FEDERAL TRADE COMMISSION

Non-Compete Clause Rule	Docket No. 2023-0007

COMMENT OF
THE ANTITRUST DIVISION OF THE
UNITED STATES DEPARTMENT OF JUSTICE

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Dated: April 19, 2023

The Antitrust Division of the United States Department of Justice ("Antitrust Division") respectfully submits this comment in response to the Federal Trade Commission's ("FTC") request for public comment on its notice of proposed rulemaking on the non-compete clause rule, as described in its Federal Register Notice published on January 19, 2023.[1]

The Antitrust Division unequivocally supports the FTC's full exercise of its rulemaking authority to address the anticompetitive effects of non-compete clauses. It offers this comment to identify where the Antitrust Division's own experience and expertise provide support, in addition to those reasons set forth by the FTC, for the FTC's proposal to restrict the pervasive use of non-compete clauses throughout the United States. The Antitrust Division commends the FTC for its efforts to promote worker mobility and increase labor market competition.

I. INTEREST OF THE ANTITRUST DIVISION

The Antitrust Division, along with the FTC, is entrusted with enforcing the federal antitrust laws. These laws reflect a legislative judgment that "[t]he heart of our national economic policy long has been faith in the value of competition."[2] For this reason, the federal antitrust laws seek to protect economic freedom and opportunity by promoting free and fair competition in the marketplace. As the Supreme Court has explained, antitrust law serves as "a comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade."[3]

Protecting workers is a central goal of antitrust. Antitrust law – and the essential value of competition – applies equally to labor markets as to markets for other services and products.[4] The Supreme Court has made clear (in the context of discussing the Sherman Act) that antitrust law does "not confine its protection to consumers, or to purchasers, or to competitors, or to sellers" but that the law is instead "comprehensive in its terms and coverage, protecting all who are made victims of the forbidden practices by whomever they may be perpetrated."[5] A focus on workers is longstanding. The English common law that pre-dated U.S. law saw the "impoverishing of poor artificers" as one of the core harms of monopoly power.[6] For that reason, since at least *Dyer's Case* in 1414,

[1] Non-Compete Clause Rule, 88 Fed. Reg. 3482 (Jan. 19, 2023).

[2] *Nat'l Soc'y of Pro. Eng'rs v. United States*, 435 U.S. 679, 695 (1978) (quoting *Standard Oil Co. v. FTC*, 340 U.S. 231, 248 (1951)).

[3] *N. Pac. Ry. Co. v. United States*, 356 U.S. 1, 4 (1958).

[4] *See NCAA v. Alston*, 141 S. Ct. 2141, 2154-60 (2021); *Anderson v. Shipowners' Ass'n of Pac. Coast*, 272 U.S. 359, 363-64 (1926); *United States v. Jindal*, No. CV 4:20-CR-00358, 2021 WL 5578687 at *5 (E.D. Tex. Nov. 29, 2021) ("The Supreme Court has made clear that the Sherman Act applies equally to all industries and markets—to sellers and buyers, to goods and services, and consequently to buyers of services—otherwise known as employers in the labor market.").

[5] *Mandeville Island Farms, Inc. v. Am. Crystal Sugar Co*., 334 U.S. 219, 236 (1948).

[6] *Denver & N.O.R. Co. v. Atchison, T. & S.F.R. Co.*, 15 F. 650, 672 (C.C.D. Colo. 1883) (quoting *The Case of Monopolies/Darcy v. Allen,* 11 Coke, 84).

the law has looked with skepticism on restraints on workers' future employment.[7] In labor markets today, antitrust protections promote competition among employers, contributing to higher wages, benefits, and working conditions for employees.

The Antitrust Division, therefore, sees promoting competition and challenging anticompetitive practices in labor markets as critical to its mission. For years, it has challenged firms and individuals that use anticompetitive employment practices such as no-poach agreements, wage-fixing conspiracies, unlawful information exchanges, and non-compete clauses that harm competition.[8] The Antitrust Division has also challenged horizontal agreements between employers not to hire each other's workers as criminal violations of the antitrust laws.[9] In addition, the Antitrust Division has filed amicus briefs and statements of interest in cases addressing employment restraints.[10] Anticompetitive employment agreements result in a range of harms by depriving workers of a competitive market for their services and by depriving employers of a robust pool of

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[7] *Dyer's Case*, Y.B. Mich. 2 Hen. 5, f. 5, pl. 26 (C.P. 1414).

[8] *See*, *e.g.*, *United States v. Am. Tobacco Co.*, 221 U.S. 106, 181-83 (1911) (finding tobacco companies violated both Section 1 and Section 2 of the Sherman Act because of the collective effect of six of the companies' practices, one of which was the "constantly recurring" use of non-compete clauses); *United States v. Patel, et al*., No. 3:21-cr-220,-VAB 2022 WL 17404509, at *8-10 (D. Conn. Dec. 2, 2022) (alleging defendants agreed to "restrict the hiring and recruiting of engineers and other skilled-labor employees between and among" competitors); *United States v. Manahe*, No. 2:22-cr-00013-JAW, 2022 WL 3161781, at *7 (D. Me. Aug. 8, 2022) ("The Court concludes that the indictment alleges a recognized *per se* illegal form of market allocation among purchasers of labor."); *United States v. Hee*, No. 2:21-cr-00098-RFB-BNW (D. Nev. Mar. 30, 2021); *United States v. Surgical Care Affiliates, LLC*, No. 3:21-cr-00011-L (N.D. Tex. July 8, 2021); *United States v. Cargill Meat Solutions Corp. et al.*, No. 1:22-cv-01821-ELH (D. Md. July 25, 2022) (resolving unlawful exchange of wage and benefit information among chicken processing plants).

[9] *See United States v. DaVita Inc.*, No. 1:21-CR-00229-RBJ, 2022 WL 266759, at *3 (D. Colo. Jan. 28, 2022) (denying defendants' motion to dismiss criminal claims on the basis that naked non-solicitation agreements or no-hire agreements to allocate the market are per se unreasonable, as "anticompetitive practices in the labor market are equally pernicious—and are treated the same—as anticompetitive practices in markets for goods and services."); *see also United States v. Patel*, 2022 WL 17404509, at *10-11 (holding agreement described in indictment was appropriately subject to per se treatment as it described a horizontal agreement to allocate employees in a specific labor market).

[10] *See, e.g.*, Brief for the United States and Federal Trade Commission as Amici Curiae, *Deslandes v. McDonald's USA, LLC*, No. 22-2333, 22-2334 (7th Cir. Nov. 9, 2022); Brief of the United States as Amicus Curiae, *Aya Healthcare Servs., Inc. v. AMN Healthcare, Inc*., No. 20-55679 (9th Cir. Nov. 19, 2020); Statement of Interest of the United States, *Markson v. CRST Int'l, Inc*., No. 5:17-cv-01261-SB (SPx) (C.D. Cal. July 15, 2022); Statement of Interest of the United States, *In re Outpatient Med. Ctr. Emp. Antitrust Litig*., No. 1:21-cv-00305 (N.D. Ill. Dec. 9, 2021); Statement of Interest of the United States at 22-23, *Seaman v. Duke University*, No. 1:15-CV-462 (M.D.N.C. Mar. 7, 2019) (no-poach agreements between competing employers serve to allocate employees within a labor market); Statement of Interest of the United States at 4, *In re Ry. Indus. Emp. No-Poach Antitrust Litig.,* No. 2:18-MC-00798 (W.D. Pa. Feb. 8, 2019) ("no-poach agreements among competing employers are *per se* unlawful unless they are reasonably necessary to a separate legitimate business transaction or collaboration among the employers"); Statement of Interest of the United States at 11, *Beck et al. v. Pickert Medical Group, P.C., et al*., No. CV-21-02092 (2d Jud. Dist. Nev. Feb. 25, 2022) (asserting that even if non-compete agreements were ancillary to a broader collaboration, "several allegations suggest they would be unreasonable under a rule-of-reason analysis").

available employees. They can reduce wages, limit workers' employment options, foreclose employers' ability to access talent, and stifle innovation.

Accordingly, the Antitrust Division has significant expertise with respect to competition issues in labor markets. Based on that experience and expertise, the Antitrust Division agrees with the FTC's assertion that non-compete clauses harm competition in labor markets in the United States. The Antitrust Division supports the FTC's rulemaking effort to promote labor market competition by restricting anticompetitive non-compete clauses.[11]

II. THE ANTITRUST DIVISION BELIEVES THAT NON-COMPETE CLAUSES HARM LABOR MARKET COMPETITION BY INHIBITING WORKER MOBILITY

A. Non-compete clauses limit competition in design and effect. The Antitrust Division, through its experience as an enforcer of the antitrust laws, has witnessed the aggregate potential of these agreements to restrict worker mobility and dampen competition in labor markets. Non-competes that are broad in scope, duration, and geography are particularly problematic. For those reasons, like the FTC, the Antitrust Division is concerned by the proliferation of non-competes throughout the U.S. economy.[12]

In addition to the Antitrust Division's labor market enforcement experience and the support offered by the FTC for its proposed rule, the Antitrust Division's review of empirical research demonstrates that non-compete clauses are pervasive and have a deleterious impact on labor market competition.[13] This research shows that workers and employers alike bear the costs of the non-competes.[14]

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[11] 88 Fed. Reg. 3508 ("Non-compete clauses obstruct competition in labor markets because they inhibit optimal matches from being made between employers and workers across the labor force. The available evidence indicates increased enforceability of non-compete clauses substantially reduces workers' earnings, on average, across the labor force generally and for specific types of workers.").

[12] *Id*. 3501 ("The proliferation of non-compete clauses is restraining competition in labor markets to such a degree that it is materially impacting workers' earnings—both across the labor force in general, and also specifically for workers who are not subject to non-compete clauses."); Statement of Interest of the United States at 11, *Beck et al. v. Pickert Medical Group, P.C., et al*., No. CV-21-02092 (2d Jud. Dist. Nev. Feb. 25, 2022).

[13] *See generally id*. 3484-93 (discussing empirical research examining the effects of non-compete clauses on labor and product markets).

[14] *See* Natarajan Balasubramanian et al., *Locked In? The Enforceability of Non-Compete Clauses and the Careers of High-Tech Workers*, 57 J. HUM. RES. S349, S377 (2022) (finding earnings of new hires increased by roughly 4% when Hawaii stopped enforcing non-compete clauses for high-tech workers); Evan Starr, Justin Frake & Rajshree Agarwal, *Mobility Constraint Externalities*, 30 ORG. SCI. 961 (2019) (finding increased enforceability of non-compete clauses in a certain state and industry combination coincided with a 6% decrease in earnings for workers who work in that same state and industry but did not have a non-compete clause); *see also* Evan Starr et al., *Screening Spinouts? How Noncompete*

As to workers, mounting evidence indicates that non-competes cover a broad swath of workers[15] and reduce their earnings.[16] The harmful effects of non-competes extend to workers regardless of income, skill, and geography.[17] At least one study suggests that non-compete usage may even negatively impact wages for workers who do not themselves have a non-compete clause in their employment contract.[18] In addition, given the existing patchwork of state laws governing non-competes, workers can often be confused about the enforceability of non-compete clauses. This confusion can have the same deterrent effect as non-competes that employers can enforce through legal action.[19]

Non-compete clauses can also harm businesses as employers. They prohibit businesses from freely hiring workers to meet their workforce needs[20] and negatively impact business formation by preventing workers from starting their own businesses.[21]

Enforceability Affects the Creation, Growth, and Survival of New Firms, 64 MGMT. SCI. 552, 561 (2018) (finding that non-compete clauses reduce intra-industry spinoff entrepreneurial activity).

[15] *See* Evan P. Starr et al., *Noncompete Agreements in the U.S. Labor Force*, 64 J. L. & ECON. 53, 60 (2021) (finding that 38% of respondents have worked under a non-compete agreement at some point in their lives); *see also* Natarajan Balasubramanian et al., *Employment Restrictions on Resource Transferability and Value Appropriation from Employees* (Feb. 1, 2023), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3814403 (finding 22.1% of survey respondents currently work under a non-compete and noting this figure is consistent with results in prior studies); Alexander J.S. Colvin & Heidi Shierholz, *Noncompete Agreements*, ECON. POL'Y INST. (Dec. 10, 2019), https://www.epi.org/publication/noncompete-agreements/ (finding that roughly half (49.4%) of survey respondents of private-sector American business establishments indicated that at least some employees in their establishment were required to enter into a noncompete agreement, regardless of pay or job duties).

[16] *See, e.g.,* Matthew S. Johnson, Kurt Lavetti & Michael Lipsitz, *The Labor Market Effects of Legal Restrictions on Worker Mobility* 2 (2021), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3455381 (increasing non-compete enforceability by a certain metric would decrease workers' earnings by 3-4%).

[17] *See* Kurt Lavetti, Carol Simon & William D. White, *The Impacts of Restricting Mobility of Skilled Service Workers: Evidence from Physicians*, 55 J. HUM. RES. 1025, 1042 (2020) (reporting that 45% of physicians worked under a non-compete clause in 2007); Matt Marx, *The Firm Strikes Back: Non-Compete Agreements and the Mobility of Technical Professionals*, 76 AM. SOCIO. REV. 695, 702 (2011) (finding 43% of electrical and electronic engineers signed a non-compete clause); Matthew S. Johnson & Michael Lipsitz, *Why Are Low-Wage Workers Signing Noncompete Agreements?*, 57 J. HUM. RES. 689, 700 (2022) (finding 30% of hair stylists worked under a non-compete clause in 2015).

[18] *See* Evan Starr et al., *Mobility Constraint Externalities supra* note 14.

[19] *See* THE STATE OF LABOR MARKET COMPETITION 17, U. S. DEP'T TREASURY (Mar. 7, 2022) ("While guaranteed enforcement would strengthen their effects, uncertainty over enforcement can nonetheless affect behavior ('in terrorem' effects). This is true even if the actual probability of a contract being enforced is zero. So long as the perceived probability of an employer attempting to enforce the contract is non-zero, restrictive employment agreements can create frictions."); *see also* J.J. Prescott, Norman D. Bishara, & Evan Starr, *Understanding Noncompetition Agreements: The 2014 Noncompete Survey Project*, 2016 MICH. ST. L. REV. 369, 377 (2016) (finding that the incidence of non-compete clauses in employment contracts is not strongly correlated with their enforceability, suggesting employers include these clauses even when they expect them to be unenforceable).

[20] *See* Liyan Shi, *Optimal Regulation of Noncompete Contracts*, 92 ECONOMETRICA 425, 440 (2023) (finding that firms must make inefficiently high payments to buy workers out of non-compete clauses with former employers).

[21] *See, e.g.*, Sampsa Samila and Olav Sorenson, *Noncompete Covenants: Incentives to Innovate or Impediments to Growth*, 57 MGMT. SCI. 425, 432 (2011) (finding that an increase in capital funding

Talented employees are forced to sit out of labor markets covered by non-competes, preventing businesses from employing key people that could spur the businesses' success.

B. Although some employers – especially those of specialized and executive-level employees – assert interests in the post-employment conduct of certain employees, the Antitrust Division does not believe that these interests justify the broad harms of non-compete clauses on labor market competition.

Employers, for instance, may assert a need to prevent the disclosure of sensitive business information from certain workers with specialized knowledge (although this concern is not salient for most low-wage workers). But there already exists a large body of federal law, state law, and contractual mechanisms targeted at this precise concern. For instance, the FTC's non-compete rulemaking does not circumvent the existing federal and state laws on trade secrets or other protections on the disclosure of proprietary information.[22] In addition, as the FTC observes in its rulemaking, less restrictive covenants in employment agreements – namely non-disclosure agreements – are aimed at protecting against the outflow of trade secrets and other valuable, confidential, or sensitive business information that could threaten the firm if disclosed.[23] These covenants, which are common and currently exist in many employment contracts,[24] mitigate employer concerns that departing employees will improperly disclose trade secrets or business information. Unlike appropriately tailored non-disclosure agreements and trade secret law, non-compete clauses are a blunt tool to address the targeted concern of sharing sensitive information.

III. COMPETITIVELY HARMFUL NON-COMPETE CLAUSES ARE TOO PERVASIVE FOR CASE-BY-CASE ADJUDICATION TO ADDRESS FULLY

Case-by-case adjudication of anticompetitive non-compete clauses is an important enforcement tool. But – in addition to the reasons set forth in the preamble to the proposed rule[25]– the Antitrust Division's experience suggests that case-by-case adjudication is not well suited to remedy the aggregate anticompetitive effects of pervasive non-compete clauses by itself.

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increased the number of new firms by nearly three times the amount when non-competes were not enforceable as compared to when they were enforceable).

[22] *See* 88 Fed. Reg. 3505-08; Defend Trade Secrets Act of 2016, Pub. L. No. 114-153, § 2(a), 130 Stat. 376, 376-80 (codified at 18 U.S.C. § 1836(b)). Trade secret protection also derives from state law. *See generally Kewanee Oil Co. v. Bicron Corp.*, 416 U.S. 470 (1974); *see also* Defend Trade Secrets Act § 2(f) ("Nothing in the amendments made by this section shall be construed . . . to preempt any other provision of law.").

[23] 88 Fed. Reg. 3487 (citing Natarajan Balasubramanian et al., *supra* note 14).

[24] *Id.*

[25] *See id*. 3538.

As the FTC's proposed rule explains, approximately one in five American workers, which amounts to approximately 30 million people, are restricted by non-compete clauses.[26] The impact of these clauses is cumulative. A high frequency of non-competes has the ability to affect the opportunities of all workers in that market.[27] But while the cumulative effects of pervasive non-compete clauses are significant, the effects of individual non-compete clauses tend to be small relative to the cost of litigation. Even firm-wide cases have limited impact with respect to a widely prevalent practice with cumulative effects. That reality has contributed to the pervasiveness of anticompetitive non-competes throughout the U.S economy in ways that case-by-case adjudication has been, and will likely continue to be, unable to address fully.

Administrability challenges are also significant for case-by-case adjudication at the state level. The existing patchwork of state laws governing non-competes may leave the same worker free to move from job to job in one jurisdiction but subject to a non-compete in the next, resulting in "considerable uncertainty" for both firms and workers as to whether a particular non-compete could be enforced.[28]

IV. CONCLUSION

The Antitrust Division shares the FTC's concern that many Americans across the country are unnecessarily burdened by non-compete clauses. In addition to the reasons detailed in the preamble to the notice of proposed rulemaking, the Antitrust Division's experience and expertise supports the FTC's view that these restraints harm workers and businesses alike, restricting mobility for workers and access to workers for businesses. In the Antitrust Division's view, the aggregate impact of these clauses leads to reduced labor market competition to the detriment of our economy, often resulting in lower wages and a potential reduction in innovation. Case-by-case adjudication has struggled to address fully this aggregate harm. The Antitrust Division commends the FTC for its efforts to promote worker mobility and labor market competition and vigorously supports the FTC's full exercise of its rulemaking authority to address the anticompetitive effects of non-compete clauses.

Respectfully Submitted,

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[26] *See id*. 3482.

[27] *See id*. 3501.

[28] *See id*. 3495-96 (noting "significant variation" in courts' application of choice of law rules in disputes over non-compete clauses, along with potential changes to state non-compete law, leads to "considerable uncertainty" as to whether a non-compete clause is enforceable); *see also* Evan P. Starr et al., *Noncompete Agreements in the U.S. Labor Force*, *supra* note 15, at 60 (finding that nearly 30 percent of employees themselves do not know if they have signed a non-compete agreement).