimately able to join the company, but only after retaining counsel and incurring litigation costs.

• An audio and video technologist for a company that ran large concerts and corporate events. His non-compete agreement barred him from working in the audio-visual industry for *three* years anywhere in *the Midwest*, which basically meant that he would either need to move across the company or leave the field after his employment ended. After the company furloughed him during the pandemic, he was hired by a competitor. When the former employer accused him of violating the non-compete agreement, he found yet another job, but the former employer again accused him of violating the non-compete agreement. After the technologist sued for a declaratory judgment to invalidate the non-compete agreement, the employer counter-sued to extend the non-compete agreement and recover attorneys' fees and costs. The litigation is ongoing.

Hi!
I have been a Chiropractor for 3 years. I had my own practice in Buffalo NY and then decided to move back home to Northern NY in August 2021. I reached out to a local chiropractor in hopes of joining their practice, I threw all my eggs in one basket; I was desperate to find a job. In November 2021 I was welcomed into the practice after multiple meetings and personality tests later to make sure I was what they were looking for.

Things began to spiral slowly downhill at first and then as the months passed, speed was gaining. I began to notice in March 2022 that the owners of the practice and I had very different ideas on what chiropractic treatments are. I let it go for a while and thought I could get past it and become what they were looking for in a provider. I was hired to treat patients and help grow the practice, eventually to take the practice over as the owners were looking toward retirement in the upcoming years. What the owners were looking for was an exact replica of them, someone who treated patients the exact same way as they did with no variations in care.

Fast-forward a few months later, July 24, 2022 to be exact and my life would never be the same. A few days prior I had a meeting with my boss about the concerns I had with treatment and the practice in general.

- I had stated that 3 minutes wasn't enough time to treat patients in and the practice felt like a factory setting (4 patients every 15 minutes was expected).

- I had stated that I struggled with coming to work everyday trying to adjust just like him. (He prefers an activator tool method and I prefer manual adjustments)

- I had stated that diversity in the workplace is a good thing and having 2 providers that treat differently allows for more options for patients to get the care they need.
  I really struggled when patients would see me as a provider and ask to be manually adjusted because they were not feeling better with the treatment they had been receiving. I felt torn between doing what a patient is paying for or doing what I was hired for.
  Those listed above were the concerns I had in the meeting, for which I was hoping we could come to a compromise. Little did I know I would be fired...<u>on a Sunday.</u> The reason they gave me was "our views don't align." Which was true and in hindsight this has been a blessing in disguise, but not without significant struggle. When I signed my contract there was a 2 year 25 mile radius non-compete clause in it. I had asked before I signed if we could alter that and the owners had said we could negotiate if needed. When I was fired I asked if that negated the contract and they said no, the non-compete still stands. Not only in NY a fire at will state, its also a state that still utilizes non- competes.
  So now, I am jobless, in a lot of student loan debt and not allowed to work within a 25 mile radius of my home. Living in a small town, 25 miles is the equivalent of 45-60 minutes of driving time.

This is just the tip regarding the things they have put me through. The rest I have listed below.

- When I was hired I was not allowed to practice or adjust anyone. I was a desk receptionist and the only reason I got to adjust was because Covid-19 struck their household, twice. So, I went from seeing nobody for weeks to seeing 70-80 patients a day. All while expected to treat them the exact same way they did without altering anything.

- Before they fired me, I had to fire an employee who had worked for them for 2-3 years. She had 2 shifts left before her "resignation" date was to be reached. During those 2 days I hired 2 new employees. This is where things get strange...I was allowed to hire and fire employees. I was allowed to create new treatment plans for patients but I was NOT allowed to change existing treatment plans for patients. Which still does not make sense.

- He would become jealous and would pull the other staff members aside and ask why patients were on my schedule instead of his. During the meeting I had with him in July 2022 he made a comment about how he didn't like that patients he had seen for years no longer wanted to be seen by him and began showing up on my schedule.

    - This point and the one above, demonstrate qualities of narcissism. My former employer was/is a very controlling person who wants things to be exactly his way. While in the situation it was very hard to see, but now that I no longer work at that practice it is much clearer that I would always be inferior to him and his abilities.

- They fired me 3 days before I was supposed to get a $4,000 bonus, needless to say I never got that.

- I began weekly mental health counseling because I was afraid to run into them out in public, the thought of seeing them sent me into a pure state of anxiety. It had reached a point where I would only leave the house when I knew they had operating business hours. I still talk to a mental health counselor every week. I began that in February 2022.

- I had a virtual court hearing in March 2022 with a labor law judge with the Department of Labor in NY because they felt I was ineligible for unemployment benefits. During that hearing my former boss had stated that I was fired for misconduct, the judge had decided after the hearing that his reason for firing me was not misconduct and had included prior court cases to justify her decision.

- He had printed off posts from my facebook page and mailed them to the Department of Labor stating that I was working. My facebook posts were informative posts about common conditions people have and how to fix them or who would be best at helping with said condition.

- He bribed patients to get information about what I was doing. He gave away free services for information about me. He had bribed patients on 2 separate occasions. The first time being in October 2022 - soon after he fired me and the second occasion being March 2023.

- Since the virtual court hearing things with my former employer have been quiet but I am afraid that he will continue to harass and find ways to come after me. I have spoken to the assistant in the Attorney Generals office about this situation as well.

I am sure this exceeds the definition of brief, but this situation has been exhausting. Mentally, physically and emotionally. If you do the math I was only at this job for 8 months before being fired. I chose to keep the names and business name of my previous employers anonymous because I do not feel that is relevant. This is my story and if were being honest, they did me a favor by firing me. All I want is to be able to work in my town again and treat patients the way they deserve to be treated. Patients deserve to be heard and they deserve more than 3 minute interactions with their chiropractor. I want to be the voice for those in healthcare that cannot practice or perform what they love to do because of a binding contract. There cannot be secrets in healthcare. There cannot be confidential information about treatments or technology in healthcare. The goal of healthcare is to help people and by having non-competes we are not helping people. Being a female in a male dominant profession is not easy, in fact its grueling.

NATIONAL EMPLOYMENT LAW PROJECT

Testimony of Najah Farley

National Employment Law Project

In Support of Proposed S.3100
An Act to amend the labor law, in relation to prohibiting non-compete agreements and certain restrictive covenants (2023)

Hearing before the New York State Senate

Senate Standing Committee on Labor

Senate Standing Committee on Commerce, Economic Development and Small Business

May 23, 2023

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Thank you, Senator Ramos, Senator Ryan, and members of the Labor Committee and the Committee on Commerce, Economic Development and Small Business. My name is Najah Farley. I am a senior staff attorney at the National Employment Law Project (NELP). The National Employment Law Project is a non-profit, non-partisan research and advocacy organization specializing in employment policy. 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 in low- and middle-wage industries are unable to earn a living when hampered by these abusive contracts.

I testify today in support of S.3100, which would significantly limit the use of noncompete covenants for employees and independent contractors in New York State. I first came to this issue when I was an Assistant Attorney General at the New York State Office of the Attorney General, where multiple usages of these agreements were uncovered and investigated across many industries and throughout the state, including complaints from phlebotomists, IT professionals, security guards, bike messengers, and school cafeteria workers, amongst others. Since joining NELP, I have continued advocating against the proliferation of these agreements, having seen firsthand their deleterious effect on workers.

Non-competition agreements are imposed by employers on employees, often as a condition of getting a job or receiving a promotion. They bar an employee or independent contractor from going to a competing employer or related business for a period following the end of an employment relationship or contract. Sometimes they are bound by either industry or geography, but some are very broad, implicating entire regions of the United States. Some may even list rival specific competitor companies that employees may not join after leaving their previous employer. Research suggests that nearly one in five workers in the United States is currently bound by a noncompete.[1] Employers' stated reasons for using noncompetes are typically to protect trade secrets, screen for employees that intend to stay with the company, and protect investment in employee trainings.[2]

Noncompete provisions are usually presented by employers in a "take it or leave it" fashion, and most employees and independent contractors do not have the power to change them or negotiate their implementation. Workers are forced to sign or forego the job opportunity, contract, or

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[1] Starr, Evan and Prescott, J.J. and Bishara, Norman, *Noncompetes in the U.S. Labor Force* (December 24, 2017), https://ssrn.com/abstract=2625714.

[2] U.S. Department of Treasury Office of Economic Policy, *Non-compete Contracts: Economic Effects and Policy Implications* (2016), https://home.treasury.gov/system/files/226/Non_Compete_Contracts_Econimic_Effects_and_Policy_Implications_MAR2016.pdf

promotion. Studies have shown that workers rarely negotiate on the issue of noncompetes, largely because many receive the noncompete as a condition of a job offer or after accepting the job offer and lack the power to do so.[3] Of those who received the noncompete before the job offer, only 10 percent bargained over the noncompete.[4] For these reasons, NELP often refers to noncompetes as "coercive waivers" as they are not negotiated and workers do not have the power to meaningfully change the terms of the agreements or to refuse to take the job.

We support S.3100 because it would stop the usage of these agreements for the majority of workers in New York State, limiting them to the sale of a business and other clearly defined instances. This law is key to disrupting the coercive nature of the noncompetes as they are currently used.

Many employers apply these agreements across all workers in their businesses to protect trade secrets and proprietary information, whether or not workers actually have access to this information. However, this rationale does not apply to most workers because employers have access to other causes of action to protect confidential and proprietary information and practices and trade secrets under federal law.[5]

In the wake of the pandemic, passing a bill limiting or banning noncompetes is of the utmost importance. Given the deleterious effects that noncompetes have on workers' wages, limiting them substantially is yet another tool to promote workers' rights while improving the economy. Noncompetes have been shown to depress wages by reducing competition.[6] This is because economists have also found correlations between states with strict noncompete enforcement and those with lower wage growth and lower initial wages.[7] The Economic Policy Institute has noted that 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."[8] One study showed that in states where noncompetes are more strictly

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[3] Two studies have shown that 30-40% of workers received the noncompete after they have accepted the job offer. Starr, Evan, J.J. Prescott, and Norman Bishara, *Noncompetes in the U.S. Labor Force*, University of Michigan Law & Econ Research Paper No. 18-013, 2019 and Marx, Matt, *The Firm Strikes Back: Non-Compete Agreements and the Mobility of Technical Professionals*, American Sociological Review, vol. 76, no. 5, 2011, pp. 695-712.

[4] Starr, Evan and Prescott, J.J. and Bishara, Norman, *Noncompetes in the U.S. Labor Force* (December 24, 2017), SSRN: https://ssrn.com/abstract=2625714.

[5] The Defend Trade Secrets Act of 2016 created the first federal civil cause of action and also created a number of statutory remedies for the misappropriation of trade secrets in the United States. 18 USC § 1833(b)(3).

[6] Marshall Steinbaum, *How widespread is Labor Monopsony? Some New Results Suggest its Pervasive*, ROOSEVELT INSTITUTE, December 18, 2017; Greg Robb, *Wage growth is soft due to declining worker bargaining power, former Obama economist says*, MARKETWATCH, August 24, 2018.

[7] Starr, Evan, *The Use, Abuse and Enforceability of Non-Compete and No-Poach Agreements: A Brief Review of the Theory, Evidence and Recent Reform Efforts*, February 2019 Issue Brief, p. 10, available at: https://eig.org/wp-content/uploads/2019/02/Non-Competes-Brief.pdf

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

enforced, noncompetes reduce workers options to move to new firms.[9] This reduction in labor market turnover or "churn" affects the overall job market. This is how noncompetes—one small, seemingly narrow agreement—have an outsized effect on the overall economy.

Public and Private Right of Action

Another key component of this legislation is the inclusion of a private right of action—important because of the information gap and power differential when it comes to these agreements. As discussed above, most noncompetes are presented in a "take it or leave it" fashion, and many employers are not open to negotiations on the terms of these waivers.

Second, noncompetes can rarely be challenged on their face, as they require an employer to file a case against an employee claiming that the employee has violated the noncompete provisions. This leads to a power differential that allows employers to enforce the agreements through "soft" measures, such as threats and sending cease-and-desist letters to the employee or the employee's new job. Placing the burden of proof on the party attempting to enforce the noncompete will serve to change this balance of power and make it easier for workers to challenge the imposition of a noncompete.

A private right of action also allows employees to challenge the waivers and ensure that they are nullified before moving on to another employer and without the risk that they could be fired from their new occupation due to the previously signed waiver. This legislation, by providing a liquidated damages provision, will also discourage employers from unlawfully imposing their agreements. This type of provision will have a deterrent effect for unscrupulous employers who still attempt to bind their employees with noncompete agreements. And as part of the New York Labor Law, the Attorney General's office should also be able to bring public enforcement actions against employers who violate this law as well.

Effect of Noncompetes on Workers of Color and Women

In our recent comments to the Federal Trade Commission's proposed noncompete rule, we discussed the history of noncompetes and how their modern-day usage can be traced back to contracts forced on newly freed, formerly enslaved people.[10] Beyond this history, noncompetes continue to affect workers of color and women. Researchers have found that noncompetes can have a detrimental impact on people of color because it gives businesses more power to discriminate.[11] Further, women in states with strict noncompete enforcement are less likely to

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[9] Matthew Johnson, Kurt Lavetti, & Michael Lipsitz, *The Labor Market Effects of Legal Restrictions on Worker Mobility* (June 6, 2020), 5, https://ssrn.com/abstract=3455381.
[10] 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, 39 SEATTLE U. L. REV. 957, 959 (2016).
[11] Matthew Johnson, Kurt Lavetti, & Michael Lipsitz, *The Labor Market Effects of Legal Restrictions on Worker Mobility* (June 6, 2020), 4, https://ssrn.com/abstract=3455381.

leave their jobs or start rival small businesses.[12] Women and workers of color are also less likely to negotiate, and their earnings are reduced by twice as much when they are in states with strict noncompete enforcement.[13] Because of these effects on wages, noncompetes may have an effect on racial and gender wage gaps nationally.

State Reform

States throughout the country have restricted the usage of noncompetes since 2016, and New York State is behind many other states in enacting progressive legislation in this arena.[14] California, Oklahoma, and North Dakota have had complete bans on the enforceability of noncompetes for decades.[15] Amongst more recent changes, in 2021, Illinois updated its noncompete law to ban noncompetes for all workers making $75,000 a year or less (a threshold that will increase every year to match inflation).[16] The bill, lauded as a compromise by the defense bar, also prohibited employers from enforcing noncompetes against workers who are separated due to Covid-19 or similar circumstances. If an employer wants to enforce a noncompete against a worker separated due to a natural disaster, the employer will be required to pay the employee's base salary throughout the noncompete's duration.[17] In Oregon, lawmakers amended the state's noncompete law to increase the salary threshold for enforcement of noncompete agreements to $100,533.[18] The amended law also requires employers to pay workers half of their annual base salary or $100,533, whichever is higher, throughout the period that the noncompete is in effect. These amendments strengthened one of the strongest noncompetes laws in the country. Nevada also amended its noncompete laws as well, officially banning

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[12] 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..

[13] 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..

[14] This issue became very popular in state-level reforms due to the exposé on Jimmy John's usage of these agreements with sandwich makers in 2016. *See*, Dave Jamieson, *Jimmy John's Makes Low-Wage Workers Sign 'Oppressive' Noncompete Agreements*, HUFFINGTON POST, October 13, 2014, available at: http://www.huffingtonpost.com/2014/10/13/jimmy-johns-non-compete_n_5978180.html.

[15] 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"); see also, Oklahoma, *Title 15 O.S.2001 § 219A* and North Dakota, *9-08-06* (Unlawful and Voidable Contracts).

[16] Illinois Freedom to Work Act ("IFWA"), 820 ILCS 90/1 *et seq.*,

[17] Peter Steinmeyer and Brian Spang, Noncompete Reform Balances Employee and Biz Interests, LAW360, June 2, 2021, https://www.law360.com/articles/1387841/ill-noncompete-reform-balances-employee-and-biz-interests

[18] ORS 653.925 Noncompetition Agreements, https://oregon.public.law/statutes/ors_653.295

noncompetes for hourly workers.[19] The Nevada law also provides for attorneys' fees for workers who challenge noncompetes if they are found to be unlawful.

A study in 2021 showed that the 2008 Oregon noncompete law increased hourly wages by 2 to 3 percent on average.[20] S.3100 will likely have an even larger effect on wages, if enacted, because it would be a much stricter noncompete law than the Oregon noncompete law passed in 2008. All these state law changes leveled the playing field for workers seeking to be freed from these onerous agreements and also encouraged small businesses. These state reforms have in large part contributed to federal reform as well.

National Landscape

Nationally, the Federal Trade Commission (FTC) issued a proposed rule that would also largely ban noncompetes, allowing noncompetes only in relation to the sale of a business.[21] The FTC's assessment in its Notice of Proposed Rulemaking (NPRM) estimates that the FTC proposed rule, if implemented, will raise U.S. workers total earnings by $250 billion per year.[22] The NPRM received hundreds of thousands of comments, many from workers who had been adversely affected by noncompetes. When reviewing the comments, I saw comments from small businesses that found it impossible to hire, and from doctors who said that noncompetes made it impossible for them to work, among many others. Many of the worker comments were anonymous because many workers suffer retaliation in the workplace when speaking out about these issues. That is why national advocacy has been of the utmost importance in bringing these issues to light.

Also, the Workforce Mobility Act has been reintroduced. The bill, sponsored by Senators Chris Murphy (D) and Todd Young (R), was first introduced on February 25, 2021, and reintroduced on February 2, 2023. It would largely eliminate noncompetes for the majority of workers, only keeping them for workers involved in the sale of a business, similar to S.3100. This bipartisan bill would go a long way toward allowing workers to chart their own careers without being hampered by unlawful noncompetes.

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[19] Nevada Assembly Bill 47 relating to unfair trade practices, https://legiscan.com/NV/bill/AB47/2021 And a number of states have banned non-competes for hourly workers and workers who are eligible for overtime (non-exempt workers), such as Illinois, Rhode Island, New Hampshire and Maryland.

[20] 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

[21] The President's executive order, released on July 9, 2021, directed federal agencies to act to increase competition and included specific language on noncompete reform. White House, Fact Sheet: Executive Order on Promoting Competition in the American Economy (July 9, 2021), https://www.whitehouse.gov/briefing-room/statements-releases/2021/07/09/fact-sheet-executive-order-on-promoting-competition-in-the-american-economy/.

[22] FTC Notice of Proposed Rulemaking, 16 CFR 910, p. 76, January 5, 2023, https://www.ftc.gov/system/files/ftc_gov/pdf/p201000noncompetenprm.pdf

Conclusion

NELP supports S.3100 because it will ensure that noncompetes will no longer obstruct workers in New York State from changing jobs to raise their pay or move to better working conditions or starting a new small business. Passing S.3100 will also provide New York State workers with access to state remedies and private rights of action to challenge unlawful noncompetes outright. S.3100 could only serve to make New York State a better place for workers. For these reasons, we therefore urge the passage of S.3100. Thank you for this opportunity to submit testimony.

May 23, 2023

Submitted via: lesser@nysenate.gov and walshs@nysenate.gov

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Senate Standing Committee on Labor

Legislative Office Building
Albany, New York 12248

Re: Written Testimony of National Employment Lawyers Association and National Institute for Workers' Rights on S.3100, Amendments to New York's Labor Law Prohibiting Non-Compete Agreements and Certain Restrictive Covenants.

The National Employment Lawyers Association (NELA) and the National Institute for Workers' Rights ("Institute") submit this testimony in support of S.3100, an Act to amend New York's Labor Law to prohibit non-compete agreements and certain restrictive covenants ("S.3100" or "the Amendment").[1]

NELA is a national professional membership organization of and for lawyers who represent employees in all aspects of employment law. The largest organization of its kind in the country, NELA, together with its 69 circuit, state, and local affiliates, has more than 4000 members nationwide who variously represent employees in discrimination, whistleblower, wage and hour, health and safety, and contract disputes and who advise employees, partners, and independent contractors on employment-related agreements. NELA's mission is to serve lawyers who represent employees, advance employee rights, and advocate for equality and justice in the workplace. NELA has filed numerous amici curiae briefs before the United States Supreme Court and other federal appellate courts on a wide range of employment law issues as well as comments on relevant Notices of Proposed Rulemaking.

The mission of the National Institute for Workers' Rights is to advance workers' rights through research, thought leadership, and education for policymakers, advocates, and the public.

[1] This testimony is adapted from comments submitted on April 19, 2023 by NELA and the Institute in support of the Federal Trade Commission's January 5, 2023 Notice of Proposed Rule-Making entitled, Non-Compete Clause Rule ("FTC's Proposed Rule" or "Non-Compete Clause Rule"), 16 C.F.R. Part 910, RIN 3084-AB74, which proposes federal regulations banning non-compete clauses and de facto non-compete clauses, except in connection with sales of a business exceeding certain thresholds.

As the nation's employee rights advocacy think tank, the Institute influences the broad, macro conversations that shape employment law.

NELA members are the lawyers who represent employees with respect to the non-compete and de facto non-compete clauses covered by the Amendment. Because our members variously represent clients in these matters across industries, functions, and economic levels, from hourly-paid workers to high-level executives, NELA has deep experience with non-compete clauses and a panoramic view of the ongoing harmful anti-competitive effects they impose on workers, the public, and markets. Based on our members' vast experience with non-compete disputes and clauses as unfair methods of competition, NELA and the Institute urge New York State to enact the Amendment, as drafted, with certain modifications, and to reject the fallacy likely to be cited by opponents of the Amendment that non-compete clauses are necessary to protect trade secrets and other legitimate employer interests.

I. NON-COMPETE CLAUSES ARE UNFAIR METHODS OF COMPETITION THAT HARM WORKERS AND THE PUBLIC.

A. How Non-Competes Unfairly Limit Competition, Harming Workers and Consumers.

NELA supports the Amendment because, as the Federal Trade Commission sets forth in the FTC's Proposed Rule, non-compete clauses are unfair methods of competition because they negatively impact mobility in the labor market and are often coercively imposed. Non-compete clauses unfairly tether employees to their jobs and restrain competition by preventing employees from leaving their employment for better or even comparable opportunities within their relevant field of experience or industry. Employees who do leave are forced to sit out from their field for prolonged periods of time, something few workers can afford to do. This leaves the vast majority of workers with no choice but to stay in jobs that may be stagnant and/or underpaying at best, and abusive, intolerable, and/or rife with unlawful treatment, at worst.

For employers, this is a win-win. Non-compete clauses provide them with an inexpensive and easy way to retain talent without having to compete for employees with better pay and working conditions. Meanwhile, the costs and risks of this anti-competitive behavior are shifted to workers, consumers, and the public. Employees must forego opportunities for better pay, better working conditions, and/or career advancement in their chosen field. Even more troubling, many of our members have clients who have experienced unlawful harassment, discrimination, and/or retaliation, wage-and-hour violations, and/or unsafe conditions at the hands of an employer but who cannot escape this mistreatment unless they are willing to change fields or move substantially farther away.[2] More generally, as stated in the FTC's Proposed Rule,

[2] The ability to even work in the same field in another geographic area assumes that the non-compete clause has a geographic limitation; employers have imposed non-compete clauses that are national or

non-compete clauses depress wages in the geographical areas where they are used both for the employees who are subject to them and those who are not. Non-Compete Clause Rule, 88 Fed. Reg. 3482, 3488 (proposed Jan. 19, 2023) (to be codified at 16 CFR Part 910).

Moreover, because most employers also insist on employment at-will, they are able to both freeze employees in their jobs and retain the option to terminate employees when they choose. Many of the non-compete agreements encountered by our members make no exception to the non-compete if the employee is terminated without "cause." Although some New York courts may not enforce non-competes against employees terminated without cause,[3] many workers who are terminated without cause do not know that the non-compete may be unenforceable. Those who do often lack the means to risk a lawsuit by the employer, even if the worker will ultimately be successful, just as it is similarly cost-prohibitive for workers who legitimately dispute a purported "cause" termination to challenge enforceability of the non-compete in court. As a result, many workers are constrained by noncompetes even when they have legal grounds to challenge them.

Too often, consumers lose the freedom to choose their professional service providers and other market providers due to non-competes that prohibit the providers from working in the same geographic area after their employment ends. The non-compete clauses deprive or interfere with the public's ability to choose their own professional advisers, because it is usually not feasible for those clients to travel outside the relevant geographic area to maintain the professional relationship during the period of the non-compete. Some states have laws prohibiting or limiting use of non-competes against certain professionals, such as medical professionals, social workers, accountants, and/or broadcasters, but these exclusions are not consistent across state lines. Non-Compete Clause Rule, 88 Fed. Reg. 3482, 3494 (proposed Jan. 19, 2023) (to be codified at 16 CFR Part 910).

Similarly, no-service and no-business clauses function as non-competes by prohibiting employees from servicing or accepting business from clients or customers at future employers, even if the employee has not solicited the client or customer. The clients and customers are therefore prohibited from moving their business to their provider of choice.

As the FTC's Proposed Rule also aptly notes, non-compete clauses also negatively impact the public by restricting innovation. New entrants to the markets are prevented from

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global in scope, further drastically limiting the worker's options. *See Ainslie v. Cantor Fitzgerald, L.P.*, Consol. C.A. No. 9436-VCZ, 2023 WL 106924, *17 (Del. Ch. Jan. 4, 2023) (holding that worldwide geographic scope of non-competition, non-solicitation, and no-business provisions was unreasonable and noting that the absence of a geographical limitation does not render the restrictive covenant unenforceable per se, but such clause must be "'narrowly tailored to serve the employer's interests in the circumstances of the case.'" [internal citations omitted]).

[3] See, e.g., New York, *Kolchins v. Evolution Markets, Inc*., 122 N.Y.S. 3d 288, 290 (1st Dep't 2020); *Buchanan Capital Markets, LLC v. DeLucca*, 41 N.Y.S.3d 229 (1st Dep't. 2016).

recruiting the talent that they need to provide innovative goods and services; and workers subject to non-compete clauses are nearly always prevented from starting competitive businesses, even though they cannot use the employer's trade secrets or confidential information to do so. Rather, they must continue to work for their existing employer or leave the industry for a lengthy period before striking out on their own. This also causes harm to the market and the public by delaying or eliminating the introduction of superior products and services.

The cost of litigation means that these negative impacts on competition exist regardless of whether the non-compete is "reasonable" under state law. This is because, regardless of whether a non-compete is enforceable, its very existence creates a chilling effect on worker mobility.[4] Many workers are afraid to leave a job, let alone one that is unfulfilling, underpaying, or abusive, for fear of being sued. The cost to litigate a claim arising out of a non-compete clause can run into five and six figures, a prohibitive amount for the vast majority of employees, whether an hourly worker, mid-level manager, or even a doctor or engineer. A victory in such a case would be pyrrhic at best and financially ruinous at worst. Faced with this impossible choice, in our members' vast experience, many employees rationally resign themselves to complying with the non-compete, even a patently unenforceable one.

The chilling effect also spills onto competitors and other employers, many of whom are deterred from hiring workers bound by non-competes, no matter how unreasonable or unenforceable that non-compete might be, for fear of being swept up in litigation between the employee and former employer and possibly even sued for tortious interference with contractual relations. Competitors seeking to recruit talent are often faced with the challenging choice to forego a desirable job candidate or to pay the cost of litigation or settlement in order to seek closure on a restriction, even when unenforceable.[5]

In our members' experience, clients' former employers, aware that new employers are reluctant to get involved in a potential non-compete dispute, have wielded non-compete clauses like a cudgel, using the clause to improperly interfere in a former employee's ability to obtain a new job by scaring the new employer off. Some employers are willing to hire an employee with

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[4] This *in terrorem* effect means that:

> "[f]or every covenant that finds its way to court, there are thousands which exercise an *in terrorem* effect on employees who respect their contractual obligations and on competitors who fear legal complications if they employ a covenantor, or who are anxious to maintain gentlemanly relations with their competitors. Thus, the mobility of untold numbers of employees is restricted by the intimidation of restrictions whose severity no court would sanction."

Harlan M. Blake, *Employee Agreements Not To Compete*, 73 HARV. L. REV. 625, 682-83 (Feb. 1960).

[5] *See* Non-Compete Clause Rule, 88 Fed. Reg. 3482, 3501, at Part IV.A.1.a.ii (proposed Jan. 19, 2023) (to be codified at 16 CFR Part 910).

a non-compete, only to fire that employee at the first sign of litigation or the threat of litigation. We have attached a document that collects stories of workers in this and other difficult situations because of non-competes.

Although opponents of the FTC's Proposed Rule and similar state legislation, such as the Amendment, have attempted to minimize these impacts by arguing that non-compete clauses are imposed selectively to protect trade secrets and similar information and then negotiated between parties of comparable bargaining strength, that position is pure fallacy. First, non-competes are unfair methods of competition and impede worker mobility no matter how widely used. Second, our members' experience is that many employers, especially larger ones, reflexively use non-competes as invidious boilerplate, imposing them sweepingly throughout their organizations without regard to function and/or responsibilities, out of a generalized desire to prevent competition and retain employees and not due to any bona fide threat to a legitimate protectible interest.

Non-competes are rarely negotiated as part of an overall bargained-for employment agreement. In fact, employees are often presented with a non-compete agreement as though it were a routine administrative form and told to sign it in order to accept or start a job. Many workers do not know that they can have a lawyer review and explain the often convoluted and vague language of non-compete clauses or, if they are aware, they cannot afford to hire a lawyer to do so. Even when employees try to negotiate the language, which is often overly broad and/or ambiguous, employers often say that the clause is take-it-or-leave it because it is "standard" in the organization.

Very few employees, whether an hourly worker or an executive, have the luxury of walking away from a job. The reality is that many are forced to accept the non-compete in order to be able to work. Thus, in the vast majority of situations, the notion that non-compete clauses are the product of meaningful negotiations between parties of equal bargaining power is simply not true. While we can readily recognize that non-compete clauses are coercively imposed on low-wage and middle-income workers, as described further below, our experience is also that such clauses are coercively imposed with respect to employees at more senior levels of employment as well.

Of course, for an employee to even contemplate negotiation of a non-compete assumes that the employee has been provided with the non-compete clause *before* accepting a job. But, some employers spring non-compete clauses on unsuspecting employees at the start of the employment – after the employee has already resigned from a prior position and possibly turned down alternative offers – or impose a new or more onerous non-compete clauses on employees who are mid-tenure, on tight deadlines, upon risk of termination. As the employees typically cannot obtain alternative employment quickly, they are forced to accept the non-compete to keep his or her job, usually without additional compensation or benefits. Although, as described below, some states require employers to provide new consideration to impose a non-compete on

an existing at-will employee, New York does not; it allows continued employment of an at-will employee to be sufficient consideration for a post-hire non-compete agreement.

B. Non-Competes Are Not Necessary To Protect Employers' Interests.

1. Employers Have Ample Alternative Protections for Trade Secrets and Confidential Information.

Opponents of noncompetes attempt to depict a bleak picture by claiming that the restrictions on such agreements will effectively eliminate their ability to protect their confidential information and trade secrets. These arguments should be rejected. The notion that an employee should pre-emptively be forced to remain tethered to a job or benched from their field because of the potential for disclosure of confidential information and/or trade secrets is a harmful overreach that would allow employers to use unfair methods of competition to protect a much narrower set of already-amply protected interests.

At the outset, such arguments are in part belied by the way many employers, especially larger ones, themselves use non-competes as invidious boilerplate – imposing them reflexively and sweepingly, without relation to an employee's actual responsibilities, place within the organization, and/or receipt of trade secrets or sensitive confidential information, as stated above. In our members' experience, and as examples provided above and shared during the FTC's February 16, 2023, public hearing session demonstrate, employees across the economic spectrum are frequently subjected to non-compete clauses even though they do not receive trade secrets or competitively sensitive confidential information in performing their job.

Moreover, employers have ample ability to protect trade secrets and confidential information. The Uniform Trade Secrets Act, which has been adopted by forty-seven states and the District of Columbia, and the federal Defend Trade Secrets Act of 2016, separately provide for a civil cause of action for trade secret misappropriation. Non-Compete Clause Rule, 88 Fed. Reg. 3482, 3505, at Part IV.B.1. Trade secret theft is also a federal crime under the Economic Espionage Act of 1996. *Id*. Intellectual property law also provides significant legal protections for an employer's trade secrets. *Id.*

Employers also can protect trade secrets, inventions, and confidential information contractually, through non-disclosure, intellectual property, and/or confidentiality agreements. In fact, it has never been easier for employers to protect their confidential information, as they have found ever more ways to electronically track employees' work emails, downloads, and other transactions on work platforms. Moreover, employers can protect client lists through contractual non-solicitation clauses that prohibit an employee from soliciting a client's business after employment with the employer ends.

2. California: Where Business Not Only Survives but Thrives.

We need only look to California's long statutory history and public policy prohibiting non-competes for assurance that prohibitions on non-competes have not caused employer chaos or economic decline.

California Business and Professions Code and relabeled as section 16600 provides: "Except as provided in this chapter, every contract by which anyone is restrained from engaging in a lawful profession, trade, or business of any kind is to that extent void." Cal. Bus. & Prof. Code § 16600; see *Edwards v. Arthur Andersen LLP,* 44 Cal. 4th 937 (2008).[6] California has effectively had a ban on non-competes for over 150 years, yet the California economy—and in particular, its technology sector—has flourished. The California economy is thriving. It has the largest economy in the U.S. and is poised to overtake Germany as the world's 4th largest economy.[7]

Many economists have suggested that its ban on non-competes has played a key role in the development of its technology sector.[8] Many scholars and commentators have posited that the success of Silicon Valley, the heart of California's technology industry, is precisely *because of* California's statutory bar on non-competes.[9] This prohibition has led technology employers to cooperate and compete, generating a "dynamic process leading to Silicon Valley's characteristic career pattern, lack of vertical integration, knowledge spillovers, and business culture."[10] In an influential book, AnnaLee Saxenian compared the technology industries of Silicon Valley in

[6] In 1872, California first codified its prohibitions on non-competition by enacting Section 1673 of its Civil Code, which read: "Every contract by which any one is restrained from exercising a lawful profession, trade, or business of any kind, otherwise than is provided by the next two sections, is to that extent void." Cal. Civ. Code § 1673 (1872). In 1937, this code section was moved to the California Business and Professions Code.

[7] "ICYMI: California Poised to Become World's 4th Biggest Economy," Office of Governor Gavin Newsom, Oct. 24, 2022 https://www.gov.ca.gov/2022/10/24/icymi-california-poised-to-become-worlds-4th-biggest-economy/.

[8] *See, e.g.*, ANNALEE SAXENIAN, REGIONAL ADVANTAGE: CULTURE AND COMPETITION IN SILICON VALLEY AND ROUTE 128 (1994); Ronald J. Gilson, *The Legal Infrastructure of High Technology Industrial Districts: Silicon Valley, Route 128, and Covenants Not to Compete*, 74 N.Y.U. L. REV. 575, 627 (1999).

[9] *See e.g.* Jason S. Wood, *A Comparison of the Enforceability of Covenants Not To Compete and Recent Economic Histories of Four High Technology Regions*, 5 VA. J.L. & TECH. 14 (2000).

[10] Gilson, *supra* note 20, at 609.

California with Route 128 in Massachusetts, crediting California's ban on non-competes as a key factor explaining Silicon Valley's far superior rates of growth and innovation to Route 128.[11]

Economic research has found that technology workers in California move jobs more frequently than in other states, leading to more rapid knowledge diffusion and innovation.[12] Another economic study found that bans on non-competes are associated with increased job mobility and higher employee wages.[13] Numerous studies have found that non-competes stifle the creation of new businesses;[14] startups are more likely to be successful and to grow larger in states like California that ban non-competes.[15] States that ban non-compete clauses tend to show greater innovation, more entrepreneurship, higher job growth, and greater venture capital investment.[16]

Thus, the weight of the empirical evidence unambiguously not only refutes arguments about the illusory parade of horrors that would be caused by a ban on non-competes but also demonstrates that banning noncompete agreements, as exemplified by California's experience, fuels greater innovation, entrepreneurship, higher wages and job mobility, and greater higher economic growth, making a compelling case for their prohibition nationwide.

Although the sentiment runs counter to the current loud protestations from business groups, many employer-side attorneys in California generally agree that the state's ban on non-compete agreements is a good thing. "It's bad for business and bad for morale," reported one in-house attorney, "if you're an employer, you want the people working for you to *want* to work for you." She reasoned that if employees feel trapped, the employer ends up with a very disenchanted and unmotivated workforce. This attorney also previously worked in-house for a national company that used non-compete agreements with its employees in states which allowed them. She reported that the threatened litigation between companies over these agreements created "make-believe work" for legal departments. She also pointed out that employers still

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[11] SAXENIAN, *supra* note 20.
[12] Bruce Fallick, Charles Fleischman, and James Rebitzer, *Job-Hopping in Silicon Valley: Some Evidence Concerning the Microfoundations of a High-Technology Cluster*, 88 REV. ECON. AND STATS. 471 (2006).
[13] Natarajan Balasubramanian, Jin Woo Chang, Mariko Sakakibara, Jagadeesh Sivadasan, and Evan Starr, *Locked In? The Enforceability of Covenants Not to Compete and the Careers of High-Tech Workers*, 57 J. HUMAN RESOURCES 2349 (Apr. 2020).
[14] EVAN STARR, THE USE, ABUSE, AND ENFORCEABILITY OF NON-COMPETE AND NO-POACH AGREEMENTS, ECON. INNOVATION GROUP, Feb. 2019, https://eig.org/wp-content/uploads/2019/02/Non-Competes-2.20.19.pdf.
[15] Evan Starr, Natarajan Balasubramanian, and Mariko Sakakibara, *Screening Spinouts? How Noncompete Enforceability Affects the Creation, Growth, and Survival of New Firms*, 64 MANAGEMENT SCIENCE 552 (2017).
[16] Sampsa Samila and Olav Sorenson, *Noncompete Covenants: Incentives to Innovate or Impediments to Growth*, 57 MANAGEMENT SCIENCE 425 (2011).

have a solid backstop of trade secret protection agreements, which are fully enforceable in California.

Venture capitalist Bijan Sabet has stated that he does not require noncompete agreements from companies he invests in and that he asks other companies to abandon them too, because they do more harm than good.[17] Another Silicon Valley-based investor has cited noncompete agreements as a major impediment to hiring talent to promising new startup ideas. Oftentimes, they identify strong candidates who are interested in the job but do not accept because they are too afraid to take a job because they are bound by a noncompete. This slows down the pace of innovation and hinders the flow of talent to the best ideas.[18]

II. NELA AND THE INSTITUTE SUPPORT THE AMENDMENT BUT RECOMMEND MODIFICATIONS TO STRENGTHEN ITS POWER AGAINST UNFAIR METHODS OF COMPETITION AND HARM TO WORKERS.

A. Definitions of Non-Compete and De Facto Non-Compete in Proposed Labor Law Section 191-d.

The Amendment prohibits employers and other entities from requiring or entering into a "non-compete agreement and defines "non-compete clause" as "any agreement or clause contained in any agreement between an employer and a covered individual that prohibits or restricts such covered individual from obtaining employment, after the conclusion of employment with the employer included as a party to the agreement…." Importantly, the Amendment uses a functional test to determine whether a contractual term is prohibited, as applicability of the ban turns on whether a contractual term "restricts" a person from obtaining employment..."

NELA supports this broad definition and use of a functional test. This aspect of the rule reflects the common principle in employment law that what matters is the reality of the worker's situation, not the words and labels used to describe it. Employers might not always cleanly and clearly label as "non-competes" contractual obligations that have the effect of imposing a non-compete. A rule that permits employers to limit employees' freedom to seek other employment by simply using a different label would eviscerate the purpose and efficacy of the Amendment. The functional test and use of "prohibits or restricts" in the Amendment's definition of a "non-compete agreement" is also consistent with the Restatement (Second) of Contracts § 186(2)(1981), which uses a similarly expansive definition: "A promise is in restraint of trade if

[17] Matt Marshall, *Case closed: Non-competes aren't good*, VENTURE BEAT, 2007, https://venturebeat.com/business/case-closed-non-competes-arent-good/.
[18] Timothy Lee, *A little-known California law is Silicon Valley's secret weapon*, VOX, Feb. 13, 2017, https://www.vox.com/new-money/2017/2/13/14580874/google-self-driving-noncompetes.

its performance would limit competition in any business or restrict the promisor in the exercise of a gainful occupation." Likewise, the Uniform Restrictive Employment Agreement Act (UREAA) drafted by the National Conference of Commissioners on Uniform State Laws, utilizes a broader, more generalized protective focus: "Even if an agreement does not meet the definition of a non- solicitation agreement, confidentiality agreement or other named agreement, however, it is a restrictive employment agreement if it prohibits, *limits, or sets conditions* on working elsewhere after the work relationship ends or a sale of business is consummated." UREAA at 14 (Feb. 14, 2023), available at https://www.uniformlaws.org/committees/community-home?communitykey=f870a839-27cd-4150-ad5f-51d8214f1cd2 (emphasis added).

B. The Senate Should Strengthen the Ban by Expressly Including Non-Competes with Unfair Enforcement Remedies and Providing Examples of Non-Compete Clauses.

While NELA applauds the inclusion of a broad definition of "non-compete agreements" in the Amendment, we do believe that greater clarity by way of examples of prohibited clauses would assure uniformity, avoid the *in terrorem* effect of any uncertainty, and preempt creative contract writing that would undermine the intent of the Amendment. More specifically, NELA requests that the Amendment make clear that the following types of clauses are prohibited by the Amendment because they are explicitly or functionally non-compete clauses.

1. <u>Forfeiture-for-Competition Clauses</u>: Forfeiture-for-competition clauses provide that an employee who violates a non-competition obligation forfeits compensation, rather than being subjected to injunctive relief. While many jurisdictions scrutinize these provisions under the same reasonableness standards as applied to other non-competes, s*ee, e.g., Deming v. Nationwide Mut. Ins. Co*., 279 Conn. 745, 763, 905 A.2d 623, 635 (2006), New York does not, reasoning that the employee is not prohibited from working because he or she has the "choice" of competing or accepting compensation and that such scrutiny is unnecessary.

In reality, such choice is illusory. Often, the employee risks forfeiting meaningful compensation for work performed, while the employer stands to receive a liquidated remedy that may bear little, if any, relation to the damages actually incurred as a result of the alleged breach. *See, e.g., Ainslie*, Consol. C.A. No. 9436-VCZ, 2023 WL 106924, *17, 22-24 (analogizing the forfeiture for competition clauses at issue to liquidated damages provisions and noting that such provisions create the same "undue chilling effect on employment and upward mobility as a restrictive covenant" where the liquidated damages have no relation to actual harm suffered). Thus, forfeiture for competition clauses deter competition and worker mobility just like other non-compete clauses; they simply provide the employer with a pre-determined economic remedy. The Amendment should explicitly clarify that forfeiture-for-competition clauses are non-compete clauses prohibited by the Amendment.

2. Liquidated Damages Clauses: Like forfeiture-for-competition clauses, restrictive covenants with liquidated damages provisions are enforced through payment of a fixed amount of damages rather than through injunctive relief. Such clauses restrain competition and limit mobility like other non-competes; they simply allow the employer to avail itself of a preset amount of damages that may bear no relation to the damages actually incurred as a result of an alleged breach. *See generally Ainslie*, Consol. C.A. No. 9436-VCZ, 2023 WL 106924, *22-24.

As with forfeiture-for-competition clauses, however, some states hold that liquidated damages provisions are not restraints of trade. In *Eastern Carolina Internal Medicine, P. A. v. Faidas*, 149 N.C. App. 940, 564 S.E.2d 53 (2002), for instance, the court ruled that a physician's contract that required payment of liquidated damages in the amount of $109,000 in the event the physician worked for another healthcare provider within a three-county territory, was not a non-compete and thus not "subject to strict scrutiny as to reasonableness and public policy required with a covenant not to compete," because the clause did not forbid competition but instead required payment of a fee. *Id.* at 945, 56. New York should, with clarity, debunk and invalidate this type of reasoning and confirm that liquidated damages provisions are prohibited under the Amendment.

3. No-Service/No-Business Agreements: Often misnamed "non-solicitation" clauses, no-service/no-business agreements prohibit former employees from servicing or accepting business from customers or clients of their former employer after employment ends, even when the employee does not solicit the business. These clauses have the same impact as a non-compete clause, especially as to salespersons and licensed professionals, as they eliminate consumers' market choice and impede worker mobility, particularly where such clauses are drafted so broadly as to apply to clients with whom the employee had no direct contact and/or contain no exception for an employee's pre-existing clients. Courts have rejected attempts to pass off as "mere…non-solicitation provision[s]" covenants that prevent former employees from engaging in business with customers and recognized that such clauses constitute non-compete clauses. *Dent Wizard Int'l Corp. v. Andrzejewski*, 2021 IL App (2d) 200574-U, ¶ 35, 2021 Ill. Ap. Unpub. LEXIS 687, *18 (IL App. April 23, 2021) (citing *Zabaneh Franchises, LLC v. Walker*, 2012 IL. App (4th) 110215, P21, 972 N.E.2d 344, 361 Ill. Dec. 859 (2012)).

Accordingly, NELA proposes that no-service/no-business agreements be included as examples of non-competes prohibited by the Amendment. This addition would be particularly helpful in order to distinguish these no-service agreements from actual non-solicitation agreements, which are not prohibited by the Amendment

4. No-Shop/ "Forward" Contracts. No-shop or "forward contract" clauses prohibit employees from accepting an offer for future employment while still employed by the current employer. By putting employees in this professionally and economically untenable

position, i.e., requiring an employee to be unemployed before accepting a new position, these clauses restrain employee mobility and decrease the employee's bargaining position with a new employer for wages and other benefits. NELA thus requests that no-shop/forward contract clauses be included as examples of de facto non-competes.

5. Non-Disparagement Clauses. Broad non-disparagement clauses can function as non-competes insofar as they prohibit a former employee from making otherwise lawful statements in the normal course of competition on behalf of a future employer or engagement. We request that the Commission include as an example of a de facto non-compete an agreement prohibiting a former employee from making otherwise lawful statements in furtherance of lawful competition.

C. Definition of Employer.

The Amendment defines "non-compete agreement" to mean "any agreement, or clause contained in any agreement, between an employer and a covered individual that prohibits or restricts…." Section 190(3) of New York Labor Law defines "employer" to mean "any person, corporation, limited liability company, or association employing any individual in any occupation, industry, trade, business or service…."

We recommend that the Amendment should define non-compete agreements to mean "any agreement, or clause contained in any agreement between **an employer and/or any parent, subsidiary, agent, officer, partner, and/or affiliate of an employer …."** to ensure that no worker falls through the cracks as a result of complex arrangements by which a worker is subject to control by multiple entities or employed by one entity while subject to a non-compete clause through a compensation or equity agreement with a different entity, such as a parent, affiliate, or subsidiary of the employer. Non-competes are deployed to the detriment of workers and fair competition not just by traditional employers but across an array of opaque relationships whereby multiple entities act variously or in concert to constrict worker freedom. Thus, we propose that the definition of employer apply to an employer's affiliates, parents, subsidiaries, persons or entities under common control, and joint employers.

A broad definition would better ensure that employers do not escape the statute's proscriptions through various affiliated or shell entities not arguably otherwise covered by the Amendment's definition of employer. Such an approach is in keeping with a broad definition of "covered person" to mean workers classified as independent contractors, as well as externs, interns, volunteers, apprentices, or sole proprietors providing service to a client or customer.

D. The Amendment Should Require Retroactive Application and Rescission Are Critical to Curtail the Harms Imposed by Non-Competes.

Section 3 of Labor Law Section 191-d declares noncompetes to be void. As a matter of

logic and policy, that declaration would cover all existing noncompetes. But Section 5 of S.3100 provides that the new law applies only "to contracted entered into or modified on or after" the effective date. We urge the Senate to modify the Amendment to expressly apply to all non-compete agreements already in existence as of the effective date. The economic and market-based harms that result from the use and abuse of non-compete provisions continue at least through the life of the contract and the term of the non-compete period and, in some cases, longer. The depression of wages, limits on career progression, and lack of market choice for consumers caused by non-competes can be reasonably be viewed as cumulative and extending beyond the term of the non-compete clause.

A ban on only future non-compete clauses leaves these existing harms and their *sequella* in place and unchecked. Employees who have already entered into non-competes would still be prevented from switching jobs. Entrants into the job market would still be precluded from positions filled by dissatisfied workers whose mobility is limited by non-competes. Consumers would still lose their ability to choose. Innovation would continue to be stymied to the extent would-be entrepreneurs are subject to non-competes.

A law that applies only on a going-forward basis has at least two more detrimental effects. It creates a perverse incentive for employers to enter into non-compete provisions with employees before the Amendment's effective date and creates two classes of workers arbitrarily: those who are subject to a non-compete provision and those who are not. This would result in depressing employee mobility – and, as a result, earnings potential – for the more senior members of the labor market, with a disparate impact on our nation's oldest workers. While we already see hiring preferences for younger workers, we would undoubtedly see more of this preferential treatment where employers view younger job candidates as being presumptively more mobile and thus attractive, given that they would be less likely to be subject to restrictive non-competes.

In addition, a change in enforceability is not self-enforcing: it requires the parties to each individual contract to understand the change and to conduct themselves accordingly. Based on the experiences of our members as representatives of employees, many workers who are subject to unenforceable non-competes are not aware of their unenforceability.[19] As stated above, whether and to what extent a contractual provision is enforceable has become increasingly challenging for a layperson to understand.[20] Moreover, most workers lack the means to seek legal counsel as to the enforceability of a non-compete and, if determined to be unenforceable, to

[19] *See also* J.J. PRESCOTT AND EVAN STARR, SUBJECTIVE BELIEFS ABOUT CONTRACT ENFORCEABILITY 2 (2022) (finding that "70% of employees with unenforceable non-competes mistakenly believe their non-competes are enforceable").

[20] *See generally* Non-Compete Clause Rule, 88 Fed. Reg. 3482, 3494 at Part II.C.1 (proposed Jan. 19, 2023) (outlining the landscape of state law governing non-competes, including recent legislative changes).

mount a costly legal challenge to declare the non-compete unenforceable or to defend a suit against enforcement of such a restriction.[21]

In this regard, like the FTC's Proposed Rule, the Amendment should provide for rescission of existing non-compete agreements; and employees would be provided an individual, written notice that any restrictions are no longer in effect. This written rescission would make employees more aware of their rights and therefore increase employee mobility within the labor market.[22] Further, the ability to provide a prospective employer with a written rescission of a non-compete provision would give job-seekers the ability to assuage any concerns of litigation risk held by a prospective employer.

III. NELA STRONGLY OPPOSES ANY PROPOSED ALTERNATIVES BASED ON TITLES, INCOME LEVELS, OR REBUTTABLE PRESUMPTIONS.

Some opponents of a ban on non-compete agreements have argued that, if a ban is to be imposed, there should be carve-outs for "senior executives" or based on income levels. Opponents have alternatively argued for a rebuttable presumption rather than a total ban. NELA strongly opposes these potential alternatives to a complete ban because the alternatives would unjustifiably leave the economic and market-based harms caused by non-compete agreements intact, create uncertainty, and allow for easy evasion.

A. NELA Opposes Exceptions and Separate Rules for Senior Executives.

To the extent that opponents of the Amendment argue that "senior executives" should be subject to different rules or carved-out from the non-compete ban, that argument should be rejected. At the outset, as the FTC noted in its Proposed Rule, there is no agreed-upon definition of "senior executive." 88 Fed. Reg. 3482, 3520 at Part IV.C (proposed Jan. 19, 2023). It is an amorphous category that can expand and contract depending on usage and context and is not an appropriate basis on which to determine eligibility for workplace protections. Creating exceptions or separate rules for senior executives would invite arbitrary distinctions that are unrelated to any legitimate protectible employer interest, be ripe for abuse, and perpetuate the unfair competition targeted by the Amendment.

A carve-out or separate rule for senior executives would still deprive competitors, consumers, and the public of the ability to fairly compete for the executive's talent or benefit

[21] *Id.* at 3489 (noting that employees who believe their non-competes are unenforceable are still less likely to breach their terms, seemingly to avoid the specter of a lawsuit or risk the reputational harm associated with breaching a contract).

[22] PRESCOTT AND STARR, *supra* note 21, at 26 (concluding that information campaigns, such as individualized notice to workers, regarding the unenforceability of a non-compete will likely improve an employee's ability to take a competitive job).

from their innovation. Moreover, that someone is a senior executive or highly compensated does not insulate him or her from the untenable choices that other workers who are subject to non-competes face; they too need to earn a livelihood and pursue their careers. Moreover, most high earners and/or senior executives do not have the bargaining power to avoid a non-compete.

More generally, the fact that an employee was highly paid or advanced in their career to hold a senior position for the work they performed for a former employer is simply not a legitimate protectible reason to force them to remain tethered to a job or to force them to sit out of their career after the employment ends. As stated above, to the extent that employers need to protect trade secrets and the like, they have ample alternative options for protecting those interests.

In fact, given that senior employees tend to be older than junior employees, saddling only senior executives with non-compete agreements can make them less attractive to potential employers in favor of younger and more junior employees, and forcing senior executives to sit-out of their fields can deprive them of their livelihoods during critical earning years. Compounding this problem is that the number of available comparable jobs decreases as employees become more senior, making it that much more difficult for a high-level employee to find a comparable job after being forced to sit-out from their field.

B. NELA Opposes Exceptions and Separate Rules Based on Income Thresholds.

To the extent that opponents of the Amendment argue for exceptions and separate rules based on income levels, NELA strongly opposes such arguments. As with separation rules for senior executives, distinctions based on income levels are arbitrary, are unrelated to any legitimate protectible interest, would be ripe for abuse, and would perpetuate the anti-competitive harms identified by the proposed rule, while there are viable alternatives for employers to protect trade secrets, confidential information, and client lists. The anti-competitive effects of non-competes occur at all wage levels – the market, consumers, and the public are still deprived of the ability to compete for the innovation and talent of high earners who can contribute to new and existing market entrants. As with senior executives, most high wage earners do not have the bargaining power to avoid a non-compete. In any event, the fact that someone earned a high wage for performance of their job is not a legitimate basis to limit such employees' mobility post-employment.

Using salary or wages as a metric is also inapt and unfair because doing so ignores the compensation and opportunities that can reasonably be expected to be lost during the non-compete period. An employee who earns a salary of $100,000 per year but who is required to sit out from his or her career or field for one year after employment may need to stretch his prior earnings to cover a lack of comparable pay during the non-compete period or may have lost better-paying opportunities at the result of the non-compete. Once those costs are factored in, the employee may well have earned less than $100,000 per year for one or more years of his or her

prior job but still would be deprived of the protections of a rule that only banned non-compete clauses for those paid salaries of less than $100,000 per year. The non-competes themselves would make any eligibility test based on salaries and wages inherently inaccurate and deprive intended beneficiaries of the protections of the Proposed Rule.

In addition, any threshold amount that would apply to all locations would be difficult to find. What would be high wages in some parts of the country, would not be in others. Any attempt at equalizing for cost of living would increase uncertainty and impede the goal of providing a clear rule. Further, an employer would not necessarily have to pay a worker the threshold amount for any set amount of time. At-will employees can be terminated at any time, with little, if any severance pay. Employers seeking to evade the rule could simply raise an employee's salary to meet the threshold and terminate them after they sign the non-compete.

C. NELA Opposes a Rebuttable Presumption Would Leave Intact the Harms Addressed by the Amendment

To the extent that opponents of the Amendment argue for a rebuttable presumption instead of a total ban, NELA opposes any such alternative. For the reasons described in Part I of our comments, a rule that would require employees to both know the contours of the law and also when it is being overstepped has a chilling effect on both an employee's desire to consider new job prospects and a prospective employer's desire to hire a restricted candidate.

We need look no further than existing state laws to see that statutes with a rebuttable presumption of enforceability can still have a detrimental impact on employee mobility and, consequently, labor markets. Florida, which has a statute that sets forth presumptive enforceability standards,[23] is considered the state with the highest enforceability of non-competes and, consequently, a more depressed labor market in terms of wages for even the most senior employees.[24]

[23] FLA STAT. § 542.335.
[24] *See* Non-Compete Clause Rule, 88 Fed. Reg. 3482, 3524 at Part VII.B.1.a.iv (proposed Jan. 19, 2023).

D. Blue- and Purple-Penciling to Salvage Non-Compete Agreements Should Be Prohibited.

If the Commission ultimately permits any exceptions, however, the problem of reformation of overbroad restrictions will certainly arise. The Commission has noted that states apply a variety of approaches towards reformation of overly broad restrictive covenants:

> • Some states, like Wyoming, will not enforce or reform overbroad restrictions (red-penciling);
> • Other states, like North Carolina, permit a court to strike overly broad provisions, but do not permit the court to otherwise modify the terms (blue-penciling);
> • Other states, like Texas, allow the Court to reform or re-write overly broad provisions so the restrictions can be enforced, and sometimes only where the contract authorizes court revisions (purple-penciling).

Non-compete agreements frequently contain reformation or blue pencil clauses which state that the contracting parties agree to seek reformation or permit the court to make an otherwise unenforceable contract clause enforceable.

The Amendment should also provide that contracts cannot require reformation of overbroad non-compete provisions. Contract reformation is equitable in nature. Contract re-writing is largely not countenanced in other areas of contract law. *Penn v. Standard Life Ins. Co.*, 76 S.E. 262, 263 (N.C. 1912) ("Courts are not at liberty to rewrite contracts for the parties. We are not their guardians, but the interpreters of their words."). Indeed, why should the Court invoke its equitable powers to enforce a provision disfavored under the common law, when the drafter has overstepped its bounds? They should not, particularly given the *in terrorem* effect of overly broad non-competes. That is, for each non-compete salvaged by a court's reformation, thousands more workers will be penalized by adhering to overly broad provisions, believing them to be legal, or at least not worth challenging.

As the Wyoming Supreme Court recently recognized, it does not make sense to heap these judicial benefits on an overreaching employer:

> When challenged, the employer gets the benefit of the court redrafting the agreement to make it reasonable. *Golden Rd. Motor Inn*, 376 P.3d at 158; Pivateau, 86 Neb. L. Rev. at 689-90. The employer receives what "amounts to a free ride on a contractual provision that the employer is . . . aware would never be enforced." Pivateau, 86 Neb. L. Rev. at 689-90. "'[T]his smacks of having one's employee's cake[] and eating it too.'" *Richard P. Rita Pers. Servs. Int'l, Inc. v. Kot*, 229 Ga. 314, 191 S.E.2d 79, 81 (Ga. 1972) (quoting Harlan M. Blake, Employee Agreements Not to Compete, 73 Harv. L. Rev. 625, 683 (1960)

> [hereinafter referred to as Blake]). *See also Reddy*, 298 S.E.2d at 914-15 (in rejecting the liberal blue pencil rule, the West Virginia Supreme Court reasoned it "will necessarily encourage employers to draft overly broad agreements in the belief that . . . if they [are challenged], the terms will simply be judicially narrowed").

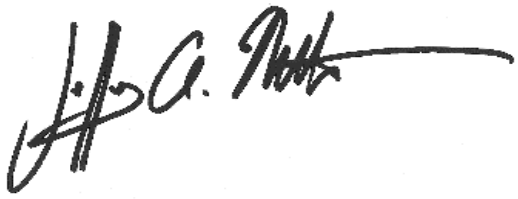
Hassler v. Circle C Res., 505 P.3d 169, 177 (Wyo. 2022). We agree with the sound reasoning of the Wyoming court and urge that the Amendment should forbid employers from obtaining reformation, or blue-penciling, of prohibited provisions.

VI. CONCLUSION

For the reasons set forth above, NELA and the Institute urge enactment of the Amendment as drafted, with the modifications requested above, thereby broadly prohibiting the use of non-compete agreements.

If you have questions regarding these comments, or difficulty opening the attachment, please contact Jeffrey A. Mittman, Executive Director, jmittman@nelahq.org.

Sincerely,



Jeffrey A. Mittman
Executive Director

Attachment: Stories of Workers Harmed by Non-Compete Clauses

APPENDIX

Stories of Workers Harmed by Non-Compete Clauses

Following are examples of the untenable choices and Kafka-esque circumstances that some of our members' clients have faced when they were forced to choose between their dignity, rights, and need to work, and compliance with a non-compete agreement.

• An LGBTQ+ traffic flagger for a traffic safety company in Ohio was required to sign a non-compete agreement when she was promoted to trainer. The non-compete agreement prohibited her from working for similar companies for 12-months within 100-miles of her employer. When co-workers started spreading rumors that she was in a relationship with a fellow LGBTQ co-worker, she complained about harassment. The employer then transferred her to a new work location, which was further from her home. Believing that the transfer was retaliatory, she resigned and filed a charge of discrimination with the EEOC. She moved to Texas in order to start a new job that was well outside the 100-mile radius of the non-compete agreement -- and her former employer sued her for violating the non-compete anyway. Her new employer laid her off because of the litigation. She was required to defend the lawsuit in Pennsylvania, where she neither lived nor worked, because of the choice of venue clause in the non-compete agreement. The Time's Up Legal Defense Fund ultimately subsidized her litigation costs, and the case eventually settled.

• A salesman with twenty years of experience in steel sales, brought a large book of business with him to his employer. He signed a non-compete that prohibited from working for competitors for 2 years "within the geographic area [employer] solicits," an area that included approximately half of the United States, and a non-solicitation agreement, which prevented him from soliciting the business's clients after leaving. Because the employer's president was abusive, the salesman decided to resign but, because of the non-compete agreement, he had to accept a job in Arizona, take a large pay cut, and rebuild his business from clients on the west coast from scratch. When he had to work from Indiana remotely during the pandemic, the former employer sued him for violating the non-compete agreement, and, after a year of litigation and more than $25,000 in (heavily discounted) attorneys' fees, the case resolved through settlement.

• A bar in a university town in Georgia required all of its managers and bartenders to sign non-compete agreements preventing them from working for any bars within two miles of the bar for two years, even though the bartenders had no specialized training or trade secrets from the bar. Those who violated the non-compete clause were required to pay a penalty of $5,000 to the bar, disguised as reimbursement for "training costs." The non-compete functionally prevented the bartenders and managers from working for any other bar in the town, yet the bar also failed to pay employees for all their hours of work. When one employee quit and went to work for another bar in the town because she was not being paid properly, the employer threatened to seek

a temporary restraining order against her. She had to take an advance of salary from her new employer in order to pay her former employer and end the risk of protracted litigation.

• A children's gymnastic coach at a local gym, was subject to a non-compete prohibiting her from working as for *any* gymnastics, dance, tumbling, or movement education organization within 30 miles of the gym for a year after her employment ended. Because the gym owners were disrespectful and abusive to her and the students, she quit and took a job as an assistant coach at another gym several miles away. The former employer sued her, seeking a temporary restraining order blocking her employment at the new gym and seeking damages.

• Two women worked for a small housekeeping business in Utah, cleaning approximately ten houses per week, were laid off after less than one year of tenure. They had signed non-compete agreements prohibiting them from working for a competing business for one year in the county where the business operating *plus a neighboring county where the business did not conduct any work.* When they were laid off, the former employer threatened them with a lawsuit and withheld their final pay based on a "liquidated damages" clause in the contract (even though they had not violated the non-compete). The women were afraid to continue working in the area covered by the non-compete, even though the business had not even operated in one of those counties.

• A project manager for a construction company in Utah had a non-compete agreement that prohibited him from working on any construction projects *in five states for two years* post-employment, even though the company did not work at all in two of the five states (and was not even licensed to work in those states) and never took jobs below a certain dollar value in Utah. After the project manager was fired, he took on some small construction jobs in Utah – jobs that were too small for his former employer to take. The former employer sued the project manager for violation of the non-compete. The litigation costs forced him out of business and put him on the brink of bankruptcy.

• A salesperson for a large national construction supply company, was subject to a non-compete preventing him from working for a competitor *within 100 miles for two years* post-employment, even though his sales territory was smaller than the area covered by the 100-mile radius. When the salesperson was hired by a small competing company within the 100-mile radius (but outside his former sales territory), the former employer sued. Although the salesperson was able to continue working for his new employer, he was forced to engage in expensive litigation to challenge the overly broad non-compete.

• An online content writer in New Jersey for an online medical website had a non-compete agreement prohibiting her from working for a competitor of the website and its parent for one-year post-employment. The non-compete clause effected prevented the writer from working for *any medical publishing company*, even though she was not involved in strategic decision-making for the website in any way. She had the opportunity to move to a much better

paying job with more potential advancement with a large company, which wanted to hire her, but the company would not proceed with her offer unless she obtained a waiver of the non-compete clause from her employer. The employer refused. Only after she filed a lawsuit seeking a declaratory judgment and preliminary junction to invalidate the non-compete did her former employer agree to negotiate the non-compete clause, and she was ultimately able to join the company, but only after retaining counsel and incurring litigation costs.

• An audio and video technologist for a company that ran large concerts and corporate events. His non-compete agreement barred him from working in the audio-visual industry for *three* years anywhere in *the Midwest*, which basically meant that he would either need to move across the company or leave the field after his employment ended. After the company furloughed him during the pandemic, he was hired by a competitor. When the former employer accused him of violating the non-compete agreement, he found yet another job, but the former employer again accused him of violating the non-compete agreement. After the technologist sued for a declaratory judgment to invalidate the non-compete agreement, the employer counter-sued to extend the non-compete agreement and recover attorneys' fees and costs. The litigation is ongoing.

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To:

The Great City of New York
From: Prabhu Sigamani, Director
Restaurant Opportunities Centers United New York

Thursday, May 23, 2023

It is my honor and duty to stand before you on behalf of all restaurant workers. The mission of the Restaurant Opportunities Centers (ROC) United is to improve wages and working conditions for the nation's restaurant workforce. We are thousands of restaurant workers, hundreds of great employers, and thousands of engaged consumers united to raise restaurant industry standards as such.

To the committee and elected officials, guests, and constituents, thank you for allowing me to be here to share our concerns about non-compete agreements and their negative impact on New York workers. ROC New York appreciates the opportunity to testify in support of Senate Bill S3100.

ABOUT ROC NY HERE

There are nearly 129,000 tipped workers in Upstate New York. 62,000 of these tipped workers are servers, and 77% of these are women. 30% of these servers are mothers – half of these single mothers. Tipped restaurant workers in upstate New York live in poverty at the same rate as other restaurant workers, 2.4 times the rate of the general workforce.

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In our experience, non-compete clauses are often buried in the fine print of employment contracts and, in many cases, are not flagged by employers; many workers do not even recall signing a non-compete agreement until an employer attempts to enforce it. SB S3100 will bolster food preparation and service workers' ability to make a good living and advance their careers with more autonomy. This testimony highlights some of the most common harms that non-compete agreements cause in the food preparation and service industry.

The Bill would prohibit non-compete agreements and certain restrictive covenants. We strongly support this, which should significantly reduce the use of non-compete clauses in the food preparation and service industry. Non-compete agreements in the restaurant industry pose significant threats to worker mobility, hinder entrepreneurship, and prevent workers from earning higher wages.

According to the GAO, these agreements can restrict workers from seeking employment with a competitor or starting a competing business. These agreements can help companies protect confidential information, but they can also lead to less job mobility and lower wages for workers.

SB S3100 is needed as it will benefit millions of workers in the restaurant industry, narrowing racial and gender-based wage gaps and promoting worker mobility and increased income. To provide context, food preparation, and service workers comprise an essential and lucrative part of the U.S. economy–an industry including more than 15 million workers nationwide, with a forecasted $997 billion in sales for 2023. The majority of these workers are women and people of color. According to a 2021 study surveying almost seventy thousand workers, one in six food preparation and service workers in the United States has signed a non-compete agreement with their employer. This means as many as 1.4 million food and service workers may be bound by a non-compete agreement. Making matters worse, only ten percent of employees negotiate over non-compete terms, and one-third of employees are asked to sign non-compete clauses after accepting employment.

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The COVID-19 pandemic has also made non-competes use by fast food chains, especially pernicious. As fast food service workers were increasingly deemed "essential workers," many fast food chains began raising wages. Still, workers bound by non-compete agreements could not gain higher wages by moving to another employer within the industry. Even the U.S. Chamber of Commerce, a staunch defender of non-compete agreements, has noted that "a noncompete agreement used to make sure a fast food worker, making minimum wage, doesn't leave to work across the street at a competing restaurant that is willing to pay more is very likely a problem."

Non-compete agreements have become more popular for low-wage positions, like many in the food preparation and service industry. Outside of fast food chain employers, noncompetes also impact chefs, white-collar food service managers, food safety and science specialists, workers and more across the industry. Bound by non-competes, these workers cannot create jobs, innovate, or meaningfully compete with existing players to move the industry forward. Recent studies have also found that non-compete agreements systematically drive down wages, even for workers they do not bind.

Workers trapped in their jobs by non-competes represent positions that do not open up for someone else–and if employers know their workers cannot leave, there are few incentives to offer competitive pay and benefits. In support of the Federal trade Commission's Proposed Rule regarding non-compete, we collected nearly 300 responses from restaurant workers across the nation

The following responses is the voice of the Restaurant workers:

- "I have worked for both a corporate-owned and franchise-owned McDonald's restaurants for over ten years. I am a single parent, struggling to make ends meet. But I didn't have any opportunities to raise my income because I unknowingly entered into an agreement that forbids hiring me for other locations or other jobs that are a 'competitor' of McDonald's. I didn't know about non-compete terms because they were not explained to me during the hiring process. The FTC proposed rule on banning non-competes would allow me to grow and increase my wages to support myself and my child. I would no longer suffer from reduced wages and loss of potential growth opportunities."

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- "During the pandemic, as an essential worker, I was stuck at my job, earning $2.13 per hour, because of the non-compete clause that I agreed to have in my contract. I didn't know that it would affect my wages and my life greatly. As a hardworking father, I risked

- my own life and the health of my family so that people could eat or bring food to their tables. But at that time, there were other employers that saw how important our job was, and they were hiring for higher wages and better benefits. Yet, I couldn't leave my job because of the non-compete terms. I believe that the FTC proposed rule on banning non-compete terms would help me and millions of restaurant workers who may be in a similar situation."

- "[T]he only sense [non-compete agreements] make for food-service jobs is to strengthen employers' upper hand in dominating underpaid workers. They are grossly unfair to the workers."

- "No one in the food industry, whether you work at McDonald's or a fancy restaurant, should be subject to a non-compete agreement. Non-competes contribute to gender and racial-based wage gaps and suppress an individual's income after that person leaves a particular employment (or worse, is fired). If lawyers in New York cannot be held to a non-compete agreement, why should a restaurant worker be?"

- "Non-compete clauses make it harder for people to switch jobs in order to get better wages. As a result, employers can continue to pay poorly because they know their employees won't quit. Knowing their workers could leave for jobs that pay better is [an] incentive for companies to pay their employees well. In the end, everybody benefits because workers have more to spend, and thus stimulate the economy."

- "Non-compete clauses can trap workers with a specific skill-set in a toxic workspace because moving outside of the non-compete zone is expensive and can impact entire families who have to uproot or take a pay cut to learn a new skill in a new industry. Having non-compete clauses means the employers have no incentive to provide competitive wages in their area."

Non-compete clauses in the food preparation and service industry impose significant burdens and harms on workers who would otherwise seek gainful employment that better serves their needs

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and talents or who would start their own businesses. ROC NY strongly supports SB S3100 and will continue to raise awareness for restaurant workers so that they know of the harms of non-competes.

Thank you,

Rev.Prabhu Sigamani, Director of ROC New York

The following was submitted as a public comment to the FTC on January 10, 2023:

I am writing in support of the proposed non-compete clause rule to restrict and/or eliminate non-competes from the workplace.

As a former employee of a company who compelled me to sign a non-compete, I can say with experience that non-compete clauses chain an employee to an employer for the long term if for no other reason that the employer is the one with the bigger financial pockets and can easily crush an employee into submission to the noncompete - whether or not the non-compete document has merit - with the threat of a lawsuit whether in current employ or post employment.

In my case, I was let go from my employment of 11-1/2 years mid-year in 2009 during the financial crisis. My employer (a lighting/audio/video production company in the New York City special events industry) was deeply in financial distress and seeking to cut expenses wherever possible. I was let go and my employer cautioned me that the non-compete was still in effect and that I should not seek employment with a firm that competed with the company.

At the time, I had spent virtually my entire professional life in the New York City theatrical and special events business. I owned an apartment with a wife and young child. The idea that I was to simply walk away from my profession and all of my professional contacts and colleagues was simply preposterous. I consulted with an attorney and was advised that I should go ahead and seek new employment - which I did and was successful. (I remain with this same company today 12+ years later).

In the late fall of 2009, my former employer served notice of a lawsuit and I spent the next year fighting back. I did not have the financial means readily available to do this but had no choice as I was in no place to move from New York City, the country was in deep recession, and the idea that I would have to change professions not only practically impossible but deeply unfair and unjust. I borrowed money from my father to pay the lawyer. In December of 2010, the matter was finally brought before a judge who ordered my former employer to provide financial proof that I had caused irreparable harm. My former employer chose to drop the lawsuit rather than pursue the case.

I spent $35,000 in legal fees fighting him off for a year. This was a tremendous amount of money for me.

Non-competes in my opinion are on their face un-American, deeply unfair to the employee, and an unjust and unjustified restriction on a worker's rights to freely work with and for whomever offers the best possible employment. The employee has no financial ammunition - unless most likely assuming debt - in the face of a committed former employer who wishes to chase the employee from the profession.

Regardless of an employer's arguments that they have an inherent right to restrict their employee's right from seeking the best possible employment situation that is in their interests, I cannot agree in any manner whatsoever. Nothing can justify the assault on an employee to work where the offer is best. I am adamant in that opinion.

Thank you for your time. I urge support to all parties involved in implementing this rule that will restrict or eliminate non-competes from the American workplace wherever it may occur and regardless of profession or employee income.

Sincerely,

Richard Tatum
New York, New York

Sanford Heisler Sharp, LLP

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May 22, 2023

VIA EMAIL SUBMISSION

Senate Standing Committee On Labor
Senate Standing Committee On Commerce, Economic Development, and Small Business

Hearing Room A
Legislative Office Building
Albany, New York 12248

Re: Hearing on Non-Compete Agreements

Dear Chair Ramos, Chair Ryan and Committee Members:

Sanford Heisler Sharp, LLP is encouraged that the Senate Standing Committees on Labor and on Commerce, Economic Development, and Small Business are considering banning non-compete agreements in New York State. Sanford Heisler Sharp strongly encourages such a ban and submits this written testimony to highlight the harm non-competes impose upon individuals and the public.

Sanford Heisler Sharp is a public interest law firm with offices in California, New York, Washington D.C, Baltimore, and Tennessee. The firm represents plaintiffs in civil rights, employment, and whistleblower matters. As one of the largest worker-side employment law firms in the country, we have seen first-hand the extreme burden that non-compete agreements impose on workers.

Accordingly, we submit this comment to underscore the urgent need to ban non-competes in New York State. In Section 1, we detail the substantial harms that non-competes impose upon workers, including our clients. In Section 2, we describe the ways in which non-competes undermine fundamental workplace protections, including antidiscrimination, anti-retaliation, and whistleblower protections; this is a central reason why there should be no salary caps on any non-compete ban. In Section 3, we suggest that the legislature consider explicitly prohibiting the insidious practice of Training Repayment Agreement Provisions (TRAPs).

This testimony is not intended to be a comprehensive reflection of all the evils of non-compete agreements—there are many. Nor is this testimony intended to describe all the types of employer practices that operate as *de facto* non-compete agreements—there are also many.[1] Instead, we hope to highlight for the Committees certain key reason why, as advocates for civil

[1] In addition to TRAPs, they can include non-solicitation agreements, non-disclosure agreements, bonus claw backs (signing bonuses, retention bonuses, etc.), mandatory repayment of tuition assistance, mandatory repayment of relocation incentives, and the repayment of sales commissions upon separation from employment.

and workers' rights, we support banning non-competes, both in their explicit and *de facto* incarnations.

1. <u>Non-Competes Cause Immense Financial and Emotional Distress to Employees</u>

In the course of our practice representing employees in their claims of discrimination, harassment, and retaliation, we have seen firsthand the multifarious harms that non-competes impose upon individual employees. In addition to the financial and emotional distress caused by their employers' misconduct, our clients' suffering is exacerbated when a non-compete prevents them from securing further employment. While resolving their claims brings some closure to a difficult and upsetting chapter of their lives, we consistently find that securing new employment helps our clients to truly move on from traumatic situations. For example, one client wishes to share the following statement about how her non-compete impacted her both financially and emotionally:

> I was employed by a delivery logistics company for a number of years, where I experienced severe gender-based harassment and sexual assault. After reporting these abuses, the company terminated my employment, leaving me traumatized and demoralized. Adding insult to injury, I found myself in dire financial circumstances after my firing and faced the prospect that I would not be able to get another job, and therefore would not be able to pay my bills or support myself and my family. While I did my best to find a new job, I struggled to find positions to apply for given the expansive non-competition clause in my employment agreement. The provision provided that I could not work in any capacity for any organization whose "business, products, or operations" were "in any respect competitive with or otherwise similar" to my company's business. The provision restricted such employment in any state or country where the company "derived revenue or conducted business." As a delivery logistics company that assisted retail delivery for hundreds of retailers nationwide and internationally, the clause effectively made it impossible for me to apply for any job where I could use my skills and experience; in theory, every company that delivers products to customers would be "similar" to my former employer.
>
> On top of the devastation I felt as a result of the harassment I experienced, I was overwhelmed and despondent seeing how much my former employer could take from me. I was in constant distress that I would never work in my field again, and I was truly fearful that even applying for positions would expose me to action from my former employer.
>
> However, I was fortunate to have private counsel. In the course of negotiations with my private counsel, the company agreed to modify and substantially narrow the non-compete clause, voiding the expansive geographical range and instead listing a small handful of competitor companies that would need to be informed of my trade secret confidentiality obligations. Releasing me from the restrictions of the non-compete allowed me to apply to hundreds of jobs where I could apply my knowledge and skills in this particular industry, and has allowed me to continue my career. I was able to avoid the financially and

emotionally devastating consequences of the non-competition provision because I was fortunate enough to have hired an attorney to assist me; I am confident I would have had to drastically alter my career path, or even switch careers entirely, if not for the help of my lawyer.

Not all of our clients have been this fortunate. In one case, we represented the former female president of a company who was wrongfully terminated. She had spent nearly two decades in this position, and her entire career at this company, which operated nationwide. Her employment agreement prohibited her from taking any employment with any business that competes with the company in the geographic region where the company operated for a full year following her firing. Having spent her entire career in a niche industry, she had exclusive experience at the highest levels of this industry but could not apply to any other company as a result of the non-compete clause. As a result, she had no choice but to leave over two decades of expertise and experience and start an entirely new career in a completely different field.

Thus, the burden of these provisions on individual employees who are eager to get back into the workforce is palpable and may have lifelong consequences for employees like our clients.

2. <u>Non-Compete Agreements Undermine Anti-Retaliation and Whistleblower Protections</u>

In addition to the burdens that non-compete agreements impose on individual workers, they also diminish workers' ability to enforce employment laws and expose employer misconduct, threatening fundamental workplace protections.

New York State's workplace regulations depend upon workers bravely coming forward to report illegal conduct, including discrimination,[2] wage and hour violations,[3] health and safety

[2] *See* N.Y. Exec. Law § 297 (authorizing persons aggrieved to file a complaint with the Division of Human Rights and file civil actions in court); *See also* New York State Department of Human Rights, *available at* www.dhr.ny.gov (explaining that "Under the Human Rights Law in New York, every citizen has an 'equal opportunity to enjoy a full and productive life.' If someone feels they have been discriminated against they can file a complaint with the Division of Human Rights").

[3] The New York Labor Law is partially enforced based on complaints and information received from employees. *See e.g.* N.Y. Lab. Law § 196-a (authorizing employee complaints to commissioner); N.Y. Lab. Law § 663 (authorizing civil actions to recover unpaid wages)

concerns,[4] and corporate malfeasance.[5] For that reason, numerous state statutes contain anti-retaliation protections,[6] which have the "primary purpose" of "[m]aintain[ing] unfettered access to statutory remedial mechanisms." *Williams v. New York City Hous. Auth.*, 872 N.Y.S.2d 27, 34 (1st Dept. 2009) (quoting EEOC compliance manual).

Yet, despite these protections, workers often face illegal retaliation. Indeed, in FY 2021-22 alone, 38% of complaints made to the New York State Division of Human Rights included allegations of retaliation for opposing discrimination.[7] At the federal level, in each year between 2018 and 2021, over 50% of EEOC charges included allegations of illegal retaliation.[8] Yet, enforcement agencies often have insufficient staffing and funding to prosecute all meritorious claims. For example, between 2011 and 2021, the EEOC[9] filed litigation in only about 8% of cases (nationwide) in which the agency was unable to conciliate meritorious claims.[10] The New York State Department of Labor faces similar enforcement challenges, given current levels of staffing

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[4] *See Lawlor v. Wymbs, Inc.*, 212 A.D.3d 442, 443 (N.Y. App. Div. 1st Dept. 2023) (holding that employee stated a claim for unlawful retaliation when he was terminated after complaining about employer's failure to enforce a mask mandate in the midst of the COVID-19 pandemic, finding that the employee complaint concerned 'a substantial and specific danger to the public health or safety'"); *Sulieman v. Roswell Park Cancer Inst.*, No. 05-CV-766S, 2008 WL 2690278, at *12 n. (W.D.N.Y. June 30, 2008) (noting that the "purpose of New York's Healthcare Whistleblower's Protection Act, [Labor Law § 741,] [is] to protect reporting of improper patient care services by private or public health care providers in New York.")

[5] For example, New York State recently amended New York Labor Law § 740 to expand on the protections for employees who disclose or threaten to disclose a policy or practice that the employee believes violates the law, or who objects to participating in a practice or policy the employee believes is illegal. The new law specifically prohibits any adverse action an employer takes in response to an employee's exercise of their § 740 rights. *See also Ulysse v. AAR Aircraft Component Servs.*, 841 F. Supp. 2d 659, 678 (E.D.N.Y. 2012) (Noting purpose of former Labor Law § 740 was "to protect the whistleblower that makes a complaint," and thereby the statute "indirectly encourage these complaints to be made."); *Ferris v. Lustgarten Found.*, 189 A.D.3d 1002, 138 N.Y.S.3d 517, 521 (2020) (noting that "Not–For–Profit Corporation Law § 715–b is intended to protect, among others, employees who in good faith report any action . . . that is illegal [or] fraudulent.").

[6] *See e.g.*, N.Y. Lab. Law §§ 215, 740, 741; N.Y. Exec. Law § 296(7) (Human Rights Law); N.Y. Not-for-Profit Corp. Law § 715-b; N.Y. State Fin. Law § 191 (NYS False Claims Act).

[7] *See* New York State Department of Human Rights Annual Report Fiscal Year 2021-22, https://dhr.ny.gov/system/files/documents/2022/12/nysdhr-annualreport-2021-22.pdf.

[8] *See Charge Statistics (Charges filed with EEOC) FY 1997 Through FY 2021)*, U.S. Equal Employment Opportunity Commission, https://www.eeoc.gov/data/charge-statistics-charges-filed-eeoc-fy-1997-through-fy-2021.

[9] The EEOC has a work-sharing agreement with NYS Division of Human Rights. In that manner, the agencies cooperate in the enforcement of anti-discrimination law in New York.

[10] *See All Statutes (Charges filed with EEOC) FY 1997- FY 2021*, U.S. Equal Employment Opportunity Commission, https://www.eeoc.gov/data/all-statutes-charges-filed-eeoc-fy-1997-fy-2021; *EEOC Litigation Statistics, FY 1997 through FY 2021,* U.S. Equal Employment Opportunity Commission, https://www.eeoc.gov/data/eeoc-litigation-statistics-fy-1997-through-fy-2021.

and funding.[11] In this context, workers—especially those without the benefit of legal counsel—face tremendous disincentives to reporting illegal conduct.

Non-compete agreements further exacerbate this enforcement crisis. Employees subject to non-competes cannot easily exit their employment and find new work. This dramatically raises the stakes when they wish to report unlawful conduct.[12] If their employers retaliate by wrongfully terminating their employment, employees with non-compete agreements have no reasonable opportunity to secure substantially similar work.

In fact, employers often use non-compete agreements as a weapon to keep employees from speaking up. This is underscored by the fact that as soon as a departing employee asserts claims against the employer – usually discrimination or retaliation claims –the employer raises the issue of the non-compete restriction. This tactic is designed to intimidate the employee into backing down from his or her legitimate claims or forcing the employee to resolve the claims in a manner that is less favorable for the employee. Indeed, even when workers file lawsuits for discrimination and retaliation, employers often allege counterclaims for violation of their non-compete agreements putting the employee in legal and financial peril. *See Rao v. St. Jude Med. S.C., Inc.*, No. 19-CV-923 (MJD/BRT), 2022 WL 4485553, at *24 (D. Minn. Sept. 27, 2022). Non-compete agreements thus provide employers with a contractual buttress to the ever-present threat of illegal retaliation.

Banning non-competes is therefore a necessary measure to promote enforcement of state antidiscrimination, anti-relation, worker-protection and whistleblower policies. Indeed, for this reason, it would be unwise to impose an income cap on any non-compete ban. It is essential—and in the public interest—that workers at all income levels have an unfettered opportunity to report and oppose illegal conduct. In fact, highly compensated employees may have the greatest knowledge of such illegal conduct due to their senior positions in their companies. It is therefore imperative that they can blow the whistle without the fear of destroying their careers due to non-compete agreements.

Removing the burden of non-competes will clear the way for employees, at all incomes levels, to report illegal conduct within their organization and to state regulators. To be sure, the threat of illegal retaliation will remain. But workers will no longer have barriers preventing them from exiting hostile or illegal workplaces. Nor will non-competes stand in the way of restoring their careers following unlawful retaliation.

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[11] *See* Make the Road New York & Center For Popular Democracy, *Coming Up Short: The State of Wage Theft Enforcement in New York* (2019) *available at* https://maketheroadny.org/coming-up-short-the-state-of-wage-theft-enforcement-in-new-york/.

[12] *See e.g.,* Elizabeth Anderson, Private Government: How Employers Rule Our Lives (And Why We Don't Talk About It), 66 (2017) (describing the harm caused by non-compete clauses; the limitation on workers' ability to exit employment relationship; and the disproportionate power non-competes afford employers).

3. New York Should Ban Training Repayment Agreement Provisions (TRAPs)

Any ban on non-competes must also ban the various employer practices that operate as *de facto* non-competes agreements. Though there are many such practices, Training Repayment Agreement Provisions (or TRAPs) are a particularly insidious form of *de facto* non-compete.[13]

In general, TRAPs are contractual provisions that require an employee to repay training costs if they separate from their employer within a specified time. Those costs may reach thousands of dollars, and employers often expect these debts to be repaid even when an employee is terminated involuntarily.[14] These debts make it prohibitively expensive for workers—especially low wage workers[15]—to exit their employment and find new work. That is especially so because workers are often expected to work for lower wages during their training period.[16] Accordingly, the repayment obligation effectively serves as a sword hanging over employees, preventing them from leaving and finding new jobs.[17]

Any ban on non-competes must account for these realities. Accordingly, in addition to or in conjunction with legislation banning non-competes, we urge the legislature to pass law that explicitly bans TRAPs—i.e. any agreement where the employer demands that the employee repay training costs upon separation from employment.

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Sanford Heisler Sharp applauds the Committees' efforts to highlight the harms of non-compete agreement, and we encourage the legislature to ban non-compete agreements. As described in this testimony, such agreements impose substantial burdens on workers and

[13] In our view, S. 3100 would ban *de facto* non-compete agreements because the bill defines non-compete agreements as "any agreement" that "prohibits or restricts" a covered individual "from obtaining employment, after the conclusion of employment." Nevertheless, employers will likely make every effort to obtain judicial (mis)interpretations that narrow this definition. One way to insure against such misinterpretations is to explicitly ban particular forms of *de facto* non-competes, even if they are already prohibited by S. 3100.

[14] *See* Jonathan F. Harris, *Unconscionability in Contracting for Worker Training,* 72:4 Alabama Law Review 723, 740 (2021) (discussing TRAPs and involuntary termination); Jonathan Harris, *The New Noncompete: The Training Repayment Agreement Provision (TRAP) as a Scheme to Retain Workers Through Debt,* NULR of Note: Northwestern University Law Review (Nov. 9, 2022), https://blog.northwesternlaw.review/?p=2730; Stuart Lichten and Eric M. Fink, *"Just When I Thought I was Out…": Pos-Employment Repayment Obligations,"* 25:1:5 Washington and Lee Journal of Civil Rights and Social Justice at 74 (Mar. 11, 2019) (discussing repayment costs).

[15] *See* Lichten and Fink 25:1:5 Washington and Lee Journal of Civil Rights and Social Justice at 51, 88; *Trapped at Work: How Bigger Business Uses Student Debt to Restrict Worker Mobility,* ProtectBorrowers.org, at 14 (July 2022), https://protectborrowers.org/wp-content/uploads/2022/07/Trapped-at-Work_Final.pdf.

[16] *See* Harris, *supra* n. 14 at 725-726.

[17] We further note that TRAPs are part of an ongoing trend of employers shifting risks—here, the risk of losing an investment in training—onto their workers, which has increased financial instability for American households. *See generally* Jacob S. Hacker, The Great Risk Shift: The New Economic Insecurity and the Decline of the American Dream (2d Ed. 2019).

undermine fundamental workplace protections. Moroever, TRAPs—along with other *de facto* non-compete agreements—impose these same harms on workers and society. They should also be banned by statute.

We thank the Committees for their consideration of this testimony.

Sincerely,

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INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE & AGRICULTURAL IMPLEMENT WORKERS OF AMERICA – UAW

May 22, 2023

Dear Senator Ramos and Senator Ryan,

On behalf of Region 9A of the United Automobile, Aerospace and Agricultural Implement Workers of America (UAW), we write to express our strong support for S.3100 to prohibit non-compete agreements and certain restrictive covenants.

Region 9A includes thousands of UAW members providing legal services to low-income New Yorkers. Many of these advocates represent workers who are unjustly burdened by non-compete clauses and other coercive contract terms. In fact, non-competes are increasingly used by employers in low-wage industries to further erode workers' bargaining power.[1] In the interest of our members' ability to seek justice for their clients and our communities, we support this legislation as an essential part of the ongoing fight against worker exploitation across the state of New York.

In addition, the UAW is proud to be at the forefront of fights for racial, gender, and social justice, and we oppose non-compete clauses as impediments to workplace equity. UAW Local 2320 member Najah Farley wrote on behalf of the National Employment Law Project, "Non-competes are disproportionately harmful to women and people of color and have a history linked to racial injustice."[2] We stand united against employers' use of non-competes and other coercive contracts to exploit vulnerable workers.

Finally, Region 9A recognizes that ending non-compete abuse will lift wages and workplace standards for the entire New York workforce, union and non-union workers alike. "Noncompete clauses systemically drive down wages, even for workers who aren't bound by one," explained Federal Trade Commission Chair Lina Khan in the *New York Times* earlier this year. "[I]f employers know their workers can't leave, they have less incentive to offer competitive pay and benefits, which puts downward pressure on wages for everyone."[3]

Recognizing that an injury to one is an injury to all, Region 9A stands in solidarity with all New York workers and against coercive employment contracts, including exploitative non-compete clauses. We thank Senator Ramos and Senator Ryan for their leadership on this and other important worker justice issues.

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[1] "How Noncompete Clauses Keep Workers Locked In," by Conor Dougherty, *New York Times* (May 13, 2017), available at https://www.nytimes.com/2017/05/13/business/noncompete-clauses.html.
[2] "How Non-Competes Stifle Worker Power and Disproportionately Impede Women and Workers of Color," by Najah Farley, *National Employment Law Project* (May 18, 2022), available at https://www.nelp.org/publication/faq-on-non-compete-agreements.
[3] "Noncompetes Depress Wages and Kill Innovation," by Lina Khan, *New York Times* (January 9, 2023), available at https://www.nytimes.com/2023/01/09/opinion/linakhan-ftc-noncompete.html.

Sincerely,

Brandon Mancilla
Region 9A Director

COMMENTS OF VEEVA SYSTEMS INC.
REGARDING NEW YORK SENATE BILL S.3100
May 19, 2023

Veeva Systems Inc. ("Veeva") submits the following comments regarding S.3100's proposed non-compete ban. Below we discuss:

1. Veeva's status as a publicly traded public benefit corporation in the technology space and its position on non-competes;

2. The reasons why non-competes are an unfair method of competition. For example, they restrain competition and depress wages, violate employee rights and limit their productivity, have real world consequences on individuals and competitors, are unnecessary to protect intellectual property, and narrow the job market; and

3. The prevailing business perspective that employees should be treated as stakeholders and how non-competes run afoul of that viewpoint and harm business.

1. Veeva

Veeva provides cloud software, data and consulting services to the life sciences industry, including pharmaceutical, biotech, and medtech companies. Among other functions critical to the industry, our technology solutions help life sciences companies run clinical trials more efficiently, maintain quality manufacturing processes, and monitor drug safety. Veeva was founded in 2007 and listed on the New York Stock Exchange in 2013 (NYSE: VEEV). Veeva employs over 6,500 people (including nearly 300 employees in the State of New York) and our market cap is approximately $29 billion. Our website is www.veeva.com.

In 2021, we became the first U.S. publicly traded company to convert to a public benefit corporation (PBC), a corporate structure that enables a for-profit company to simultaneously pursue a public benefit purpose. We believe the PBC structure better aligns to our long-standing core values—do the right thing, customer success, employee success, and speed. Our stated public benefit purpose is to help the industries we serve be more productive in their efforts to improve health and extend lives, and to provide high-quality employment opportunities in the communities in which we operate. Our Board has adopted the elimination of employment non-compete agreements in the U.S. as one of four key objectives in pursuit of our PBC purpose, highlighting the significant public benefit that we believe is associated with the elimination of non-compete agreements. Veeva's PBC objectives are listed below:

- Enable faster, less expensive clinical trials that are less burdensome and more accessible to patients
- Support customer choice and remove competitive barriers from the industry
- High-quality job creation – 10,000 employees by 2025
- ***Advocate for the elimination of the use of non-compete agreements as a condition of employment in the U.S. by 2030***

We believe the use of employment non-compete agreements to constrain individual choice is pernicious and we have worked against the practice for more than a decade. Since our founding, we have never asked employees to sign non-compete agreements and we offer legal defense to employees who are threatened by a past employer over a non-compete. We now wholeheartedly support a ban on the use of employment non-compete agreements in New York.

2. Banning Non-compete Agreements is Sound Public Policy

The economic arguments for banning non-compete agreements are clear. Leading academic research shows that the overall economic impact of non-compete agreements is negative and wide-reaching.[1] Non-compete agreements are pervasive (especially among technology workers in permissive states) and the use of such agreements undeniably restrains competition in labor markets, stifling employee mobility, depressing wages, limiting the ability of employers to reach the most qualified personnel (which is a drag on innovation and productivity), and discouraging entrepreneurship. Further, because non-compete agreements most acutely impact competition between firms in the same industries, they help entrench market leaders and harm consumers. Clearly, non-compete agreements are contrary to free and vigorous competition. That's why we call them *"non-competes"* after all.

Consider Silicon Valley as a case study for what eliminating non-compete agreements can help to enable. California's long-standing ban on employment non-competes has shown that the free flow of talent adds to the pace of entrepreneurship, start-ups, and job growth. When innovation sparks from the mixing of experience and ideas, the economy expands. The Silicon Valley model has proven that the free movement of talent can help create the most innovative companies and products in the world and advance the economy overall. There is every reason to believe that State of New York will experience a similar boost to innovation and economic dynamism.

a. Employee Rights and Employee Productivity

Perhaps more importantly, we believe the freedom to change jobs is a fundamental right. People should be able to advance their careers and improve their lives without fear of being sued by their former employers when they have done nothing wrong. Legally empowering former employers to limit a person's freedom to make life and career choices is improper and unfair. In fact, it runs counter to the American dream. Yet, these impacts are playing out on a significant scale throughout the economy, hurting families by limiting mobility and income potential, and often employees are unaware they have even agreed to such restrictions until it's too late. Corporations and lawyers should not have that kind of lingering control over the lives of employees in any industry or for any role.

In addition, we believe that employee freedom increases productivity. No one is motivated to do their best work under a cloud of threats or when locked into a job. Employees that feel trapped by their employer are less engaged and less productive. It's better for employer and employee when people are empowered to change jobs freely if they would like to.

[1] See the work of Evan P. Starr, J.J. Prescott, & Norman D. Bishara or Mark A. Lemley & Orly Lobel, for example

Companies should focus on fostering an environment where employees want to stay, rather than trying to control or intimidate employees with non-compete agreements.

b. Real Impact on Companies and the Lives of Employees

Over the last decade, Veeva has provided for the legal defense of more than 20 employees sued or threatened with suit by former employers trying to enforce abusive non-compete agreements at an estimated expense of over $10 million, including lawsuits filed in New York. For most companies (especially smaller ones), the mere possibility of legal spending at that scale is enough to discourage them from hiring an employee who might even arguably be subject to a non-compete agreement, and that's true even when the non-compete is overly broad and not likely to survive legal challenge. In this way, the threat of legal action over non-compete agreements limits the recruiting pool and available workforce, especially for less well-funded companies, and serves to entrench larger market leaders that have the financial means to file lawsuits (or credibly threaten to do so) around the country.

Even when a company provides for the legal defense of its employees, as Veeva does, there is still a meaningful negative impact on the employees and their families. Veeva employees have described their experiences as follows:

"People don't really understand how disruptive signing non-compete agreements can be to your life until it happens to you. I joined my previous company just out of college and signed the paperwork without thinking I had a choice. Fourteen years later when I accepted a new job our whole lives were in upheaval. When I resigned, I was walked out the door and served legal papers at my home in front of my wife and children. I questioned if I should have moved jobs, if my new job was still secure, if I would have to pay the legal fees, and if this would sabotage my career. After almost a year of legal processes, the case was dismissed, finding that I had done nothing wrong." – Veeva employee Joby George

"At the time I signed a non-compete agreement, I was young and it was downplayed as a routine, non-enforceable condition of employment. After over a decade with this company, it came time for me to look for new opportunities based on indicators deemphasizing my area's product line. My managers supported my move but HR and legal teams quickly filed a lawsuit against me personally. I was told I could not start working at my new job, and after several months I could only work in a separate area which delayed my learning and career advancement. The case was dropped, but it was an ordeal." – Veeva employee Scott Mitreuter

"I ran a small company that was acquired. I found out about the acquirer's non-compete policy when we were near the end of the process and all our employees would have to sign them. There were a lot of questions and anxiety around the enforcement unknowns. In any acquisition there are people who leave because they signed up to a small company and don't fit in a larger one. I believe in non-disclosure and trade secret agreements but not having the freedom to leave and be happy in a job because it's not a cultural fit is wrong.

When I left the company myself after over 5 years I underestimated how exhausting the stress and burden of multi-year legal proceedings would be. Non-compete procedures wear people down and that affects their families. People don't think about having their personal freedoms taken away when they sign a document to keep their job. It's so important to protect them by abolishing non-competes." – Veeva employee Peter Stark

c. Non-competes Are Not Needed to Protect Intellectual Property

As a technology company, Veeva keenly appreciates the need to protect intellectual property and we strongly support the ability for companies to do so. But, non-compete agreements simply are not the right way. We support the use of patents (Veeva has over 70 issued patents), copyright laws, trademark laws, trade secret laws, and reasonable confidentiality agreements to protect valuable intellectual property. There is no shortage of targeted options for intellectual property protection. Non-compete agreements, on the other hand, are the bluntest of instruments. Concerns over intellectual property protection cannot justify the use of non-compete agreements over the well-established negative impacts on people, companies, and the economy overall.

3. Treating Employees as Stakeholders and Expanding the Job Market

As a PBC, we have accepted a legal obligation to consider the best interest of our stakeholders in how we run the company. We have been explicit and clear that employees are key stakeholders at Veeva, but ours is not a particularly controversial viewpoint and it's not unique to PBCs.

In his 2018 letter to CEOs, Larry Fink, CEO of BlackRock, the largest investment fund in the world, stated that "to prosper over time, every company must not only deliver financial performance, but also show how it makes a positive contribution to society. ***Companies must benefit all of their stakeholders***, including shareholders, ***employees***, customers, and the communities in which they operate."[2]

In 2019, the Business Roundtable, an organization made up of some of the world's largest and most well-known corporations, famously took the position that corporations "share a fundamental commitment to ***all of our stakeholders***."[3] It went on to list employees as stakeholders and espoused investing in employees, treating them with respect and dignity, and delivering value to them for the benefit of communities.

Similarly, Wachtell, Lipton, Rosen & Katz, and New York based law firm and one of the world's preeminent authorities on the topic of corporate governance, has observed: "The purpose of a corporation is to conduct a lawful, ethical, profitable and sustainable business in order to create value over the long-term, which requires ***consideration of the stakeholders*** that are critical to its success (shareholders, ***employees***, customers, suppliers, creditors and communities), as determined by the corporation and the board of directors using its business judgment and with regular engagement with shareholders, who are essential partners in supporting the corporation's pursuit of this mission."[4]

Indeed, we believe that most forward-thinking business leaders agree with the fundamental premise that—in seeking to increase the long-term value of the corporation—

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[2] See https://aips.online/wp-content/uploads/2018/04/Larry-Fink-letter-to-CEOs-2018-BlackRock.pdf (emphasis added)
[3] See https://opportunity.businessroundtable.org/ourcommitment/
[4] See "On the Purpose of the Corporation" at https://www.wlrk.com/webdocs/wlrknew/ClientMemos/WLRK/WLRK.26961.20.pdf (emphasis added)

employees should be treated as stakeholders and their interests should be taken into account in corporate decision-making. We also think that most forward-thinking business leaders don't believe the use of employment non-compete agreements is in the best interest of employees. They know that non-compete agreements are bad for morale and send the wrong message to employees.

Further, we believe those same business leaders would like nothing more than for the proverbial talent playing field to be opened up to competition and free from the artificial friction created by non-compete agreements. That would allow them to create value for their shareholders by recruiting the best employees in the new "work anywhere" environment, without having to worry about state employment law gamesmanship.

However, flawed as we think it is, there is a perception among many business leaders that unilaterally abandoning the use of non-compete agreements will disadvantage their companies vis-a-vis the competition. Thus, the race to the bottom we find ourselves in now.

That's where a clear and unambiguous ban on non-compete agreements can play a crucial role. Such a ban should be—and over the long term, we predict, will be—welcomed by business leaders, shareholders, and employees when they feel the benefits that flow from an open and competitive labor market.

OUTTEN & GOLDEN LLP

Advocates for Workplace Fairness

May 23, 2023

Submitted Electronically via Email to lesser@nysenate.gov and walshs@nysenate.gov

Sarah Lesser
Legislative Director
Senate Standing Committee on Commerce, Economic Development and Small Business

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Legislative Director
Senate Standing Committee on Labor

Legislative Office Building
Albany, New York 12248

Re: Written Testimony of Wayne Outten Regarding S.3100, Amendments to New York's Labor Law Prohibiting Non-Compete Agreements and Certain Restrictive Covenants.

Thank you for the opportunity to submit written testimony on S.3100, an important amendment to New York Labor Law that would provide an immensely positive impact on New York workers and the New York economy.

I am the co-Founder and Chair of Outten & Golden LLP. On behalf of Outten & Golden LLP, I submit this written testimony in support of Senate Bill S.3100 (the "Amendment") an act to amend New York's Labor Law, in relation to prohibiting non-compete agreements and certain restrictive covenants for New York employees.

Outten & Golden is a 60+ attorney law firm headquartered in New York City, with offices in Washington D.C, and San Francisco. Outten & Golden focuses exclusively on representing employees, executives, and partners in all areas of employment law. From combating worker exploitation and systemic discrimination in class action and impact litigation, to representing executives and professionals in contract negotiations, to protecting individuals' civil rights in the workplace, Outten & Golden is focused solely on the field of employment law. Through advocacy in the courts, legislatures, and elsewhere, Outten & Golden supports and promotes

policies and laws that advance workplace fairness and employee rights. Outten & Golden has a robust practice group that focuses on representing executives and professionals in contractual matters of all types, with particular expertise and experience in negotiating agreements and counseling employees - both domestically and internationally - on non-competes. In addition, Outten & Golden litigates non-competes and defends TROs and injunctions on behalf of all types of employees: salespeople, software engineers, executives, financial services professionals, medical professionals, and many others.

Attached as Appendix A is an anonymized story from a firm client that exemplifies how non-compete clauses can deeply impact an employee's professional life and personal life. That statement was submitted recently in support of the Federal Trade Commission's proposed rulemaking on the subject. The client prefers anonymity because he fears retaliation from his current employer and from prospective employers.

I. The Amendment Should Make Clear that All Restrictive Covenants Between Employees and Employers that Have the Effect of Limiting Competition Are Unenforceable.

Even in the most contractarian jurisdictions, case law recognizes that non-compete provisions are not ordinary contractual provisions: they require additional judicial scrutiny to ensure they are reasonable and enforceable in light of the facts and circumstances.[1] This reflects the fundamental nature of non-competes: there are no "magic words" to render a non-compete enforceable; rather, the factual circumstances themselves dictate the impact that a contractual provision may have on an employee's ability to work. For this reason, some jurisdictions have banned non-competes by prohibiting all contractual "restraints on trade."[2]

The Amendment has the foresight and flexibility to recognize that contractual provisions can have the impact of a non-compete without using the term "non-compete" expressly.[3] We support the Amendment in this respect and suggest that the Amendment go even further so as to explicitly state that it applies to all restrictions (such as non-solicit provisions and overly broad confidentiality clauses) that have the effect of restraining a worker from engaging in a lawful profession, trade or business.

II. The Amendment Appropriately Bans All Restrictive Covenants that "Restrain" a Worker and Should Include a Functional Test to Determine if a Clause Has The Effect of Restraining A Worker.

As a firm that has deep roots in New York, we are well-versed in the nuances of New York law, including its atypical approach to forfeiture-for-competition provisions. These provisions are

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[1] *See generally* Restatement (Second) of Contracts § 188.
[2] *See e.g.*, Cal Lab. Code. §§ 16600; N.D. Cent. Code § 9-08-06.
[3] *See* S.3100 191-d(3).

contractual prohibitions on competition that are enforceable not through injunctive relief but instead through the employee's forfeiture of a monetary benefit. New York courts have held that contractual provisions that permit an employee to choose to compete – albeit for a hefty financial penalty – are not subject to the same judicial scrutiny as non-competes that are enforceable through injunctive relief.[4] We believe that this approach is fundamentally flawed because a financial inducement to avoid competing with a former employer may be as serious a burden and restraint on the employee as injunctive relief.[5] Moreover, it is clear that forfeiture-for-competition clauses are not aimed at protecting an employer's protectable interest - but rather, at stifling employee mobility.

Forfeiture-for-competition clauses also stifle competition and innovation on a broader scale: while such forfeited compensation often is negotiated as part of an employee's sign-on package with a prospective new employer, a smaller entity or start-up (including a start-up founded by the employee) typically cannot shoulder that cost. Explicitly prohibiting forfeiture-for-competition clauses would align with decisions in several jurisdictions that have eschewed this doctrine because of its fundamental unfairness.[6]

For these reasons, non-competes enforced through liquidated damages or an obligation to repay earned compensation also are detrimental and should be treated as non-competes. These types of contractual provisions – common in the financial services industry where they are sometimes tied simply to departure for any reason – have the same detrimental impacts on employee mobility as non-competes enforceable through other means.[7] We urge the New York State Senate to support an amendment to the Amendment that *explicitly* recognizes that non-compete provisions that are enforceable through any legal mechanism, including through monetary damages alone, are banned.

We have seen all types of contractual restrictions have the same detrimental impacts as direct non-competes. We suggest that the Senate expressly adopt a functional test to determine whether a contractual clause has the effect of restraining competition even indirectly. We believe that this is consistent with approaches taken by multiple jurisdictions that have banned or limited the use of client non-solicitation provisions because of their anti-competitive effect.[8]

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[4] *See Kristt v. Whelan*, 164 N.Y.S.2d 239 (1st Dep't. 1957), *aff'd without opinion*, 6 N.Y.2d 807 (1958).

[5] *See Ainslie v. Cantor Fitzgerald L.P.*, 2023 WL 106924 (Del. Ch. Jan. 4, 2023) *20-25 (refusing to apply the employee-choice doctrine because it will have an *in terrorem* effect and operate as an unreasonable restraint on trade where the underlying contractual instruments would result in an employee forfeiture of sums that are "meaningful" to the employee).

[6] *See e.g., Ainslie*, 2023 WL 106924; *Deming v. Nationwide Mut. Ins. Co*., 905 A.2d 623, 634-38 (Conn. 2006); *Snarr v. Picker Corp.*, 504 N.E.2d 1168 (Ohio App. 1985).

[7] *See e.g.*, Sarah Butcher, *Credit Suisse's Clawbacks are Stopping Rivals Poaching People*, EFinancialCareers (Apr. 3, 2023) https://www.efinancialcareers.com/news/2023/04/credit-suisse-clawbacks-exits.

[8] *See e.g.*, Nev. Rev. Stat. § 613.195-200(2) (limiting contractual provisions that limit an employee's ability to provide services to a former employer's clients); 820 ILCS 90/ *et seq*. (limiting application of non-solicitation provisions);

By expressly articulating a functional test that focuses on the effect of the contractual provision, the Amendment would strike an appropriate balance that permits employers to use other contractual and legal tools to protect legitimate business interests without unduly burdening employees.[9]

In our experience, overly broad non-disclosure provisions can likewise prevent an employee from seeking gainful employment and therefore would function as a non-compete. Finally, we urge the Committee to extend the Amendment explicitly to contractual provisions that require employees to provide their current employer with notice of any future employment with a competitor or otherwise. Such contractual obligations have a chilling effect on employees who feel limited in accepting employment during any period during which they are under such obligation, even though a remedy for a breach of such provisions may not be recognizable.[10]

Arguably, the existing Amendment – with its use of the broad term "restrict" in Section 1(A) and with the declaration in Section 3 that all noncompetes are "void" – already covers some of the concerns expressed above. But experience teaches us that employers and their counsel will try to find ways around these provisions by arguing that some of these indirect means of restraining competition are not or should not be covered by this Amendment, thereby generating uncertainty and litigation about the scope of the Amendment. Thus, we encourage the Senate to address these issues explicitly to reduce and mitigate those concerns.

III. The Amendment Appropriately Enables Affected Workers To Pursue A Civil Remedy.

The Amendment appropriately provides that individuals may bring civil actions in a court of competent jurisdiction against any party that attempts to enforce non-competes in violation of this section of the Labor Law.[11] We support the inclusion of this subsection, and in particular

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Edwards v. Arthur Andersen, LLP, 44 Cal 4th 937 (2008) (holding that a prohibition on soliciting a firm's clients constitutes an unlawful restraint on trade under California law).

[9] Management-side attorney and lobbyists for employer groups have frequently touted non-compete provisions as essential to protecting trade secrets and confidential information. This argument is a red herring. Employers have a varied toolbox to prevent the misappropriation of trade secrets and confidential information, including contractual non-disclosure provisions and the robust misappropriation of trade secrets laws on the federal and state level. Non-competes are a blunt instrument whereas these contractual and statutory protections have been designed to protect against precisely the type of harm employers are railing against. The fact is that employers in 2023 have never been better suited to protect their trade secrets or proprietary information, thanks to advanced digital protections and an employer's ability to forensically monitor former employees' equipment, networks and systems.

[10] *See e.g.*, *American Broadcasting Co. v. Wolf*, 52 N.Y.2d 394, 406 (1981) (holding that contractual obligations to inform or negotiate with an employer for future job opportunities constitute an implied post-employment non-compete); *Bridgewater Associates, LP v. Minicone et al.*, Am. Arb. Assoc. No. 01-17-0006-7329, Interim Award 7 (Harris & Mentlik, Jan. 24, 2020) (holding that failure to provide notice of new employment does not, alone, create any damage to the former employer).

[11] Section 191-4, Section(4)(a) under S.3100.

the ability for an affected worker to recover all appropriate relief, including injunctive relief, liquidated damages, lost compensation, damages, and attorneys' fees and costs.

IV. The Amendment Should Provide Guidance Regarding the Appropriate Use of "Garden Leave" Provisions.

Our experience suggests that, regardless of the Amendment, employers will try to fashion restrictive covenants that restrain an employee's ability to work for a competitor. We suspect that employers will begin by turning to "garden leave" provisions.[12] Indeed, we have already seen employers that have shifted from the use of lengthy non-compete provisions to the use of lengthy garden leave provisions in anticipation of the passage of legislation like S.3100. Although this is an improvement from unpaid post-employment restricted periods, garden leave periods are rarely a benefit to employees because the employees are precluded from seeking professionally enriching experiences during the garden leave and because the employees are not paid their full compensation during a garden leave.

Like non-competes, garden leaves are detrimental to the labor market in that they stifle innovation and literally compensate individuals to *not* contribute to the broader economy. Further, employers typically reserve the discretion whether to enforce garden leave periods; and garden leave typically is compensated only at the employee's base salary rate, not inclusive of incentive compensation.[13] As many garden leave provisions are drafted, employers may unilaterally terminate the restricted period early without advance notice. This creates uncertainty for employees and their prospective employers. We propose that the definition of non-compete explicitly include garden leave provisions that do not provide for an employee's total compensation and benefits during the garden leave period or that are terminable by the employer unilaterally and without notice.

V. The Amendment Should Address Economic Harms through Retroactive Application; and Should Require Employers to Provide Notices to Affected Workers That Their Non-Competes Are Void.

There are several economic harms that result from the use and abuse of non- compete provisions. These economic harms do not cease on the effective date of the agreement; by their very nature, they extend beyond the point of contracting for years – and even decades – into the future. For that reason, a ban on non-competes on only a going-forward basis (as provided in Section 5 of

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[12] A "garden leave" is a period of time between the date on which a party has provided notice of intent to terminate the employment relationship and the final date of employment, during which employees typically are stripped of their duties and access to the employer's systems and premises. During this period, employees are told to stay home and "work in the garden" – and they may not work or perform services for any other entity (whether a competitor or not).

[13] In the financial services industry where many of our clients work, this can be particularly punitive because base compensation often is a fraction of an employee's total compensation.

S.3100) fails to address the ongoing economic hardships that existing non-competes impose: Employees who have already entered into non-competes would still be prevented from leaving their jobs. Entrants into the job market would still be precluded from positions filled by dissatisfied workers whose mobility is limited by non-competes. Innovation would continue to be stymied to the extent that would-be entrepreneurs remain subject to non-compete provisions.

Moreover, a ban that applies only on a going-forward basis would have two other detrimental effects. First, it would create a perverse incentive for employers to enter into non-compete provisions with employees before the Amendment's effective date. Second, it would create two classes of workers: those who are subject to non-compete provisions and those who are not. This would result in depressing employee mobility – and, as a result, earnings potential – for the more senior members of the labor market, with a disparate impact on our nation's older workers. While we already see hiring preferences for younger workers, we would undoubtedly see further increases in this conduct where employers view younger job candidates as being presumptively more mobile, given that they would not be subject to restrictive non-competes.

For these reasons, we strongly suggest that the Amendment be revised to provide expressly that it is retroactive and therefore that it applies to all existing non-compete agreements.

But retroactive application alone will not be enough, particularly without a private cause of action.[14] A change in enforceability is not self-enforcing: it requires the parties to every affected contract to understand the change and to conduct themselves in a manner consistent with that understanding.

Based on our firm's decades of experience as representatives of employees, we can confirm that many workers who are subject to unenforceable non-competes are not aware of their unenforceability.[15] Whether and to what extent a contractual provision is enforceable has become increasingly challenging for a layperson to understand, in particular because there is no explicit statute in New York. Most workers lack the means to seek legal counsel as to the enforceability of a non-compete and, if determined to be unenforceable, to mount a costly legal challenge to declare the non-compete unenforceable or to defend against an employer's lawsuit seeking to enforce such a restriction.[16] Moreover, setting aside the inherently deeper pockets that employers have, the money spent dollar-for-dollar on non-compete litigations is not equal between employees and employers: employers may deduct these costs as a business expense, but employees may not seek such a deduction. As a result, even unenforceable restrictions have

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[14] Given the scope of non-compete use, we believe that the State would not be in a position itself to enforce each violation of this Amendment.

[15] *See also* J.J. Prescott & Evan Starr, *Subjective Beliefs About Contract Enforceability* 2 (2022) (finding that "70% of employees with unenforceable non-competes mistakenly believe their non-competes are enforceable").

[16] Id. at 3 (noting that employees who believe their non-competes are unenforceable are still less likely to breach their terms, seemingly to avoid the specter of a lawsuit or risk the reputational harm associated with breaching a contract).

a chilling effect on employees who are financially unable to seek legal counsel on enforceability, to risk enforcement of a non-compete, or to challenge its enforceability.

Further, our clients have often spent decades building a professional reputation that could be tarnished by the implication that they will renege on their promises, even if those promises were non-negotiable to begin with.[17] In our experience, employers that use non-competes are often those that are most likely to foster toxic or hostile work environments. When employee attrition is limited by contractual commitments, employers do not need to respond to the pressures of the labor market to improve working conditions. Employees with contractual non-competes lack an escape hatch.

Unenforceable non-competes have an even further reach. Not only do they deter a worker's conduct in seeking new employment, but they also chill a competitor's desire to extend offers of employment to workers who are bound by such restrictions. In our experience, most non-compete disputes are not litigated; instead, they are resolved through negotiation and settlement. Competitors seeking to recruit talent must choose between passing up the opportunity to hire a desirable job candidate or paying the cost of litigation or settlement in order to seek closure on a restriction, even when unenforceable.[18] In doing so, a prospective employer often must consider the broader view of maintaining amicable relations with other industry players. As a result, we have seen clients lose employment opportunities because a prospective employer does not want to "pick a fight" with the client's current or former employer – regardless of whether the non- compete has any chance of being held up in court.

In this regard, the Amendment's declaration that all non-competes are void provides for an elegant and impactful solution, but, such voidness should apply right away to all non-competes.. Also, every affected worker should be provided an individual, written notice that any restrictions are no longer in effect. This written rescission would make employees more aware of their rights and therefore would increase employee mobility within the labor market.[21] Further, the ability to provide a prospective employer with a written rescission of a non-compete provision would give job-seekers the ability to assuage any concerns of litigation risk by a prospective employer.

VI. The Amendment Should Address Choice-of-Law Issues by Making Any Non-Compete that Violates the Rule Unenforceable Against Individuals Working in New York State.

We have seen employers take advantage of choice-of-law clauses to choose a state law that is more likely to enforce a non-compete than the state where the employee actually works.

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[17] *See* Harlan M. Blake, *Employee Agreements Not To Compete*, 73 Harv. L. Rev. 625, 682-83 (Feb. 1960) ("For every covenant that finds its way to court, there are thousands which exercise an in terrorem effect on employees who respect their contractual obligations… Thus, the mobility of untold numbers of employees is restricted by intimation of restrictions whose severity no court would sanction.").

[18] See NPRM, supra note 17, Part IV.A.1.a.ii.

Disputes regarding the appropriate choice-of-law have become a proxy for disputes regarding enforceability.[19] Even where explicit statutory protections have been enacted to prevent such an abuse of choice-of-law provisions, the exceptions often swallow the rule. For example, California's statutory provision requiring employment terms and conditions to be subject to California law has an exception for employees are represented by counsel – an exception that has been used to enforce contractual provisions that would otherwise violate California law.[20] An exception like this one influences employees to forego legal representation in negotiating their employment agreements so as to avoid a non-compete, which has broader detrimental effects on their rights: as representatives of employees, our experience is that employees have far less traction to change any terms of an employment agreement – from the "boilerplate" provisions to more substantive provisions like a non-compete – when they are not represented by skilled and capable counsel. The use of a choice-of-law provision to force an employee to be subject to an onerous non-compete provision is particularly common in the context of partnership or LLC agreements and equity plans that govern an employee's equity-based compensation, sometimes enforceable by injunctive relief, sometimes by forfeiture, and often by both.

We urge the Committee to explicitly provide that choice-of-law provisions cannot provide an exception to the Amendment for employers employing workers in New York State. To date, we have already seen an increase in New York-based employers making use of choice-of-law clauses and even off-shore corporate structures to house employees' equity-based compensation and including restrictive covenants in those documents. The Amendment should clearly provide that such provisions in any such agreements will not be enforceable within New York state, and that employers may not enforce choice-of-law clauses against New York-based workers. This would be consistent with the principle that uniform standards should create certainty for all parties - particularly for employees who currently need to retain counsel in multiple jurisdictions to understand whether and to what extent restrictions are enforceable.

For the reasons set forth above, I provide my testimony in favor of this bill, with some suggested improvements; and I urge the State of New York to ban non-competes completely.

Respectfully submitted,

Wayne N. Outten

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[19] *See e.g.*, *NuVasive Inc. v. Miles*, C.A. No. 2017-0720-SG (Del. Chan. Ct. Sep. 28, 2029); *Ascension Ins. Holdings, LLC v. Underwood*, C.A. No. 9897-VCG (Del. Chan. Ct. Jan. 28, 2015).
[20] *See e.g., Jefferies, LLC v. Geggenheimer*, No. 19 Civ. 3147 (S.D.N.Y. June 17, 2020).

Chair

Appendix A

Appendix A, included below, includes an anonymized story from a firm client that exemplifies how non-compete clauses can deeply impact an employee's professional life and personal life. This statement which has been unedited, was originally submitted in response to the Federal Trade Commission's Notice of Proposed Rulemaking for the proposed Non-Compete Clause Rules (RIN 3084-AB 74). Given the similar subject matter, we submit this statement for consideration and in support of S.3100.

A. Overview

I am writing in support of the proposed FTC rule prohibiting non-compete agreements in employment. A broad, bright-line, no-exceptions prohibition is necessary to restore competitiveness and worker mobility in America.

1. I am a scientist with several decades of experience in research and data science. I have experienced first-hand the detrimental effects of non-compete restrictions, and I am aware of numerous other cases when restrictive employment agreements have prevented high-caliber professionals from realizing their full potential and have deprived the American economy of the full benefits of their knowledge and ability.
2. Non-compete restrictions, especially when coupled with forced arbitration, create a modern functional equivalent of serfdom, even if sometimes a well-paid one. A mere threat of a legal proceeding is often enough to terrorize the employee into staying put and to prevent other potential employers from extending job offers. That's why any regime that uses a fact-specific inquiry or a balancing test will not succeed. For the employer, going to court is simply one more aspect of its day-to-day business; for an individual, however, it becomes a major disruption to his or her life. Even if the employee were to prevail eventually, the stress and the legal fees make the whole effort a Pyrrhic victory.
3. Even worse, the current tax law tilts the playing field in favor employers. If both an employer and employee spent the equal amount of $100,000 on legal fees, the employer can deduct these fees as a business expense, resulting in the net after-tax cost that could be as little as $50,000. The employee cannot get this tax advantage and must pay the full amount from his after-tax earnings.
4. I am aware that certain employers, especially in states where very long non-competes are considered "unenforceable," are using compulsory deferred compensation plans to get around the restrictions. A significant part of the employee's compensation is deferred for several years and is forfeited if the employee leaves (voluntarily or involuntarily). If the employee signs a non-competition agreement, however, some or all of the deferred compensation may be paid out during or at the end of the noncompete period. While the

employee does not have to sign, there is nothing truly "voluntary" about such noncompetes. Therefore, the Commission should prohibit the involuntary deferral of compensation where the employee forfeits the money if he accepts a job with a competitor. The Commission should consider that an employer may arrange for such a non-compete to be signed during the first few days after the employee is no longer employed - to buttress the false impression of "voluntary choice."

5. Employers often justify noncompetes by their perceived need to protect trade secrets and confidential information, which they seek to define as broadly as possible. Yet, sharing true company secrets with employees is never done out of mere benevolence. Employers do it because they expect to make more profits that way. Therefore, it is the employers who should bear the attendant costs of protecting their secrets. Noncompetes shift the costs to the individual employees instead, while the benefit continues to accrue primarily to the employer. In my experience, the companies with the best training and education for employees have been the ones that did not have noncompetes, not the other way around.
6. Setting aside the technicalities, the Commission's argument that the free-functioning labor market provides the best match of employees to jobs is the most important one. How many remain in subpar jobs that they cannot leave? How much harder is it to be promoted if the only option you have is to stay at one company? I was looking for a medical specialist and inquired about a particular doctor working at a respected hospital. Someone who knew him told me this: "He is one of the best, but he is subject to a non-compete and he is currently staying in his job only because if that. Avoid him for the time being, he is unhappy."
7. How can we as a society allow such situations to continue? The FTC proposal should be approved.

B. Specific Questions of the FTC and Individual Commissioners

In this second part, I will address the specific questions on which the FTC and individual Commissioners requested comments.

1. The Commission is correct that noncompete agreements are a method of competition - and an unfair one at that. They make it much more difficult, expensive, and dangerous to start a new company. They give an unfair advantage to big well-established incumbents with accumulated litigation experience and large legal departments. They are sometimes used also to restrict investments in competing startups, in addition to restricting employment.
2. The Commission asked for comments on alternative standards, such as a possible "rebuttable presumption" that the noncompete agreements are unlawful. Such a limited approach is a bad idea for two reasons. First, the main way these agreements work is by bullying employees and other potential employers into submission. Once a lawsuit begins, even winning it may leave the employee worse off. Therefore, there should be a simple, bright-line rule that does not call for any fact-specific inquiries. These inquiries result in lengthy discovery processes and benefit primarily the lawyers and the arbitrators who get to charge large fees. Second, by delineating the circumstances in which the Commission

does not wish to regulate, it might actually cause an increase in the use of noncompetes under those circumstances. While today some employers may be reluctant to try noncompetes, given the stench associated with them, the Commission - by implicitly blessing them in some cases - may normalize, and therefore increase, their use. That would be very unfortunate - and for those working in these fields, devastating. The Commission's proposed categorical prohibition is unquestionably the right solution.

3. The Commission also asked about differentiated approaches, based on wage thresholds or, possibly, occupation. These approaches should be avoided for the same reason. There is simply no set of circumstances that justify effectively indenturing employees to employers. In our age of extreme specialization, many learned professionals, technical specialists, and scientists work in narrow fields where they have become experts. If they are not allowed to apply to a competitor, they become virtually unemployable. The Commission's main proposal is unquestionably the right solution.
4. The Commission sought comments about the applicability of its findings to senior executives. In my experience, which I will describe in more detail later, noncompetes are both exploitative and coercive even for such executives. The simple reality is that the entity almost always has more resources than most of its executives, and a lawsuit would have a bigger impact on the executive's life than on the business of the entity. In addition, the company enjoys a tax advantage in these fights, being able to deduct its legal fees from income, while the executive cannot. And, if the company is litigious, it gains a lot of experience while litigating repeatedly, especially in secret arbitrations, which creates information asymmetry in favor of the company. In fact, the recent trend of wide adoption of forced secret arbitration by companies is yet another important reason why regulation is so needed. The blanket prohibition of noncompetes is the right solution.
5. The Commission asked about a disclosure requirement or a requirement to file reports. I fail to see what this would achieve in practice. By now, the extent of the problem is well understood, the battle lines are drawn, and more data on the prevalence of this practice will change little.
6. Commissioner Wilson in her dissent has raised several questions, some of which I have already addressed above. I disagree with the Commissioner's view that noncompetes can be non-exploitative or non-coercive. I have yet to meet a person who, having been subject to a noncompete, told me it was a fair bargain. The Commissioner stated that there could be no harm unless the noncompete was enforced. Respectfully, real life is very different. It is the threat, not the enforcement itself, that does the job most often. And the uncertainty in the law contributes a great deal to that. Consider, for example, a simple question: is the noncompete enforceable when the employer fires the employee without cause? Basic equity and common sense say it should not be. What is the situation in New York, a very important state where a lot of contracts are made? Despite large sums of money spent litigating many cases over the decades, the answer remains unclear, with most legal commentaries saying only that "cases are split." This engenders great uncertainty for

employees, who risk being sued by their former employers even after being terminated without cause. Following Justice Brandeis, Commissioner Wilson has spoken about states being "laboratories of democracy." But in this case, employees are the laboratory rats, while the companies try relentlessly to sway the courts into enforcing noncompetes in more and more circumstances. For this reason, many companies put terms into their noncompete agreements that are overbroad and probably unenforceable. Unenforceable here and now may become enforceable in other jurisdictions and in the future. The Commission needs to put the end to wasteful and protracted litigation and ban the noncompetes.

7. Commissioner Wilson also asked for comment on whether noncompetes negatively affect competitive conditions. They do. Creating a start-up becomes much harder, because you must focus on threatened or actual litigation, instead of focusing on building the business. And some employers prohibit their employees from investing in competing startups even as passive investors (even through funds managed by other companies). In some industries, entire segments have adopted the noncompete requirement as a wide de-facto standard. Thus, even if I leave my current workplace and then sit out the noncompete period by doing nothing, my new employer will have another noncompete ready for me. Over the past twenty years, binding employees to noncompetes has become a focal point that dictates the default employment terms in financial, technical, and knowledge-intensive industries. If I start a company in a field where every of my competitors binds their talent to noncompetes, I would be a fool to not do the same. By prohibiting this practice, the Commission would create a new focal point (no noncompetes), which is more efficient and better for the economy as a whole, is morally superior, and is more competitive.
8. Commissioner Wilson also quotes a paper arguing that more broker misconduct occurs in the financial industry when noncompetes were suspended. I have not seen many cases of broker misconduct personally, but I would like to point out the following: many cases of misconduct are outed by whistleblowers, whatever the industry. And as is well-known, the whistleblower typically must leave the employing firm, as the laws against retaliation simply do not work well. Now, if a prospective whistleblower is bound by a noncompete, he will think longer and harder about reporting misconduct, given the inability or limited ability to find a new job in the field. And in many cases, the potential whistleblower will keep quiet, because his current employer is the only game in town when a noncompete is in place. That alone justifies banning the practice. And yes, if employees are free to leave, they probably will report more misconduct, so it would look like there was an increase in misconduct.
9. One may argue that, if you are unhappy with your current employer, you just comply with the agreement - look for a job after one or two years (or whatever the term is). Leaving aside the question of how to pay the bills and how to get the health insurance in the meantime (COBRA continuation covers only 18 months at best), it is a reality of recruiting in America that it is so much harder to find a job unless you already have one. A person

out of work is viewed by many as “damaged goods,” and his or her resume is more likely to go straight to the wastebasket.

10. Commissioners Slaughter and Bedoya requested a description of lived experiences. I will share mine, but without naming names or being too specific. I am a highly paid specialist. I have several decades of experience in the field and have seen several very different work environments. When I joined my current employer, I was told that a noncompete agreement was necessary because the company did not use deferred compensation arrangements to retain employees. I asked for assurances that, if I complied with a one-year provision, I could go to any competitor and I was told yes, that would be no problem.

Now things have changed. My employer now defers a significant portion of our compensation, which we forfeit unless we sign a very long noncompete when we leave. Employees are told that they will be sued if they go to work for any other company in the industry. In addition, the company imposes a sweeping non-disparagement clause that prohibits criticizing not only the company, but all other activities and businesses of its directors, officers, and managers; and the company requires any and all disputes to be resolved through secret restrictive arbitration. Not surprisingly, it is very hard and dangerous to leave and the possibilities for promotion are quite limited.

How had all this become possible? After the tech collapse of the early 2000's, the employer sent us a new employment agreement and demanded that we immediately sign it, on the pain of immediate firing. That shows how a noncompete can be used to boil the proverbial frog. Several people were fired for not signing, and then the employer tried to block their new employment - to "teach the lesson to the rest of us." Because I was already bound by a noncompete, I signed. The coercion worked. Later, when the employer imposed an even more abusive employment agreement with the non-disparagement clause, I considered simply refusing to sign it. The company threatened to fire me and possibly to sue me if I found another job within my field. As a result of these threats a member of my family had a heart crisis, and I eventually signed the new agreement. This shows how the noncompetes destroy much more than earnings. Because our jobs or our businesses are such important parts of our lives they affect our families, our health and our dignity.

There are several lessons from this. First, an employment contract, like all contracts, cannot foresee all future circumstances. In employment, your ability to leave your current job is the important safety valve that allows you to get better terms, to be promoted - at another place if not the current one - or simply to avoid dealing with a bad boss or a boss that you just do not get along with. With noncompetes in place this is very hard, if not impossible. The tensions simmer and the abuse intensifies – and the employee is stuck, invariably causing substantial emotional (as well as financial) distress for the employee and the employee’s family. Employees are unable to negotiate employment terms that would address all such situations ahead of time.

Second, the litigation and intimidation opportunities that noncompetes open up for companies facilitates their bad behavior. None of this would be possible in a company where people could simply leave and go to another place. Commissioner Wilson wants to know about the costs and benefits; but how do you measure the cost of lives ruined, health destroyed, and dignity shattered? When I joined my employer, forced arbitration was not yet the norm, and I did not anticipate the immense rise in the power of companies over workers that has occurred over the past two decades. These changes alone justify the need for regulation. At its best, good regulation reduces transaction costs by bringing certainty and uniform standards. Now is the time to reinvigorate the labor markets - especially for talented executives and professionals - by banning that the serfdom that is created by noncompetes.