

December 14, 2022

Lina Khan
Chair
Federal Trade Commission

Alvaro Bedoya
Commissioner

Rebecca Kelly Slaughter
Commissioner

Christine S. Wilson
Commissioner

CC: Director Holly Vedova, FTC Bureau of Competition; Director Sam Levine, FTC Bureau of Consumer Protection

SENT VIA E-MAIL

Re: FTC must begin its rulemaking to ban employer non-compete agreements

Dear Chair Khan and Commissioners,

The undersigned organizations urge the Federal Trade Commission (FTC) to start the work of banning employers' use of non-compete agreements. It should do so by issuing a notice of proposed rulemaking (NPRM) without further delay. Tens of millions of workers across the U.S. economy remain vulnerable to economic disempowerment through employers' use of, or threat to use, non-compete clauses.¹ Each day that passes without an NPRM weakens the likelihood of a robust final rule and increases the effort's exposure to a potential Congressional Review Act challenge post-2024.

Employers' use of non-compete clauses inflict real and substantial harms on the American worker and the overall U.S. economy without any legitimate justification. By limiting worker's mobility, non-competes drive down wages, reduce the formation of new businesses and keep workers stuck in unsafe or hostile workplaces. These one-sided contracts can also unfairly restrain competition in downstream markets by allowing dominant firms to hold on to specialized workers—think of monopolistic hospitals and surgeons. Instead of retaining workers through coercive non-compete clauses, employers should maintain a loyal workforce by offering good wages, regular raises and promotions, and fair treatment.

In March 2019, a coalition of civil society organizations, labor unions and legal experts formally petitioned the FTC to issue a rule that declares worker non-compete clauses to be an unfair method of competition and classifies them as *per se* illegal under the FTC Act.² The coalition demanded an FTC rule that would make non-compete clauses illegal for all workers, irrespective of income or occupation. In July 2021, President Biden issued an executive order that expressly directed the FTC Chair to “consider working with the rest of the Commission to exercise the FTC’s statutory rulemaking authority ... to curtail the unfair use of non-compete clauses and other clauses or agreements that may unfairly limit

¹ U.S. DEP'T OF TREASURY, NON-COMPETE CONTRACTS: ECONOMIC EFFECTS AND POLICY IMPLICATIONS 6 (2016)

² Petition for Rulemaking to Prohibit Worker Non-Compete Clauses. Accessible at <https://www.regulations.gov/document/FTC-2021-0036-0001>

worker mobility.”³ This summer, the *Wall Street Journal* reported that the FTC was considering a rule on non-competes.⁴ As recently as September, Chair Khan told the Senate Judiciary Committee that the agency was “closely scrutinizing the growing use of non-compete clauses throughout the economy.”⁵ Importantly, the FTC has laid the legal groundwork for use of Section 5 of the FTC act to police a broad set of unfair methods of competition, presumably including the use of non-competes.⁶

The FTC has made clear it is contemplating action, but time is running short. It is vital that the FTC begin the rulemaking process to signal to the public, courts, and corporate America that it is committed to fair competition in the labor market. Additionally, further delay in issuing an NPRM may result in legal jeopardy. An NPRM is only the first step toward prohibiting non-compete clauses—reviewing and responding to comments and developing the final rule will take significant time. Lawmakers have historically depended on the Congressional Review Act to overturn agency actions with which they disagree.⁷ Should there be unified control of Congress and the White House following the 2024 election, any agency action completed in the second half of 2024 will be open to repeal.

The country is in the midst of a widespread re-empowerment of labor, the Biden administration has made clear that reviving employer competition for workers’ services is a key plank of its policy program. We cannot waste a historic opportunity to use federal authority to eliminate pernicious non-compete clauses. We call on the FTC to begin its important work by issuing a strong rule proposal now.

For questions, please contact Matt Kent (mkent@citizen.org).

Thank you for your attention to this matter.

Sincerely,

Public Citizen
Open Markets Institute
Future of Music Coalition
Demand Progress Education Fund
Lake Research Partners
Towards Justice
Economic Policy Institute

³ EXECUTIVE ORDER ON PROMOTING COMPETITION IN THE AMERICAN ECONOMY. (2021). <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/07/09/executive-order-on-promoting-competition-in-the-american-economy/>

⁴ *Wall Street Journal*, “FTC Considers Restricting the Use of Noncompete Clauses by Companies”, June 22, 2022. <https://www.wsj.com/articles/ftc-considers-restricting-the-use-of-noncompete-clauses-by-companies-11654747203>. “Ms. Khan also said the FTC is considering drafting a regulation targeting the use of noncompete provisions. ‘An FTC rule there could have significant value-add,’ she said. ‘We need to be using all of our tools.’ She said the rules could be adopted via a rarely used FTC authority, a section of the 1914 FTC Act, which says ‘unfair methods of competition in or affecting commerce’ are illegal.”

⁵ FTC Press Release, FTC Chair Lina M. Khan Testifies Before Senate Judiciary Subcommittee on Antitrust, Competition Policy and Consumer Rights, Sept. 20, 2022. <https://www.ftc.gov/news-events/news/press-releases/2022/09/ftc-chair-lina-m-khan-testifies-senate-judiciary-subcommittee-antitrust-competition-policy-consumer-rights>

⁶ FTC POLICY STATEMENT REGARDING THE SCOPE OF UNFAIR METHODS OF COMPETITION UNDER SECTION 5 OF THE FEDERAL TRADE COMMISSION ACT. (2022). https://www.ftc.gov/system/files/ftc_gov/pdf/P221202Section5PolicyStatement.pdf

⁷ Congressional Research Service, The Congressional Review Act (CRA): Frequently Asked Questions. November 12, 2021. <https://crsreports.congress.gov/product/pdf/R/R43992>

Revolving Door Project
National Employment Law Project
Campaign for Family Farms and the Environment
People's Parity Project
Farm Action
American Economic Liberties Project
National Women's Law Center
Center for Digital Democracy
Student Borrower Protection Center
Fight for the Future
Service Employees International Union
Institute for Local Self-Reliance
Oxfam America
Public Knowledge
Communications Workers of America
United Food & Commercial Workers Local 400
Economic Security Project Action
American Federation of Labor and Congress of Industrial Organizations