

April 18, 2023

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Washington, DC 20580

Comments on: **Non-compete Clause Rulemaking, Matter No. P201200**

Submitted at: <https://www.regulations.gov/document/FTC-2023-0007-0001>

Dear Ms. Lane:

On behalf of the Center for Law and Social Policy (CLASP), I submit these comments in support of the Federal Trade Commission's (FTC) proposed rulemaking to ban employers from imposing non-compete agreements on most workers. The FTC's proposed rule is squarely within its legal authority to promulgate and it will contribute to greater opportunities and earnings for workers to advance their careers with the freedom to switch jobs. It will also improve economic outcomes for workers of color and women who have been adversely affected by the proliferation of non-compete clauses.

Importance of banning non-compete agreements to CLASP

CLASP is a national, nonpartisan, nonprofit advancing anti-poverty policy solutions that disrupt structural and systemic racism and sexism and remove barriers blocking people from economic security and opportunity. With deep expertise in a wide range of programs and policy ideas, longstanding relationships with anti-poverty, child and family, higher education, workforce development, and economic justice stakeholders, including labor unions and worker centers, and over 50 years of history, CLASP works to amplify the voices of directly-impacted workers and families and help public officials design and implement effective programs.

CLASP seeks to improve the quality of jobs for low-income workers, especially workers of color, women, immigrants and youth. Our work includes working with policymakers to raise wages, increase access to benefits, implement and enforce new and existing labor standards and ensure workers can strengthen their voice through collective bargaining. Quality jobs enable workers to balance their work, school, and family responsibilities—promoting economic stability and security.

Banning non-compete agreements will improve the quality of jobs, especially underpaid jobs. Companies routinely use their outsized bargaining power to coerce workers into signing non-competes, which restricts workers from pursuing better opportunities and artificially suppresses wages. This practice also restricts competition in U.S. labor markets by barring employers from hiring the best available talent and restricting entrepreneurs from starting new businesses, hampering innovation. CLASP believes the banning of non-compete agreements will increase

economic opportunity and security for workers earning low wages, especially workers of color and women workers, helping to create a more dynamic, competitive and inclusive domestic economy.

Proliferation of non-competes harms workers, limits freedom to change jobs

The FTC estimates that about 30 million workers—18 percent of the workforce—are prohibited from seeking new employment opportunities because of non-compete agreements.¹ Non-compete agreements prevent workers from working for a competing employer, or starting a competing business, often within a certain geographic area and period of time after the worker's employment ends. For example, a hairdresser could be restricted from working at another hair salon within 60 miles from the salon where she currently works, for a period of two years after her employment terminates.

While called “agreements,” non-competes are often presented as a non-negotiable condition of employment. Fewer than 10 percent of workers negotiate these agreements, and when asked to sign a non-compete, 93 percent of workers just read and sign. Workers are often forced to choose between signing the non-compete or rejecting the job offer. Over 30 percent of workers are asked to sign non-competes after they have already accepted the position, when they have less negotiating power. Workers could be given the non-compete clause within a mountain of new hire paperwork and rushed through signing so that they're not even fully aware of the way they are binding themselves to their employer.²

Thirty-eight percent of workers have signed a non-compete at some time during their career, demonstrating the prevalence of this practice.³ Research finds that non-competes impede entrepreneurship and employment growth within industries. They serve to protect established companies from new start-ups,⁴ helping to protect existing companies' market shares and restricting competition within an industry.

Non-competes may have begun as a way to stop highly paid employees from walking out the door with highly guarded trade secrets, but they have become a way for companies to keep wages low for already low paid workers, stopping them from switching to better paying jobs in the same industry. According to the Economic Policy Institute, 29 percent of non-competes cover workers making below \$13 per hour, and 30.9 percent of non-compete cover workers making between \$13/hour to \$16.99/hour.⁵

Non-competes restrict competition and artificially depress wages

¹ Evan Starr, J.J. and Prescott, and Norman Bishara, Noncompete Agreements in the U.S. Labor Force, Oct. 2020, *Journal of Law and Economics* 2021, <https://ssrn.com/abstract=2625714>.

² Ibid.

³ Ibid.

⁴ Sampsa Samila and Olav Sorenson, Noncompete Covenants: Incentives to Innovate or Impediments to Growth, *Management Science*, vol. 57, no. 3, Mar. 2011, p. 425–38, <http://www.jstor.org/stable/41060682>.

⁵ Alexander J.S. Colvin and Heidi Shierholz, Noncompete Agreements, Economic Policy Institute, Dec. 10, 2019, <https://www.epi.org/publication/noncompete-agreements/>.

As noted in the preamble to the NPRM, non-competes often prevent workers from seeking and accepting new jobs in their field of expertise. This forces too many workers to accept and remain in a job in which they are less productive or a job outside of their field of expertise, leading to a job market that materially reduces wages for all workers. Non-competes have been shown to depress wages by reducing competition. This is what economists refer to as the problem of monopsony—when employers have greater market power and are able to continue to offer lower wages due to lack of competition.⁶ Many economists believe the proliferation of non-competes is a contributing factor to the growing divergence between median worker pay and productivity, as well as rising inequality.⁷

One recent study found that 17.3 percent of accommodation and food service workers (includes fast food workers, cooks, waiters, and hotel desk clerks) and 17.6 percent of retail trade workers (includes cashiers, stock clerks, salespeople and sales supervisors), are subject to non-compete agreements. In these sectors, non-competes don't only reduce job options, but could also compel workers to put up with substandard working conditions. For non-unionized workers, who are the overwhelming majority of workers in these sectors,⁸ one of the more reliable sources of economic leverage with employers is their implicit ability to leave their job for a better paying one. Non-compete agreements take that leverage away. Additional research finds that workers facing high enforceability of non-competes are unable to leverage tight labor markets to increase their wages.⁹

The fast food sandwich chain, Jimmy Johns, previously required its employees (including delivery workers) to sign non-compete agreeing not to work at any restaurant where sandwiches comprised 10 percent or more of total revenue within three miles of a Jimmy John's location for two years after leaving the company. Following an investigation from the New York Attorney General's office, Jimmy John's dropped the clause from its contracts in 2016.¹⁰

Non-competes also make it difficult to address workplace violations, which are often disproportionately higher in industries paying low wages.¹¹ When workers know they can't find a new job within the same industry, the fear of retaliation through demotion or termination may

⁶ José Azar, Ioana Marinescu, and Marshall Steinbaum, , Labor Market Concentration, Dec. 10, 2018, <https://ssrn.com/abstract=3088767>; Greg Robb, Wage growth is soft due to declining worker bargaining power, former Obama economist says, MarketWatch, Aug. 24, 2018, <https://www.marketwatch.com/story/wage-growth-is-soft-due-to-declining-worker-bargaining-power-former-obama-economist-says-2018-08-24>.

⁷ Lawrence Mishel and Josh Bivens, Identifying the policy levers generating wage suppression and wage inequality, Economic Policy Institute, May 13, 2021, <https://www.epi.org/unequalpower/publications/wage-suppression-inequality/#epi-toc-19>.

⁸ Industries at a Glance, Retail Trade: NAICS 44-45, Bureau of Labor Statistics, retrieved Apr. 16, 2023, <https://www.bls.gov/iag/tgs/iag44-45.htm>, (2.4% of accommodation and food service workers are represented by unions); Industries at a Glance, Accommodation and Food Service: NACIS 72, Bureau of Labor Statistics, retrieved Apr. 16, 2023, <https://www.bls.gov/iag/tgs/iag72.htm>, (5% of retail trade workers are represented by unions).

⁹ Matthew Johnson, Kurt Lavetti and Michael Lipsitz, The Labor Market Effects of Legal Restrictions on Worker Mobility, Jun. 6, 2020, <https://ssrn.com/abstract=3455381>.

¹⁰ Dave Jamieson, Jimmy John's Makes Low-Wage Workers Sign 'Oppressive' Noncompete Agreements, Huffington Post, Oct. 13, 2014, https://www.huffpost.com/entry/jimmy-johns-non-compete_n_5978180?1413230622=.

¹¹ Ihna Mangundayao, Celine McNicholas, Margaret Poydock, and Ali Sait, Economic Policy Institute, Dec. 22, 2021, <https://www.epi.org/publication/wage-theft-2021/>.

rise. This has a chilling effect on reporting labor law and Equal Opportunity Commission (EEOC) violations, enabling low-road employers to keep both wages and job quality low.

Non-compete agreements can leave workers jobless and unable to provide for themselves and their families - forcing workers to either stay in jobs where they are underpaid and undervalued, to change industries, losing the value of the skills they have acquired, possibly through training that they paid for themselves, or to travel great distances to make ends meet. If they switch jobs within the same industry, they risk legal action from their previous employer. According to a report by *USA Today*, a Black mother working as home health aide and supporting her teenage son on just \$10,000 a year, was sued for switching employers.¹²

The Proposed Rule and higher wages

The Proposed Rule is likely to raise wages. A 2021 study of the impact of Oregon's ban on non-competes found that hourly wages increased by 2 to 3 percent on average. Positive wage impacts are found across age, education, and wage distributions, and are stronger for women workers and in occupations where non-competes are more common.¹³ This study supports the FTC's assessment that a ban on non-compete agreements will raise workers' total earnings between \$250 billion and \$296 billion annually.

Non-compete agreements disproportionately harm workers of color and women

The use of non-competes has its roots in the country's racist history, and can be traced to the Reconstruction Era when former slave-owners utilized non-competes to exploit formerly enslaved Black workers.¹⁴ Today, non-competes continue to exacerbate racial and gender wage gaps by exerting much larger wage impacts on women and Black employees than on white men.¹⁵

Non-competes can have a more detrimental impact on women and people of color because they decrease entrepreneurship,¹⁶ provide firms the monopsony power to discriminate, and depress wages,¹⁷ exacerbating systemic racism and sexism in the labor market and beyond. Women in states with stricter non-compete enforcement are less likely than men to leave their jobs or start competing firms if they are subject to a non-compete, making them more likely to be stuck in at

¹² Jessica Guynn, How noncompete agreements harm women and people of color: 'Consequences can be devastating,' *USA Today*, Jan. 19, 2023, <https://www.usatoday.com/story/money/2023/01/19/noncompete-agreements-harm-women-people-color/11046736002/>.

¹³ Michael Lipsitz and Evan Starr, Low-Wage Workers and the Enforceability of Noncompete Agreements, *Management Science*, Vol. 68, No. 1, Apr. 5, 2021, <https://pubsonline.informs.org/doi/10.1287/mnsc.2020.3918>

¹⁴ Ayesha Bell Hardaway, The Paradox of the Right to Contract: Noncompete Agreements as Thirteenth Amendment Violations, *Seattle University School of Law Review*, 2016, p. 957-981, 2016, <https://digitalcommons.law.seattleu.edu/cgi/viewcontent.cgi?article=2334&context=sulr>.

¹⁵ Matthew Johnson, Kurt Lavetti and Michael Lipsitz, The Labor Market Effects of Legal Restrictions on Worker Mobility, Jun. 6, 2020, <https://ssrn.com/abstract=3455381>.

¹⁶ Matt Marx, Employee Non-Compete Agreement, Gender, and Entrepreneurship, May 4, 2020, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3173831.

¹⁷ Matthew Johnson, Kurt Lavetti and Michael Lipsitz, The Labor Market Effects of Legal Restrictions on Worker Mobility, Jun. 6, 2020, <https://ssrn.com/abstract=3455381>.

best a suboptimal, and at worst an unsafe, employment situation.¹⁸ Women and people of color are also less likely to negotiate on the inclusion of a non-compete clause than their white male counterparts, making these agreements more implicitly binding for them.¹⁹ These differences are likely due to both perceived and actual differences in bargaining power across race and gender, as well as behavioral differences between the genders.

The earnings of women and workers of color are reduced by twice as much as white male workers when there is stricter non-compete enforcement. Research suggests that banning non-competes would raise workers' wages overall as well as reduce wage gaps by race and gender. The pay gaps between white men and other demographic groups would narrow between 3.6-9.1 percent. The wage gap between white men and Black men would narrow by 8.7 percent; the wage gap between white women and white men would narrow by 5.6 percent; and the wage gap between Black women and white men would narrow by 4.6 percent.²⁰

Workers bound by non-competes may have to give up better, higher paying job opportunities or remain out of the workforce for an extended period of time. For workers of color, particularly Black workers who are already subject to severe income and wealth inequality, this is untenable. Black families have lower levels of wealth than white families, and less ability to withstand economic shocks and disruptions.²¹

Non-competes and sexual harassment

Of the 30 million workers subject to non-competes, more than 12 million are women.²² According to conservative estimates, one in four women experience workplace sexual harassment over their lifetimes.²³ Since the overwhelming majority of women who report harassment often face retaliation and even termination,²⁴ changing jobs is often the only way to escape a harasser. Over a two-year period, women who are targets of sexual harassment are 6.5 times more likely to change jobs than women who do not face harassment.²⁵ Non-competes

¹⁸ Matt Marx, Employee Non-Compete Agreement, Gender, and Entrepreneurship, May 4, 2020, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3173831.

¹⁹ Matthew Johnson, Kurt Lavetti, and Michael Lipsitz, The Labor Market Effects of Legal Restrictions on Worker Mobility Jun. 6, 2020, <https://ssrn.com/abstract=3455381>.

²⁰ Ibid.

²¹ Aditya Aladangady and Akila Forde, Wealth Inequality and the Racial Wealth Gap, Board of Governors of the Federal Reserve System, FEDS Notes, October 22, 2021, <https://doi.org/10.17016/2380-7172.2861>.

²² Evan Starr, J.J. and Prescott, and Norman Bishara, Noncompete Agreements in the U.S. Labor Force, Oct. 2020, Journal of Law and Economics 2021, <https://ssrn.com/abstract=2625714>.

²³ Ariane Hegewisch, Jessica Forden and Eve Mefferd, "Paying Today and Tomorrow: Charting the Financial Costs of Workplace Sexual Harassment, Institute for Women's Policy Research, Jul. 21, 2021, <https://iwpr.org/iwpr-publications/paying-today-and-tomorrow-report/>.

²⁴ Jasmine Tucker and Jennifer Mondino, Coming Forward, National Women's Law Center, Oct. 13, 2020, https://nwlc.org/wp-content/uploads/2020/10/NWLC-Intake-Report_FINAL_2020-10-13.pdf.

²⁵ Heather McLaughlin, Christopher Uggen, and Amy Blackstone, The Economic and Career Effects of Sexual Harassment on Working Women, Gender & Society, Vol 31, Issue 3, May 10, 2017, p.333–358, <https://doi.org/10.1177/0891243217704631>; and Heather McLaughlin, Christopher Uggen, Amy Blackstone, The Cost of Sexual Harassment, Gender & Society, Jun. 2, 2017, <https://gendersociety.wordpress.com/2017/06/07/the-cost-of-sexual-harassment/>.

deprive survivors of harassment of outside employment opportunities, locking them into abusive work environments.

According to a *USA Today* report, a Florida employer sued a woman who had left her job because of sexual harassment and who had then gone to work for another company in her industry. The employee reported that her previous employer failed to stop the harassment and left her with no choice but to leave the hostile work environment. The previous employer sued her for violating her noncompete clause. Ultimately, the court dismissed the case because the employer failed to provide evidence to support its claims.²⁶

Extend ban on non-competes to independent contractors

CLASP supports FTC's proposal to include independent contractors within this rule. A firm's attempt to impose a non-compete requirement on an independent contractor is all but an admission that the worker has been misclassified and should be considered an employee; true independent contractors are free to provide their services to anyone they wish.

Including independent contractors is also critical for racial and gender equity reasons, given the disproportionate impact of independent contractor misclassification on women and workers of color. When businesses mislabel their employees as independent contractors, they rob their workers of bedrock protections, like the right to earning minimum wage and overtime, and transfer the costs of running the business to their employees. These sham arrangements often occur in underpaid, labor intensive industries such as delivery services, janitorial services, and domestic and home care work²⁷ where women and people of color, including Black, Latinx, and Asian workers, are overrepresented.²⁸ The non-compete ban must also include independent contractors to ensure that women and workers of color are not doubly penalized. The FTC rule should be finalized as written to help combat systemic racism and sexism in the labor market.

Non-competes by another name

CLASP supports the inclusion in this rule of de facto non-compete clauses by other names, such as overly broad non-disclosure agreements and penalties for leaving jobs after training that are not reasonably related to the actual costs of training and are not pro-rated for the duration of employment. For example, commercial truck drivers are frequently charged large fees if they do not remain employed by a company for a required period after training, even though drivers

²⁶ Sally Hubbard and Sandeep Vaheesan, Noncompete clauses trap #MeToo victims in abusive workplaces. The FTC should ban them., *USA Today*, May 14, 2019, <https://www.usatoday.com/story/opinion/2019/05/14/sexually-harassed-women-trapped-noncompetes-abusive-workplaces-column/1184622001/>.

²⁷ Independent Contractor Misclassification Imposes Huge Costs on Workers and Federal and State Treasuries, National Employment Law Project, Oct. 2020, <https://s27147.pcdn.co/wp-content/uploads/Independent-Contractor-Misclassification-Imposes-Huge-Costs-Workers-Federal-State-Treasuries-Update-October-2020.pdf>.

²⁸ Charlotte S. Alexander, Misclassification and Antidiscrimination: An Empirical Analysis, *Minnesota Law Review*, 2017, p.907-924, <https://scholarship.law.umn.edu/mlr/151> (finding that “seven of the eight high misclassification occupations were held disproportionately by women and/or workers of color”).

frequently make less money than promised, and the training costs the company less to provide than the workers are charged.²⁹

The Proposed Rule should be finalized as written

CLASP supports the Proposed Rule because it will ensure that non-compete agreements will no longer limit workers' freedom to change jobs to raise their pay, obtain better working conditions, receive dignity and respect at work, work in more fulfilling jobs, and/or achieve upward mobility. As the U.S. economy continues to recover from the COVID-19 pandemic, this Proposed Rule can be part of the just recovery that workers deserve and need.

Banning non-compete agreements will help ensure workers in low-wage industries, including workers of color and women workers, have the freedom to seek better employment opportunities. For these reasons, we urge the FTC to finalize the rule as it is currently written, including for independent contractors, and eliminate the usage of non-competes except in the specific and very narrow exceptions listed.

Sincerely,

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Center for Law and Social Policy (CLASP)

²⁹ Sarah Butrymowicz and Meredith Kolodner, Trucking Companies Train You on the Job. Just Don't Try to Quit., New York Times, Apr. 5, 2022, <https://www.nytimes.com/2022/04/05/business/economy/trucker-training.html>.