

December 16, 2020

VIA EMAIL

Dear President-elect Biden,

Due to the fiscal and public health crisis caused by the COVID-19 pandemic, millions of workers remain unemployed and workers who have jobs face increasing precarity and coercive practices in the labor market. Employers' use of non-compete clauses is an example of a coercive practice that threatens all workers.

Non-competes require workers, following separation from their current employer, to refrain from accepting employment in a competitive line of work or establishing a competing business for a specified period in a particular geographic area. Because employers define what constitutes a "competitive line of work" or "competing business," non-compete clauses can be broad in scope and close off all prospective employment options. Non-competes can have durations of two years or more and cover a county, metropolitan area, or even the entire nation.

Due to their dependence on salaries and wages, workers are usually at a significant disadvantage in their relationship and negotiations with employers. Research shows that workers typically cannot, and do not try to, resist or negotiate non-compete clauses. Accordingly, they are ordinarily contracts of adhesion that employers present to workers on a take-it-or-leave-it basis.

Non-competes currently deny between 36-60 million workers of their freedom to leave their current employer.¹ Another estimate shows that non-competes bind almost 20% of workers.²

These agreements inflict a range of harms on workers and the broader public. Non-competes, regardless of whether they are enforceable, deter workers from leaving their current employer.³ Prospective employers may also be reluctant to hire workers bound by non-compete clauses, due to a fear of litigation by the previous employer.⁴ Due to employer reluctance to hire them, workers who have lost their jobs may face difficulty reentering the labor market due to non-compete clauses.⁵ By virtue of reducing labor market mobility, non-competes depress workers' wages and other benefits.⁶

¹ *36 Million Workers Bound By Noncompetes, Survey Says*, LAW360 (Dec. 10, 2019), <https://www.law360.com/articles/1226030/36-million-workers-bound-by-noncompetes-survey-says>; Alexander J.S. Colvin & Heidi Shierholz, *Noncompete Agreements*, ECON POLICY INST. (Dec. 10, 2019), <https://www.epi.org/publication/noncompete-agreements/>

² Evan Starr et al., *Noncompete Agreements in the U.S. Labor Force*, J. L. & ECON. (forthcoming 2020), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2625714.

³ See Open Markets Institute et al., *Petition for Rulemaking to Prohibit Worker Non-Compete Clauses* 49 (March 2019), <https://static1.squarespace.com/static/5e449c8c3ef68d752f3e70dc/t/5eaa04862ff52116d1dd04c1/1588200595775/Pe+tion-for-Rulemaking-to-Prohibit-Worker-Non-Compete-Clauses.pdf>.

⁴ *Id.* at 28.

⁵ *Id.* at 30.

⁶ *Id.* at 32-37.

Non-competes can also fortify the power of dominant corporations by preventing rivals from hiring the workers they need to compete effectively in the marketplace. For instance, a monopolistic hospital in a county or metropolitan area can impose non-compete clauses on specialty physicians and nurses and prevent rival clinics and hospitals from hiring the medical staff they need.

To protect workers from these coercive contracts, the Open Markets Institute, thirty labor and public interest organizations, and forty-seven scholars (listed below) call on the Federal Trade Commission to ban non-competes through a competition rulemaking. In March 2019, we petitioned the Commission and asked it to enact a rule prohibiting employers from presenting to, or enforcing a non-compete clause against, any worker or professional regardless of income level or occupation.⁷ In addition to describing the harms to workers and fair competition, our petition explains that the justifications for non-competes rest on unpersuasive theory. We have attached our full petition with the cover email.

We believe banning non-competes advances the Commission’s mission of protecting workers, independent businesses, and consumers from unfair practices. We also know that you have consistently opposed non-compete clauses, stating that they inhibit workers from “reach[ing] their true potential without freedom to negotiate for a higher wage with a new company, or to find another job after they’ve been laid off[.]”⁸

We ask that you appoint commissioners to the FTC who are committed to using the agency’s entire range of statutory powers to prohibit non-competes. Moreover, we request your administration to affirmatively endorse the agency’s usage of its rulemaking authority to prohibit non-competes and other practices the agency deems unfair methods of competition. We also urge your administration to employ other powers such as federal contracting to reward firms that do *not* use non-compete clauses and other coercive employment terms and thereby raise labor market standards.

Respectfully,

Open Markets Institute
AFL-CIO
Allegheny County Medical Society
American Academy of Emergency Medicine
American Economic Liberties Project
Artists Rights Alliance
Center for Popular Democracy
Coworker.org

⁷ See generally Sandeep Vaheesan, *Resurrecting “A Comprehensive Charter of Economic Liberty”: The Latent Power of the Federal Trade Commission*, 19 U. PA. J. BUS. L. 645, 651-57 (2017). See also Rohit Chopra & Lina Khan, *The Case for Unfair Methods of Competition Rulemaking*, 87 U. CHI. L. REV. 357 (2020).

⁸ Daniel Wiessner, *White House Urges Ban on Non-Compete Agreements for Many Workers*, REUTERS (Oct. 25, 2016), <https://www.reuters.com/article/us-usa-noncompetes/white-house-urges-ban-on-non-compete-agreements-for-many-workers-idUSKCN12P2YP>. See also *The Biden Plan for Strengthening Worker Organizing, Collective Bargaining, and Unions*, BIDEN HARRIS, <https://joebiden.com/empowerworkers/> (last visited Dec. 10, 2020).

Demand Progress Education Fund
Demos
Economic Policy Institute
Family Farm Action
Future of Music Coalition
The Freedom BLOC
Institute for Local Self-Reliance
Jobs with Justice
Lake Research Partners
Main Street Alliance
Make the Road New York
National Employment Law Project
Organization United for Respect
People's Parity Project
Public Citizen
Revolving Door Project
Roosevelt Institute
Service Employees International Union
Towards Justice
UFCW
Unite Here
Warehouse Workers for Justice

In their individual capacities

Alan Hyde
Amy Kastely
Ann C. McGinley
Ariana R. Levinson
Barbara Bucholtz
Ben Templin
Carol Chomsky
Catherine Fisk
Charlotte Garden
Chris Odinet
Chrystin Ondersma
Colin P. Marks
Cynthia Ho
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