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BANNING NONCOMPETE AGREEMENTS: BENEFITS FOR WORKERS, BUSINESSES, AND THE ECONOMY

HEARING

BEFORE THE

SUBCOMMITTEE ON
ECONOMIC POLICY

OF THE

COMMITTEE ON
BANKING, HOUSING, AND URBAN AFFAIRS
UNITED STATES SENATE

ONE HUNDRED EIGHTEENTH CONGRESS

SECOND SESSION

ON

EXAMINING BANNING NONCOMPETE AGREEMENTS AND HOW THAT CAN BENEFIT WORKERS, BUSINESSES, AND OUR ECONOMY

JULY 30, 2024

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C O N T E N T S

TUESDAY, JULY 30, 2024

WITNESSES

ADDITIONAL MATERIAL SUPPLIED FOR THE RECORD

BANNING NONCOMPETE AGREEMENTS: BENEFITS FOR WORKERS, BUSINESSES, AND THE ECONOMY

TUESDAY, JULY 30, 2024

U.S. SENATE,
COMMITTEE ON BANKING, HOUSING, AND URBAN AFFAIRS,
SUBCOMMITTEE ON ECONOMIC POLICY,
Washington, DC.

The Subcommittee met at 2:30 p.m., via Webex and in room 538, Dirksen Senate Office Building, Hon. Elizabeth Warren, Chair of the Subcommittee, presiding.

OPENING STATEMENT OF CHAIR ELIZABETH WARREN

Chair WARREN. This hearing will come to order.

America is the land of opportunity. We hold tight to the idea that every American can work hard, develop skills and experience, and create new opportunities for themselves and their families to have a better job and to have a better life.

But over the years, powerful corporate interests have worked to take that freedom away from America's workers. One of the ways they do this is through noncompete clauses. These are terms that are inserted into the fine print of contracts that prohibit workers from joining or starting a competing business.

Now, currently, these agreements hold back about 30 million Americans, about one in five American workers. They affect workers from software engineers to doctors, to hair stylists, to doggie daycare workers.

Noncompete clauses suppress wages; they prevent mobility, and they keep workers in dead-end jobs with no hope of moving up.

They hurt the economy as a whole, slowing innovation and inhibiting new business formation, and ultimately, raising consumer prices.

Noncompete clauses hurt all workers, but they have their worst impact on women, on non-White workers, and on workers with less education.

These agreements are unfair and un-American, and they are on the plain face of it anticompetitive. The whole point of these agreements is to prevent businesses from having to compete for workers. It's like price-fixing, but for jobs.

Bipartisan coalitions in Congress have supported restricting noncompete clauses. And that's why I was really pleased in April when the Federal Trade Commission finalized a new rule to protect more

than 100 million workers by prohibiting employers from forcing their workers into noncompete agreements.

This rule is another example of the Biden-Harris administration acting to rein-in corporate abuse and it makes lives better for ordinary Americans—from reducing abusive overdraft costs to ensuring workers get the overtime pay they deserve, to wiping out junk fees on airlines, concert tickets, hotels, and more.

Now, with this rule, the FTC is doing exactly what Congress authorized it to do—prohibiting unfair methods of competition. This rule is incredibly popular. More than 90 percent of the comments that the FTC received on the rule were favorable. And it's no wonder; FTC analysis shows that it will increase workers' pay by an average of about $500 a year. It will cut health care costs by tens of billions of dollars over the next decade. The rule will unleash innovation and economic growth, helping create about 8,500 new businesses every year and resulting in tens of thousands of new patents. The FTC and the Biden-Harris administration deserve all the credit in the world for putting this rule in place.

You heard me say it before and I will say it again: I believe in markets, competitive markets. This rulemakes sure that Americans can take their skills, their labor, and their willingness to work hard into that market and get the best possible pay and working conditions. That's how markets are supposed to work in a free country.

So where are our Republican friends on this issue? Once again, instead of standing up for real competition, they are moving nearly in lockstep with the big corporations that hate these rules.

Republicans in the House have introduced a Congressional Review Act Resolution to try to overturn the FTC's new noncompete rule. Of course, if it managed to pass the House and the Senate, President Biden would veto it.

So opponents of the bill are now taking to the courts and they are getting President Trump's judges to intervene on this rule. The Chamber of Commerce and other corporate trade groups have gone court shopping to put the case before an extremist Trump-appointed judge in Texas, and they're hoping to get an extremist ruling next month to put the whole rule on hold.

These lawsuits are the product of abuse of the justice system to try to stop the Biden-Harris administration from helping America's workers. The opponents of the rule are going so far that they are even trying to have the FTC, after all these years, have the FTC declared unconstitutional.

This is not the first time that the Chamber of Commerce and other big money outfits have trotted out this playbook. This is what happens when big business thinks it can get whatever it wants from radical Trump judges. They use the courts to block the Biden-Harris administration from enacting commonsense rules that will help Americans and help our economy. We need to deal with this specific case on noncompete clauses, but we also need broader court reform to end these abuses.

As this case in Texas moves forward, another judge in Pennsylvania has refused to strike down the FTC's noncompete rule. The Texas case should be resolved similarly. Any reasonable nonpartisan interpretation of the law would make it clear that Congress explicitly gave the FTC the authority to ban noncompetitive

restraints of trade, including noncompete agreements that keep workers from looking for a better job.

In today's hearing, we'll hear more about why the legal effort to roll back this rule is wrong and about how, once the rule is finally implemented, millions of workers will benefit.

With that, I turn to my Ranking Member, Senator Kennedy, and ask him for his opening statement.

OPENING STATEMENT OF SENATOR JOHN KENNEDY

Senator KENNEDY. Thank you, Madam Chair.

Welcome to our witnesses.

About 90 percent of my personal and political philosophy is: don't hurt anyone else unless you have to defend yourself. Don't take other people's stuff and leave me alone.

I believe in free enterprise. I believe in markets. I believe in the ingenuity and the persistence of the American people—and of all people, humanity.

Noncompete clauses are sort of like Senate bills—there are some good ones and there are some bad ones. Noncompete clauses, by their definition, are a restriction, operate as a restriction on both the employer and the employee. So from one perspective, they are restrictions on free enterprise.

That doesn't mean that they are inappropriate in all cases. When it's necessary to protect business information; when it is necessary to protect trade secrets; when those agreements are negotiated by two parties of reasonably equal bargaining strength, there can be a place for them, for noncompete agreements.

They can also be abused. I don't think it's appropriate for, for example, a fast-food restaurant—I don't know if this example even exists, but I've heard some people allege it, and shame on them if it's not true. But if it is true, I don't think a fast-food restauranteur should ask entry-level employees to sign a noncompete agreement. What's the point other than to restrict free enterprise? That makes no sense to me.

I think it's also very important for us and for the courts to take a look at the bargaining strengths, relative bargaining strength of the parties. I don't believe in contracts of adhesion. I think that people ought to, all things being equal, ought to be able to address these issues with the same amount of leverage. Now, we live in the real world. I know that balance doesn't always exist, but it's something that we have to take a look at.

Most State law of which I'm aware requires that noncompete agreements be reasonable. And courts, I think, at both the State—to some extent the Federal level, but generally it's a State issue—take a look at the length of the noncompete agreement. They look at the bargaining strength of the parties. They look at the terms, obviously. They look at what behavior is being restrained. Why is it necessary to restrain that behavior? What are the interests of the employee? What are the interests of the employer?

And if they're reasonable and there's a legitimate purpose, I think in most cases they—and Mitt Romney said this—in many cases, they've been upheld.

I'm going to stay as long as I can today. I would like to hear your testimony. I would like to ask you questions. We've got a lot going

on. I think a vote has already been called and I'm going to have to go down and vote.

But what my friend Senator Warren said in her opening statement, notwithstanding about Republicans, that's kind of this Republican's point of view about noncompete agreements.

OK. Thank you.

Chair WARREN. Thank you, Senator Kennedy.

And now I'd like to introduce our witnesses. First, we have Dr. Heidi Shierholz. Dr. Shierholz is the President of the Economic Policy Institute. She served as the Chief Economist at the U.S. Department of Labor during the Obama administration. Thank you for being here with us.

Next is Dr. R. James Toussaint. Dr. Toussaint is an orthopedic surgeon who completed his medical training at NYU and Harvard University. He currently practices in Florida.

I want to extend a very special thanks to Dr. Toussaint because he was one of the people who helped during the Boston Marathon bombing, and we're grateful for that help.

I also want to extend another very special thank you. I know that you were very helpful following the earthquake in Haiti in 2010. So thank you very much for your work.

And our third witness is Ms. Hayley Paige. Ms. Paige is a wedding and shoe designer who also resides in Florida. She rose to fame designing Hayley Paige dresses sold across the country and starring on the TLC show "Say Yes to the Dress" before being slammed with a noncompete that she only very recently beat in court. So thank you very much for being here.

So I'm going to start. We'll do witness statements, and then we'll go to our questions.

Dr. Shierholz, if I could start with you, please.

STATEMENT OF HEIDI SHIERHOLZ, PRESIDENT, ECONOMIC POLICY INSTITUTE

Ms. SHIERHOLZ. Thank you very much. Chair Warren, Ranking Member Kennedy, other Members of the Subcommittee, thanks for the opportunity to testify here today.

So first, noncompete agreements are ubiquitous. Most studies find that, roughly, one in five workers are subject to a noncompete, and without a ban, that share would almost surely keep rising.

To understand the effect of noncompetes on workers, it's useful to remember that, essentially, the only source of leverage that an individual non-unionized worker has with respect to their employer is their ability to quit and take a job somewhere else. That is the thing that means their employer has to provide them a job that is competitive enough in terms of compensation and opportunities that they're not incentivized to leave and take another job or start their own business.

But noncompetes cutoff that source of worker leverage at the knees. When workers do not have the freedom to take another job, their employers simply do not have to pay them as well or provide them as good a job. And an extensive body of research bears that out, showing that noncompetes significantly reduce wages.

OK. Some claim that, though noncompetes reduce wages, they're still necessary because, they say, they boost innovation by

incentivizing firms to invest in developing important advances. However, the evidence consistently finds that the net effects of noncompetes on innovation go in the opposite direction, and here's why: by preventing workers from leaving their employers to create new business, noncompetes reduce business formation, reducing dynamism in the economy. And by keeping workers locked in jobs, noncompetes reduce productivity growth. The economy runs the strongest when workers are in the jobs that are the best match for their skills and interests. Noncompetes keep workers from being able to go to firms that yield the most productive matches.

The declines from noncompetes in business formation and job-to-job mobility cause an overall decline in innovation. So for example, studies consistently find that noncompetes lead to significant decline in the rate of patenting, including in the rate of breakthrough inventions.

OK. Further, banning noncompetes will likely reduce inflation. Noncompetes increase concentration in markets for goods and services by preventing workers from leaving their employers to create a new business or to join other firms that would intensify competition. And all of that increases prices.

So for example, research shows that noncompetes significantly increase the cost of physician services. Banning noncompetes is estimated to reduce health care costs by at least $74 billion over the next 10 years.

It is also worth noting that employers do not actually need noncompetes to protect trade secrets. Intellectual property law provides businesses with significant legal protections for trade secrets and employers are also able to use tailored nondisclosure and nonsolicitation agreements. Provisions like those that directly address what employers may and may not do with company secrets allow businesses to protect trade secrets without being such a blunt instrument that they harm competition by taking away workers' freedom to take another job at another firm or start another business if they leave their firm.

OK. Some have claimed that the FTC does not have the authority to ban noncompetes, but the FTC Act clearly states that unfair methods of competition are illegal and it authorizes the FTC to issue rules and regulations that prevent their use.

And I think it's worth stepping back and just noticing noncompetes are not trying to hide that they are contrary to open and fair competition. It is in their name. With the noncompete rule, the FTC is doing exactly what it was empowered and directed to do by the FTC Act—take action to protect fair competition.

Finally, I'll say it's worth considering who benefits from noncompetes. Noncompetes benefit the owners of existing businesses who want to protect their advantage by stopping new businesses from forming and competing with them. They also benefit existing businesses who want to pay their workers less and prevent other firms from being able to hire them away by offering them better jobs with better wages.

So it is not actually surprising that groups representing incumbent business owners are fighting tooth and nail to keep their noncompetes, but that does not mean noncompetes are good for the country. They aren't. They are bad for the vast majority. They are

bad for economic dynamism and innovation. They depress business formation and labor mobility. They hurt productivity and growth. They raise wages; they shrink—they raise prices; they shrink workers' wages. They restrict workers' freedom.

Banning these coercive and unfair agreements is fundamental to the FTC's mandate, and the workforce, consumers, and the broader economy will be better off for it.

Chair WARREN. Thank you very much, Dr. Shierholz. We appreciate your testimony.

Dr. Toussaint.

STATEMENT OF R. JAMES TOUSSAINT, MD FAAOS, ORTHOPEDIC SURGEON

Mr. TOUSSAINT. Good afternoon, Chair Warren, Ranking Member Kennedy, and Members of the Committee. It's an honor to be here, and I thank you for inviting me to discuss my experience with noncompete agreements from a doctor's perspective.

My name is Rull James Toussaint. I'm an orthopedic surgeon at the University of Florida as of 2022. And I'd like to state for the record that the opinions expressed herein are my own and do not reflect the positions of UF or UF Health.

I was born in Haiti and emigrated to Florida, where I achieved the American dream. I was the first in my family to be accepted to college. I worked on Wall Street after college to pay off my student loans.

I was then accepted to medical school, where I graduated among the top of my class. And as a result, I mastered Harvard University's orthopedic surgery residency program and then completed an orthopedic foot and ankle fellowship.

In 2014, I joined a private practice group in north central Florida as their only foot-and-ankle-trained orthopedic surgeon. I was one of only two surgeons with this expertise across a dozen mostly rural counties serving over 850,000 people.

Over the next few years, my partners and I felt the pressures of decreasing reimbursement, coupled with the burdens of preapproval requirements from insurers and competition from other practices. We felt that an infusion of capital was necessary to remain sustainable.

As a result, we entered into a purchase agreement with a private equity company headquartered in California. The deal closed in 2017.

Although I cannot disclose the transactions details, there was, indeed, a noncompete clause. Per the noncompete clause, I would be restricted from practicing orthopedic surgery within 25 miles of any facility in which the group was currently providing medical services; any facility in which the group had previously provided medical services; any facility in which the group was targeted for expansion within the entire State of Florida, and any facility the group was in discussions with related to a potential acquisition. This noncompete was valid for 2 years, and, of course, the group was located in multiple States.

One might wonder why we would sign such a deal. The reality is that the nuances of the noncompete were not known until we, the doctors, spent hundreds of thousands of dollars in transaction

expenses related to the acquisition. We felt backed into a corner and believed that our only choice was to proceed with the transaction in good faith.

Unfortunately, within months after closing the deal, the morale of the physicians and the staff declined. Instead of cost savings, the practice's overhead expenses increased significantly due to more layers of administrators, excessive management fees, and millions of dollars of debt expenses.

The overhead increased so substantially that some physicians not only did not receive a paycheck, but actually paid to work, despite the physicians taking on all the risks of patient care. All the while, the cost to the patients started to rise and they complained that their quality of care decreased.

Personally, I became disillusioned by management focused on dollars instead of the quality of care. I eventually put in my resignation stating my intent to leave for academic practice at the nearby nonprofit public institution.

This decision made sense, given that the only other orthopedic foot and ankle surgeon in the entire region was retiring and I would be able to help educate the next generation of doctors. Despite this, the private equity group filed suit against me.

It did not matter to the group, to the private equity group, that a community of over 850,000 people would not have a specialist surgeon to care for them. It also didn't matter to the private equity group that the university was the only contracted provider of orthopedic care for Medicaid patients in the community, and without me, they would have to travel hours away for care.

And finally, it did not matter to the PE group that the State of Florida had already enacted a special statute, Chapter 542, Section 336, stating that, if one entity employs all the doctors within a specialty in the county, that the noncompete is already void. It didn't matter to them.

Despite all of this, within days of my leaving the practice, the private equity group threatened legal action to prevent me from entering academic practice. Despite the aforementioned Florida statute negating the noncompete, the private equity goals were clear—to wage a prolonged legal battle in the hopes that I would give up and leave my community before a final judgment was made.

After an expensive 4-month dispute, a legal settlement was finally achieved and I was able to join the university. Not surprisingly, many patients from my previous practice told me that they were very frustrated when they called the group asking for me. They said that the private equity group lied to them and stated that I had retired from medicine, which is clearly untrue.

Because of my concerns with private equity in health care, including their use of noncompete agreements, I joined the Coalition for Patient-Centered Care, a group of health care stakeholders who oppose private equity's influence over independent physicians.

I have experienced the negative consequences that noncompete agreements have on patients, the physicians, and their communities. And I conclude that these restrictive covenants negatively impact patient access to physicians, limit the quality of care, and increase costs to all parties.

Thank you.

Chair WARREN. Thank you, Dr. Toussaint, and I very much appreciate your coming here to share your story.

Ms. Hayley Paige, you're up next.

STATEMENT OF HAYLEY PAIGE, SMALL BUSINESS FOUNDER AND WEDDING DRESS DESIGNER

Ms. PAIGE. Good afternoon, everyone. This is such an honor. Thank you so much for having me. I love my country.

I am somebody that knew what I wanted to do at a very young age in life and I dedicated my childhood education and industry experience to bringing women joy through wedding dress design. And, boy, did I love it.

My dresses were in over 300 stores. I was on a show called "Say Yes to the Dress", and at one point, Vogue actually named me one of the top 10 wedding dress designers in the world. So this was my dazzling American dream.

However, my journey took a harrowing turn when I faced the restrictions of a noncompete clause. This stifled my ability to work; took away what I loved doing most. It left me financially devastated and it shook my faith in the justice system.

Let me take you back to how it started. In 2011, at 25 years old, I signed an employment agreement that included a noncompete clause, as well as an intellectual property provision. I believed that this noncompete was reasonably restricted within the duration or term of my employment. It would be perfectly reasonable to not compete with the very company that I was trying to add value to.

But there was also a disproportionate negotiation power that many young employees and young creators are subjected to. I felt compelled to sign that contract or I would lose my big opportunity.

Nine years later, thousands of dresses, I attempted to renegotiate that contract, as I felt I had outperformed. My contract was due for a good upgrade.

My former employer sued me in Federal court, and it was only then that I realized exactly how that contract was going to be interpreted. Under a subsequent injunction, I was forbidden from using my own birth name. I was also not allowed to practice my chosen trade for a 7-year period unpaid—no commission, no royalties. I also had to hand over my heavily followed and personal social media accounts.

It dawned on me that securing my dream job at 25 years old actually required me to forfeit that dream once that job was over. Now, I refused to succumb to victimhood entirely. I chose a creative pivot. I changed my name publicly to Cheval and I started a new Instagram.

But the idea of having to change my trade after I had dedicated my life to a very specific skill set, where, all of a sudden, it felt like my livelihood became a threat to others, was the hardest thing of everything that happened to me. Even not being able to use my birth name, it was still worse to not be able to practice my trade.

So I think you can imagine what happened next. I fought. Three-and-a-half years of litigation, millions of dollars that I didn't even have, I am now in debt. I spent every dollar I ever made designing wedding dresses to fight for my right to once again design wedding dresses.

I was privileged to have a devoted and incredible legal team that went to bat for me when my financial situation ran out. Most people do not have this privilege.

It took us two trips to the appellate court just to get my Instagram back and prove that it was mine.

Now, the residual stress on brides was devastating for me. I'm very close with many of my brides and they dreamed of this moment for years—to pick the dress of their dreams from their favorite designer, and they no longer could.

I also experienced residual stress from my store base who invested in a designer brand from a very specific designer.

In my mind, my contract did not benefit me, my brides, or my industry. It also didn't seem to impact positively my former employer, who filed for bankruptcy during the litigation.

The American dream is built on the premise of what you can do for your country. What is your contribution? And if we want to continue to inspire innovation, tax people the way that we do, and assure that opportunities remain accessible, we cannot restrict people from working.

If corporations are not limited in hiring and profiting, why are employees limited or restricted on working and earning? In my situation, I was replaced by another designer in a matter of months. Yet, I couldn't make a living for years.

Now, I know this testimony is from the perspective of an employee, but I am now also a small business owner. And what I've learned is that there are very effective legal precautions you can take to protect your intellectual property. I now officially own my own and I know why it is so important. There are privacy policies, fiduciary duties. There are also ways to impose nondisclosure agreements to effectively safeguard trade secrets.

Imagine a world where the next great innovation is unrealized; where the brightest minds are not in laboratories or hospitals or sitting here in this courtroom. Just imagine what we could be missing out on.

The irony is that this hearing is taking place in one of the best days of competition in the world—the women's gymnastics team finals in the Olympics. I was a competitive gymnast for 16 years. So you can only imagine the poetry that I am experiencing right now in this very moment.

But I can tell you first-hand that the pride and the patriotism that you can feel when you have no cap on what you're capable of doing, that is where the magic is. And that is where I believe our country goes.

So to that, long live fair competition, and let the girl design the dress.

[Laughter.]

Chair WARREN. Thank you very much, Ms. Paige. That was very powerful.

I recognize Senator Smith from Minnesota to start our questions.

Senator SMITH. Thank you very much, Chair Warren and Ranking Member Kennedy.

And thank you so much to our testifiers here today. I am really grateful for your testimony.

So I am very glad to see the FTC rule on noncompetes, and I think the stories that you told, Dr. Toussaint and Ms. Hayley Paige, really demonstrate it. To think that, with these noncompetes, you would lose not only your livelihood, but even your identity, because you're sort of trapped in this agreement that in many cases, I hear over and over again, people don't even really understand what it is that they're signing and what long-term implications it has.

I want to just turn, first, to Dr. Shierholz. You know, as I understand it, you testified one in five workers in this country have been covered by noncompetes. Why is it important that the FTC rule cover such a very broad range of workers? Because I think maybe most Americans can sort of understand that, if you are like a top-notch scientist working for a big company, that you shouldn't be able to take, you know, those trade secrets and go to another company. But that's not what we're talking about here, is it?

Ms. SHIERHOLZ. So is this on? This is on.

Senator SMITH. Yes.

Ms. SHIERHOLZ. So, noncompetes, the evidence shows that they are not just applying to people that are high—who make high wages, who may be the ones that are most likely to have access to trade secrets; that they really are even prevalent among very low-wage workers. Like there's one study that shows that the median person who is affected by a noncompete is an hourly worker who makes $14 an hour. So they really do run the gamut.

And then the other thing is it's really important to ban noncompetes, though, across the board, not just for low-wage workers, but across the board. And one of the reasons is, higher-wage workers, they're the ones who are actually in the position to be the most likely to actually be able to negotiate. They're not the 25-year-old, right?

Senator SMITH. Exactly.

Ms. SHIERHOLZ. They can potentially negotiate over their full employment package, including restrictive covenants, like noncompetes. So I'm less worried about the wage-suppressing effects from noncompetes among high-wage workers, but I'm deeply worried about the other economic harms from noncompetes amongst high-wage workers—reducing business formation; the declines in productivity; declines in innovation; increases in prices.

Senator SMITH. Right.

Ms. SHIERHOLZ. So it is incredibly important, when we think about the broader economic impact, that we have this very broad band of noncompete.

Senator SMITH. So I want to get to sort of follow up on that. Because I think we could hear from Dr. Toussaint and Ms. Hayley Paige about kind of the impact that this had on them.

And I am thinking about my home State of Minnesota. In 2023, the State passed legislation to ban new noncompete clauses in employment agreements. And with that action, it became the fourth State to prohibit these clauses—a very important step forward.

Interestingly, the Minneapolis Fed says, as you were testifying, they expect that this change will support worker mobility and also yield other economic benefits, as we've been talking about.

But what was really interesting is, as they talked with lower- and middle-wage workers—so maybe people just getting started out; people who were not at the senior executive level who had worked under noncompetes—here's what they found: that the stress and anxiety were common experiences for workers, as they struggled to kind of figure out, come to terms with what they had agreed to.

There's a really interesting example of that with a cosmetologist. A cosmetologist leaves her employer. She was very careful not to tell her old clients that she was leaving and not—know where she was going to work next. She was told, like, you can't even accept those clients again, unless you're providing a different service. Like you're doing their hair instead of doing their makeup.

And so some of those clients came to her, and then her previous employer reaches out to her and says, "Hey, stop it. You can't do any work for any of those people at all going forward." And, of course, this creates huge worry and anxiety for her.

I mean, how common do you see—and this is maybe for any of you—how common do you think it is, this sort of level of intense worry and anxiety that this cosmetologist experienced, according to the Minneapolis Fed?

Ms. SHIERHOLZ. I'm happy to go first. I will——

So it's very, very common. And one of the things that sort of underscores this is that noncompetes actually have a chilling effect on worker mobility, on business formation, even in States where they are not enforceable. The very existence of a noncompete actually deters workers from leaving a job, from forming a new business.

Senator SMITH. You just don't feel like you have as much mobility.

Ms. SHIERHOLZ. For the reason that you said, rightly, the threat. Litigation is incredibly expensive, both financially and otherwise, and it has—just the threat of that is actually what businesses use to enforce their noncompetes——

Senator SMITH. Right.

Ms. SHIERHOLZ. ——rather than, oftentimes, rather than lawsuits themselves.

Senator SMITH. Thank you.

I know I'm out of time, Madam Chair.

Senator KENNEDY. Thanks, Tina. Thanks, Tina.

Dr. Toussaint, you're an orthopedic surgeon, is that right?

Mr. TOUSSAINT. That is correct.

Senator KENNEDY. OK. Where did you go to med school?

Mr. TOUSSAINT. I went to medical school at NYU, sir.

Senator KENNEDY. OK. And you were, I think you said you were at the top of your class?

Mr. TOUSSAINT. Yes, sir.

Senator KENNEDY. And then you trained at Harvard?

Mr. TOUSSAINT. That is correct.

Senator KENNEDY. And then you joined other orthopods in a practice, right?

Mr. TOUSSAINT. That is correct.

Senator KENNEDY. How many orthopedic surgeons were in your class—were in your practice rather?

Mr. TOUSSAINT. I don't recall the number of orthopedic surgeons specifically, but there were approximately 25 partners within the group.

Senator KENNEDY. OK. And you were a partner?

Mr. TOUSSAINT. Yes, sir.

Senator KENNEDY. OK. And a private equity company came in and said they wanted to buy you, is that right?

Mr. TOUSSAINT. That is correct.

Senator KENNEDY. And you and partners sold, right?

Mr. TOUSSAINT. That is correct.

Senator KENNEDY. And they paid you a bunch of money, right?

Mr. TOUSSAINT. They paid me some money, sir, that is correct.

Senator KENNEDY. Yes. How much did you walk away with?

Mr. TOUSSAINT. I walked away with nothing.

Senator KENNEDY. No, when you—when they bought your practice, you were a partner; you were paid, right?

Mr. TOUSSAINT. Right. At that point, sir, I did not walk away, but I was——

Senator KENNEDY. Well, I didn't—strike the "walk away." How much——

Mr. TOUSSAINT. OK.

Senator KENNEDY. How much did you personally gain from the sale to the private equity group?

Mr. TOUSSAINT. I'm not allowed to disclose the details of the transaction, sir.

Senator KENNEDY. Was it over—why not?

Mr. TOUSSAINT. Because that is part of the transactions restrictive agreement, sir.

Senator KENNEDY. Was it over a million dollars?

Mr. TOUSSAINT. I'm not allowed to say, sir.

Senator KENNEDY. Was it over $2 million?

Mr. TOUSSAINT. I'm not allowed to say the amount.

Senator KENNEDY. It was a lot of money, though, wasn't it?

Mr. TOUSSAINT. I do not believe it was worth my freedom, sir.

Senator KENNEDY. But you did at the time?

Mr. TOUSSAINT. I did not, sir.

Senator KENNEDY. OK. Why did you sign the agreement?

Mr. TOUSSAINT. Because it was, for the lack of a better term, I was compelled to sign the agreement in order to fall in line with the group, sir.

Senator KENNEDY. Here's why I think you signed the agreement—and I don't mean to offend you.

Mr. TOUSSAINT. It's OK.

Senator KENNEDY. I've seen these kind of transactions before. This has gone on all over the country.

Mr. TOUSSAINT. That is correct.

Senator KENNEDY. I think the private equity group came in and offered you and your partners a huge sum of money—in the millions. And I think you took it. And I think, later, you regretted it and you wanted out of the deal. And I think that violates the freedom of contract. And I will bet—no offense, Doctor—but I will bet that you wouldn't be willing to give back the millions of dollars that you took away from the sale in order to get back your freedom to practice.

Mr. TOUSSAINT. Can I respond?

Senator KENNEDY. Sure.

Mr. TOUSSAINT. If I may respond, thank you for the opportunity to respond to your question, sir.

I have to say that, number one, I was not in favor of the sale. That's number one.

Senator KENNEDY. Mm-hmm.

Mr. TOUSSAINT. And then number two, I have to disagree with your final statement—without giving away any details. But I can say, in my personal experience, that is false, sir.

Senator KENNEDY. OK. You took the money, though, didn't you?

Mr. TOUSSAINT. The thing that I disagree with, sir, is whether or not I gave it back.

Senator KENNEDY. Yes, but did you take the money?

Mr. TOUSSAINT. I gave it back, sir.

Senator KENNEDY. You gave back all the money that the private equity group paid you?

Mr. TOUSSAINT. As part of the——

Senator KENNEDY. Is that your testimony?

Mr. TOUSSAINT. As part of the settlement, I have to say that I had to buy out of the noncompete.

Senator KENNEDY. Yes. I don't want to play games, Doc, but——

Mr. TOUSSAINT. Yes, sir.

Senator KENNEDY. ——when the private equity guys came in and said, "We want to buy you out," you might have disagreed with your partners, but it sounds like they outvoted you.

Mr. TOUSSAINT. That's correct.

Senator KENNEDY. You could have left the practice then. You chose not to. You chose to take the money, did you not?

Mr. TOUSSAINT. If I chose to lose—to leave the practice, sir, I would have had to leave——

Senator KENNEDY. I understand.

Mr. TOUSSAINT. ——the State.

Senator KENNEDY. I get that. But you took the money, did you not?

Mr. TOUSSAINT. Yes.

Senator KENNEDY. OK. Thank you.

Doctor, let's suppose that Elon Musk decided to leave Tesla; General Motors hired him away; said, "We'll pay you $50 billion a year because we, General Motors, are sucking wind," and they are. "But if we sign you up, we want an employment contract and we're going to show you all our intellectual property. And we're going to insist that you sign a noncompete agreement."

Now, you've got General Motors. You've got Elon Musk, one of the wealthiest, if not the wealthiest, people in the world. Why should those two not be allowed to negotiate an employment contract, including the noncompete agreement?

Ms. SHIERHOLZ. As I explained to Ms. Smith, I am less worried about wage-suppressing effects of noncompetes on very high-wage workers. Obviously, Elon Musk would be able to negotiate a noncompete with a new employer. He has an incredible——

Senator KENNEDY. Would you have any problem saying that's OK?

Ms. SHIERHOLZ. There are other options for key-end——

Senator KENNEDY. Yes, but would you have a problem——

Ms. SHIERHOLZ. I would have a deep problem with saying that's OK. Because what we're talking——

Senator KENNEDY. Mm-hmm. You're just against all the noncompetes?

Ms. SHIERHOLZ. Because of their effects on the economy; their effects on, negative effects on workers; negative effects on consumers, and negative effects on the economy more broadly.

Senator KENNEDY. Well, I just don't think you're very objective. I don't think you're a very objective witness.

It's been my experience that most of these issues, there are always two sides. And no offense, you're entitled to your opinion. I enjoyed listening to you, but I can tell from your breathless presentation that you just speak passionately about this, and I respect that. But I think you're kind of blinded by your ideology. That's just my point of view. But I thank you for being here.

And I went over. Give Tina more time.

[Laughter.]

Senator KENNEDY. Because she stayed within her limits and I went way over. And I've got to go vote.

Chair WARREN. All right. Thank you.

So nearly 30 million people, as you talked about, Dr. Shierholz—since I tend to think you are driven by data, and that's what's important here—are trapped in noncompete agreements. Corporations use noncompete agreements to hold workers hostage. It prevents them from either starting a competing business or going to work for another employer.

So a worker who has a noncompete faces two bad options: stay stuck in a job that you really want to leave or upend your life to break free from the noncompete by moving away from your current job, changing your career, leaving the workforce, or risking an expensive years-long battle in court.

I believe that workers should have the freedom to switch jobs. They should be able to seek higher wages, better working conditions, and if they so choose, to start their own businesses. But big businesses want to control workers and stifle competition, even if it hurts our economy as a whole.

Dr. Toussaint, you had to sign a noncompete agreement when your medical practice was bought by a private equity company. And can you just say a little more—you talked about this a bit in your opening statement—about how broad this was? This was not a noncompete that said, "You can't go right next door and open the same practice under almost the same name." How broad was your noncompete? What all did it cover?

Mr. TOUSSAINT. Thank you for the question.

It's important to note that the private equity group at the time was located in three States: Colorado, Arizona, and Florida. My noncompete specifically said that I would be restricted from practicing orthopedic surgery within 25 miles of any facility in which they are doing business; any facility that they had previously done any business; any facility that they are currently targeting for expansion within the entire State that I am currently living in, which is Florida, and then any facility that they have had discussions with and thinking of acquiring in the future. And this would be

valid for over I'm sorry—approximately 2 years. So we're talking three States.

And in my specific location, at the time I was one of two surgeons covering treatment, specialized treatment, for over 850,000 people, most of which are within rural counties.

Chair WARREN. OK.

Mr. TOUSSAINT. I thought that was insane.

Chair WARREN. All right. So they have barred you, basically, from practicing medicine in any of these three States. And I detect from the way they wrote it, in case they were thinking about any other States, you would also be covered in those.

But I take it, it was more than just a prohibition on going into private practice. When you were offered a job at a publicly funded academic hospital, what happened? Can you say again about what happened when you tried to accept that job?

Mr. TOUSSAINT. Right. Unfortunately, as part of their agreement, they wanted me to give a copy of the employment agreement and noncompete clause to every employer that I was having a discussion with.

Chair WARREN. Right.

Mr. TOUSSAINT. So that's essentially like a scarlet letter or, like, basically a mark against me to say that, "If you want to hire this doctor, despite his specialized training, you're going to have to go through us. And we are in multiple areas across the United States."

Chair WARREN. Right. And so now, let's talk about what "go through us" turned out to mean. In fact, you were able to go become a teacher of other doctors, which is, obviously, not a direct competition originally. So calling this a noncompete, it shows how much it is stretched out in terms of how much it restricts you from doing.

But what was the consequence of the "you have to go through us" part of this contract? How did you, ultimately, end up going to work for the university?

Mr. TOUSSAINT. Thankfully, the university and the community needed me more than they wanted me out of town. I, unfortunately, had to engage a number of community leaders, including the NAACP, and a lot of my patients, to go and support me in this effort to be able to work. If I didn't do that, I would have to relocate out of the State, and I would have missed out on a number of collaborations within the university.

Chair WARREN. You know, I just want to say, we talk about what happens to an employee who is stuck in one of these noncompetes, but you have given us a perfect example of how those noncompetes end up hurting communities; in your case, end up hurting patients, others that you serve.

And in this case, I just want to underscore communities are served now by the more than 37 percent of physicians across this country who are currently bound by noncompetes. So unless you go through the person who owns that contract, these are whole communities that could lose access to the physicians that have served them so well.

So you had folks on your side who were able to weigh-in, so that you, ultimately, were able to go to the university.

Ms. Paige, let me turn to you. Your former employer used a non-compete to keep you from designing wedding dresses, whether it was under your name or some other name. Can you just say something about what that meant, both for you and for your brides?

Ms. PAIGE. Thank you for your question, Senator Warren.

It was devastating and disheartening. I am in an industry that relies on an emotional purchase and there is an authentic connection made when saying yes to the dress. And to have that tarnished or severed is almost as if we're putting a veil over what's really happening.

And in my experience, it was truly difficult to imagine how you could communicate and make that connection to a bride. Not only I couldn't express myself creatively in the way that I thought I could, but I couldn't even use my name or practice the trade.

It was interesting, I think, too, from the business perspective. Because we are a wholesale business and all of these stores had invested specifically in a designer collection. And so when the designer was no longer behind the dresses, they were affected. They felt the residual stress of, how do I explain to the consumer and the brides coming in the doors that this dress no longer has the Hayley Paige behind it?

And obviously, when you invest that kind of money in your business, and you're unable to sell the merchandise or feel ethically icky in doing so, it creates a really big void in the marketplace.

Chair WARREN. Right. So hard on patients; hard on brides. Hard on the other small businesses that have built up around you and your brand, wanting to sell those Hayley Paige gowns.

Can you just say one more word about that? I thought about, when I first heard about your story, what it must feel like if you're a pianist and you're not allowed to play the piano; if you're a painter and you're not allowed to paint; if you're a wedding gown designer and you have been told you cannot make wedding gowns. There are other things you can do in life, but that has been crossed off your list for years. Can you just say a little bit about how that feels?

Ms. PAIGE. Yes. Thank you for your question, Senator Warren.

It was soul-crushing. But what's interesting about my case is that it was challenging my identity from three different factors. I was unable to use my birth name; I was severed connection to my social media community, and I was withheld from my trade. Of all three of those things that are extremely hard to wrestle with and digest, not being able to practice my trade was the most emotional and hard to overcome. And in that moment, I had realized how much of my identity came from my craft. And I think when you devote, you devote yourself to a craft, part of you becomes that craft. And it really did feel like a severing of who I was.

And I'm so grateful, of course, for the support I received, but it was also particularly devastating to feel the confidence and the height I was at in my career—not very many people can perform at that level. And that is something that should be celebrated.

And as a woman who struggles with insecurity, to feel like you're really good at something, but you're not allowed to do it, and then you have these amazing women that want to see you do it, but then you can't deliver, it's emotional and devastating.

Chair WARREN. So, Dr. Shierholz, you've just heard from two people who have lived through experiences with noncompetes. Each of them has fought back and they have mustered communities around them and been able to hit back. But talk just a little bit about the effect of these noncompetes across our economy.

Ms. SHIERHOLZ. Yes. Yes, the things that Ms. Paige and Dr. Toussaint experienced, they're just all too common. Noncompetes restrict workers' ability for starting a business; for practicing their craft in their community; for taking another job in their community. And economywide, when you put the data to it, what you find is that reduces business formation; it reduces worker mobility, and then those things reduce productivity. They reduce innovation. They increase prices, and they reduce workers' wages.

So we can see how this played out in these folks' lives, and then when you look more broadly at the economy, it's just incredibly harmful on all measures.

Chair WARREN. Well, I'm very grateful to you two for telling your stories, and very grateful to you, Dr. Shierholz, for just describing or putting the context all across our economy.

The Biden-Harris administration has taken historic action to ban noncompete agreements, and right now, it is fighting back against the Chamber of Commerce and these giant corporations that continue every day to profit off noncompete agreements.

Now, one of the things I want us to turn to now—I'm just going to give myself a second round of questions here, since I don't have anyone competing with me for this time.

[Laughter.]

Chair WARREN. I want to talk about what the Biden-Harris administration is doing here and how it is a game changer to ban noncompetes. By giving workers the freedom to move jobs and to start new businesses, employers are going to have to change what they do. They're going to actually have to compete for workers.

Workers' earnings we believe will increase collectively by about $400 billion over the next decade, according to the FTC. A typical worker, it would be about $500 more that that worker could take home. And the American economy will be more dynamic and innovative with about 8,500 more new businesses and tens of thousands more new patents, if people can get out of these noncompetes and go out and either start their own businesses or go into business with someone else, or work for someone else.

We've get this massive economic boom because the FTC has designed the ban to be extremely simple. It says no new noncompetes at all. It's not fuzzy; it's not fancy. None. Existing noncompetes can be enforced only for the most senior executives. So good for workers; good for the economy, but big corporations are unhappy about this rule.

So what they say is they can do a rule, but they want a rule that is narrower and more complex—more like Senator Kennedy was talking about on, well, maybe a case here; maybe a case there, but a lot of very complex rules about how to make that work.

Dr. Toussaint, you struggled with a noncompete agreement in Florida, where you live, but Florida already has a law that says a doctor cannot be bound by a noncompete if in their county all the doctors in their specialty work for the same employer. So I can't

think of a law more specifically designed to address your specific issue. Why didn't that law just permit you to get out of your noncompete without any further question?

Mr. TOUSSAINT. Right. Thank you for the question.

Number one, it's important to realize that this private equity company was not based in Florida. And their tactic is to file suit outside of their jurisdiction and outside of my own jurisdiction. So the plan is to wage a suit away from where we both live and make it as long and as expensive as possible to the extent that I would give up and I would walk away before a judgment is even rendered.

And so a scenario like that, you can imagine that the doctor's resources would not be as sufficient as the private equity firm's resources, and they could run it dry. Even though, eventually, I might win, it's unclear if I would even last that long.

Chair WARREN. So part of the problem we've got here, then, is the litigation itself is expensive and they have found ways to make it even more expensive.

I take it, Ms. Paige, that that was what you ran into?

Ms. PAIGE. Precisely.

Chair WARREN. Yes, just drive up the costs and grind you down into the dirt.

So the threat of the noncompete is big and important. It's also a question of who's going to be on your side to fight this. Who had to pay your legal bills, Ms. Paige? Who was there?

Ms. PAIGE. Unfortunately, I tapped out.

Chair WARREN. That was you, right?

Ms. PAIGE. Yes.

Chair WARREN. And Dr. Toussaint?

Mr. TOUSSAINT. The same here.

Chair WARREN. You had to bear your own legal bills.

So what the FTC has said is we're going to have a very simple rule. It's going to be a nationwide rule. You don't get to go sue in some other State and think you can avoid some local rule.

But it's also the case that the FTC can enforce it as an unfair practice, which means, instead of being out there all by yourself, you will actually have someone on your side. That's the idea behind this.

Yes, I see you smiling, Dr. Toussaint. That sounds like a good thing.

You know, I want to point out one more thing before we leave this. And that is that the FTC's noncompete ban is very popular. Polls show that an overwhelming proportion of Americans and a majority of small business owners support the FTC's rule. In fact, as you know, when the FTC is about to put a rule in place, it's still a proposed rule, they invite public comment. They got 25,000 comments on the noncompete rule.

And I just want to say, not everybody sits around in the evening and says, "What can we do tonight? I know, let's go do a noncompete rule comment on the FTC website."

[Laughter.]

Chair WARREN. Of those 25,000 comments, 24,000 came from individuals and businesses who said, "We want to have meaningful noncompete clauses. This is valuable to us." And many, many people went on the FTC website to tell their own stories—very much

like yours, Ms. Paige; very much like yours, Dr. Toussaint—to talk about just how challenging it was when they got hit with a noncompete.

And how many people just gave up? They did not have the money for lawyers. They simply could not go forward. So they stayed in really horrible jobs.

At this point, I'm going to pause and see if Senator Van Hollen would like to ask some questions.

Would you like to do that?

Senator VAN HOLLEN. Yes, thank you, ma'am.

Chair WARREN. Good. Senator Van Hollen.

Senator VAN HOLLEN. Thank you, Madam Chair, and thank you for holding this hearing.

I thank all of you for your testimony. As you know, we're bouncing back and forth between hearings, but I am really grateful for all of you being here to tell your stories.

And I do want to recognize the good work of FTC Chair Lina Khan and her leadership in advancing the rules to address the issue of these noncompete agreements. Because I think all of us recognize that the original idea behind, you know, noncompete agreements was people have really the crown jewels, the secrets, right, of a particular company and you signed an agreement to make sure that you can't use that intellectual property, so to speak, in another job.

But now, we find out that 30 percent of noncompete agreements affect workers earning less than $13 an hour and go way beyond what was ever intended for noncompete agreements.

So, Dr. Shierholz, I would like, if you could, to talk a little bit about how noncompete agreements affect workers who are just starting out in their careers. Right? This is impacting individuals at young ages and inhibiting their ability in many ways to go up the career ladder and find new opportunities. Could you just talk broadly about that?

Ms. SHIERHOLZ. I can. Hayley's example is the perfect example of how these can just lock in young people.

But what we do know is that banning noncompetes will raise the lifetime earnings of young workers by raising their wages and by reducing prices. And I do want to just say that some people will claim that, without noncompetes, businesses won't do training, and then that will reduce the long—you know, that will have negative long-term wage effects.

So the evidence shows that that is not true. There's good studies showing that, like, people who start a job in a State that strongly enforces noncompetes have reduced earnings for more than 8 years compared to other workers. So there's offsetting factors, but, on net, workers—and that goes for young workers as well—are made worse off by noncompete agreements.

Senator VAN HOLLEN. Well, thank you. Thank you for that.

And, Dr. Toussaint, again, I apologize if this has already been covered. I was reading about your story and your personal experience as a physician subject to a noncompete agreement. Obviously, that has a harmful impact on physicians, but it also, of course, has a harmful impact on all the patients who don't have access to the services of physicians like you.

So could you just talk a little bit about how these noncompete agreements interfere with a patient's ability to get care and the continuum of care that they need?

Mr. TOUSSAINT. Thank you for the question, Mr. Van Hollen.

It's fair to say that patients follow their physicians. They don't follow the company name or the clinic's brand. They follow the doctor.

I was one of two subspecialist orthopedic surgeons in an area of northern Florida where 850,000 needed to be served. If I was driven away and the other surgeon was left—and by the way, this other surgeon was nearing retirement—we would have had 850,000 people without a subspecialist to train them—I'm sorry—to treat them. They would have to travel hours away to get their care.

They did not come to see me because I was under the umbrella of a private equity company. And, in fact, the private equity company was not even in the area. They're not even in the State. They were there for me. And so if I would have had to leave, these patients would have had no one to care for them.

I look forward to a Federal ban on these noncompetes because it does impact the patient's ability to get care. It impacts my ability to care for my patients and to live in an area that I have grown and loved. And ultimately, it raises the cost for everyone. And I think that this needs to be addressed.

Senator VAN HOLLEN. Thank you. Thank you for addressing both the direct access of care to specialists that people need, and then obviously the impact on cost.

Ms. Paige, in our remaining time, I had a little bit of a chance to review your case and the lawsuit, and it's really outrageous what happened, but also a very good example to bring before the Committee.

And you've probably covered this with respect to your specific case, but could you also talk about how the noncompete agreements, like the kind that attempted to restrict you, and the lawsuit threaten the ability of young entrepreneurs to startup new businesses, something that you would think we would want to encourage?

Ms. PAIGE. Thank you for your question, Senator Van Hollen.

I believe this strips away the pursuit of entrepreneurship because many young employees and young, hungry creatives are not in a position to negotiate for themselves, and they may agree to something at the time that sounds quite exciting and like the opportunity of a lifetime. But as sweat equity is put in and circumstances change, it can impact the way the contract is read.

In my case, it was, in my opinion, it was weaponized. And one of the reasons I strongly believe they should be banned is that, if you do allow some but not others, it still opens the gateway for litigation, which can financially ruin any individual, but it can also hurt small businesses and corporations.

So I find that the solution to the problem is not through restriction or a scarcity mindset. It's through educating on other legal resources to protect your business, especially as a young entrepreneur looking to protect as you go, but not limit yourself.

Senator VAN HOLLEN. Thank you.

Really, thank all of three of you for your testimony.

And, Senator Warren, thank you for pulling together the hearing.

Chair WARREN. You bet. Thank you, Senator Van Hollen. We appreciate your coming by and asking these questions.

So I just have one last question I want to take a look at. You listen to stories like Dr. Toussaint and Ms. Paige and you say it just seems so obvious that we should ban these, and that we should not ask people to litigate them, even when they've got a rule that looks like it applies to them. Let's just get rid of them overall.

But right now what we've got is a lawsuit ginning in the Chamber of Commerce and a handful of giant corporations are trying to sue the FTC to prohibit them from going forward with this ban.

So, Dr. Shierholz, we've talked about whether or not there's really any legal basis for it. I think that the authorizing statute for the FTC makes pretty clear that the FTC can do this.

But the Chamber of Commerce and these big corporations have done a little judge shopping and they've gone down to this Trump-appointee judge down in Texas and are trying to fight this.

So my question to you is why is the Chamber of Commerce, why are these big corporations spending so much money to try to block the ban on noncompete clauses?

Ms. SHIERHOLZ. It's because of who they represent. They represent business owners, and often very big business owners, and those are the ones who actually benefit from noncompetes. They benefit because they can protect their position by keeping other people from being able to form a business who then compete with them.

They benefit because they can pay their workers less and prevent other businesses from being able to hire away their workers by offering them better jobs. So they are actually much better off with noncompetes.

And so it's totally reasonable why these business groups are fighting tooth and nail to keep their noncompetes, but that does not mean that they're good for the economy. It does not mean they are good for the country. They are not. They are bad for the vast majority.

Chair WARREN. Right. I think your point is a really strong point. It's not only that they want to be able to treat their workers however they want to treat their workers, and all the worker can do is just say, "OK, I won't work at all." That, obviously, is not a solution. But that it's also a way for these giant businesses to make sure they don't have any competition——

Ms. SHIERHOLZ. Yes.

Chair WARREN. ——that the Hayley Paige wedding designs are not out there competing with whatever business they want to have in the weddings space; that Dr. Toussaint is not working with other doctors to provide alternative medical practice and an alternative approach to it; that the private equity group that set this up wants to continue to reap all the profits of a noncompetitive market. And that that's a key part of what's going on here.

I just want to say again how much I appreciate your bringing this forward and telling these stories, so that people who may not have ever have had a noncompete clause, or worse yet, may actually be subject to a noncompete clause, but will not discover it until the day comes that they want to go work somewhere else, or they

want to start their own business, or they've got some terrific idea and want to link up with a couple of partners and go build something new, and discover that they're not able to do that.

I so appreciate what the FTC and the Biden-Harris administration is doing to just level the playing field; to say that anyone who goes to work can go to work. We can have all the rules we need about not disclosing confidential information or taking someone else's intellectual property, but as for your own labor and how you want to work, and what you want to do, that's open and you can take that labor where you want to go and build what you want to build. That is the American way.

So thank you very much for being here. I'm grateful to you for coming to this hearing.

Questions for the record are due 1 week from today. That's Tuesday, August 6th.

For our witnesses, if there are additional questions, you will have 45 days to respond to any of those questions.

And with that, this hearing is adjourned.

[Whereupon, at 3:41 p.m., the hearing was adjourned.]

[Prepared statements and additional material supplied for the record follow:]

PREPARED STATEMENT OF HEIDI SHIERHOLZ

PRESIDENT, ECONOMIC POLICY INSTITUTE

JULY 30, 2024

Chair Warren, Ranking Member Kennedy, and Members of the Subcommittee, thank you for the opportunity to testify today on the benefits to workers, businesses, and the economy of banning noncompete agreements.

My name is Heidi Shierholz, and I am an economist and the president of the Economic Policy Institute (EPI) in Washington, DC. EPI is a nonprofit, nonpartisan think tank created in 1986 to include the needs of low- and middle-wage workers in economic policy discussions. EPI conducts research and analysis on the economic status of working America, proposes public policies that protect and improve the economic conditions of low- and middle-wage workers, and assesses policies with respect to how well they further those goals. I previously served as Chief Economist at the U.S. Department of Labor during the Obama administration.

Noncompete agreements are clauses in employment contracts that prevent workers from going to work for, or starting, a competing business within a certain period of time after leaving a job. Under the Federal Trade Commission's (FTC's) noncompete ban, employers will be barred from asking any new workers to sign noncompetes, and existing noncompetes would be made unenforceable for the vast majority of workers. Today I will highlight the importance of the rule by discussing the ubiquity of noncompete agreements and describing the effects these agreements have on wages, business formation, economic dynamism, labor mobility, productivity, innovation, and prices. I will also discuss options firms have to protect trade secrets without noncompetes, and the FTC's authority to ban noncompetes.

Noncompetes Are Widely Used

Noncompete agreements are ubiquitous. Many studies of workers find that roughly one in five workers are subject to noncompete agreements (see, for example, Starr, Prescott, and Bishara (2020); Balasubramanian, Starr, and Yamaguchi (2023); and Rothstein and Evan Starr (2021)).[1]

My 2019 study with Alexander Colvin finds that more than one out of every four workers is subject to noncompete agreements. Using a 2017 survey of a random sample of private-sector businesses with 50 or more employees, Colvin and I found that almost half (49.4 percent) of businesses required at least some employees to sign a noncompete agreement and almost one-third (31.8 percent) indicated that all employees were required to accede to a noncompete as a condition of employment. Based on these data, we estimate that at least 27.8 percent are subject to noncompete agreements.[2] The higher share subject to a noncompete found in this survey compared with the other surveys cited above could be due to the fact that ours was a survey of business establishments, while the others are surveys of individual workers. While businesses know whether their workers are subject to noncompete agreements, workers are often asked to sign a noncompete on the first day of work when they are dealing with a great deal of administrative paperwork, and as a result often do not know or remember they are covered by a noncompete until they try to leave their job, and thus are likely to underreport being subject to them.

It is important to note that noncompete agreements are not limited to high-wage workers in knowledge-sensitive occupations and industries. My 2019 research with Alexander Colvin found that more than a quarter (29.0 percent) of private workplaces that had an average wage of less than $13.00 per hour used noncompete agreements for all their workers.[3] Michael Lipsitz and Evan Starr (2021) note that "while [noncompetes] are frequently assumed to occur only in high-wage jobs.we find that the modal worker bound by a [noncompete] is paid by the hour, with median wages of $14."[4] And in their analysis of private-sector workers in 2017–2018, Rothstein and Starr (2021) reported that 14.4 percent of workers who earned less than the equivalent of $20 per hour and 14.7 percent of workers with less than a

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[1] Evan P. Starr, J.J. Prescott, and Norman D. Bishara, "Noncompete Agreements in the U.S. Labor Force", *Journal of Law and Economics* 64, no. 1 (October 2020); Natarajan Balasubramanian, Evan Starr, and Shotaro Yamaguchi, "Employment Restrictions on Resource Transferability and Value Appropriation From Employees", January 2023; Donna S. Rothstein and Evan Starr, "Mobility Restrictions, Bargaining, and Wages: Evidence From the National Longitudinal Survey of Youth 1997", November 2021.

[2] Alexander J.S. Colvin and Heidi Shierholz, "Noncompete Agreements: Ubiquitous, Harmful to Wages and to Competition, and Part of a Growing Trend of Employers Requiring Workers to Sign Away Their Rights", Economic Policy Institute, December 2019.

[3] Ibid.

[4] Michael Lipsitz and Evan Starr, "Low-Wage Workers and the Enforceability of Noncompete Agreements", *Management Science* 68, no. 1, April 2021.

college degree had signed a noncompete agreement (compared with 21.7 percent for those earning more than $20 per hour and 24.3 percent of college graduates).[5]

As noted by Starr, Prescott, and Bishara (2020)—who found that 13.3 percent of labor force participants who earned less than $40,000 per year in 2017 reported that they were subject to a noncompete agreement—"the frequency of noncompetes among low-wage employees without access to trade secrets and the lack of negotiation in the contracting process hint at more anticompetitive rationales for the use of noncompetes by employers."[6]

Noncompetes Lower Wages

To understand the impact of noncompetes on wages, it is useful to remember that essentially the only source of leverage an individual nonunionized worker has with respect to their employers is their ability to quit and take a job somewhere else. That ability means their employer has to provide a job that is competitive enough in terms of compensation, working conditions, and opportunities that the worker is not incentivized to leave to take another job or start their own business. Noncompetes cut that source of leverage off at the knees. When workers do not have the freedom to take another job, or start a business, in their line of work in their community, their employers simply don't have to pay them as much or treat them as well.

A large and growing body of research bears this out. For example, using data from the Survey of Income and Program Participation, Evan Starr (2019) finds that an increase in enforcement of State noncompete laws (from nonenforcement to an average State's level of enforceability) is associated with a 4 percent decrease in hourly wages.[7] Further, an analysis by Michael Lipsitz and Evan Starr (2021) of wage trends in Oregon after the State banned noncompete agreements found that wages for all hourly workers increased by 2–3 percent on average.[8]

It is worth noting that these studies show that noncompetes don't just lower the wages of those subject to noncompetes, they also lower wages of workers who have not signed such agreements. As described below, noncompetes decrease entrepreneurship and new firm entry, which increases local labor market concentration and depresses wages. Further, noncompetes make labor markets "thinner," reducing the likelihood of a successful employer-employee match and driving down equilibrium wages.

An analysis of data of the Noncompete Survey Project by Evan Starr, Justin Frake, and Rajshree Agarwal (2019) presents evidence that confirms this logic. Starr, Frake, and Agarwal "find that in State-industry combinations with a higher incidence and enforceability of noncompetes, workers—including those unconstrained by noncompetes—receive relatively fewer job offers, have reduced mobility, and experience lower wages" (emphasis added).[9]

Noncompetes also appear to exacerbate racial and gender wage gaps by exerting larger wage effects on women and Black men than on White men.[10]

Long-Run Wages and Employee Training

Some have suggested that without noncompetes, firms will abandon investments in employee training and as a result, workers' wages will be lower in the long run. While evidence is mixed on whether noncompetes are associated with more training, it is worth noting that one reason noncompetes might lead to more training is that they shrink the pool of available workers with relevant experience, so employers are forced to hire less experienced workers that require more training. Evidence also suggests that on net, any gains in long-term wages workers may receive from additional training in a noncompete regime is more than offset by the wage suppressing effects of the noncompetes themselves. Balasubramanian et al. (2020) find that individuals who start a job in a State that enforces noncompetes see lower earning last-

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[5] Donna S. Rothstein and Evan Starr, "Mobility Restrictions, Bargaining, and Wages: Evidence From the National Longitudinal Survey of Youth 1997", November 2021.

[6] Evan P. Starr, J.J. Prescott, and Norman D. Bishara, "Noncompete Agreements in the U.S. Labor Force", *Journal of Law and Economics* 64, no. 1, October 2020.

[7] Evan Starr, "Consider This: Training, Wages, and the Enforceability of Covenants Not To Compete", *ILR Review* 72, no. 4, August 2019.

[8] Michael Lipsitz and Evan Starr, "Low-Wage Workers and the Enforceability of Noncompete Agreements", *Management Science* 68, no. 1, April 2021.

[9] Evan Starr, Justin Frake, and Rajshree Agarwal, "Mobility Constraint Externalities", *Organization Science* 30, no. 5, July 2019.

[10] Matthew S. Johnson, Kurt Lavetti, and Michael Lipsitz, "The Labor Market Effects of Legal Restrictions on Worker Mobility", National Bureau of Economic Research Working Paper no. 31929, December 2023.

ing over at least 8 years, compared to those who start a job in a State that doesn't enforce noncompetes. [11]

It is also worth noting that employers who provide jobs with competitive wages, working conditions, and opportunities do not have to worry that their employees will defect to competitors en masse shortly after they receive valuable training.

Noncompetes Reduce Business Formation, Dynamism, Labor Mobility, Productivity, and Innovation

Some claim that though noncompetes reduce wages, they are still necessary because they boost innovation by incentivizing firms to invest in developing important advancements by reducing the ability of their workers to take valuable information about those advancements to a competitor. However, the best evidence consistently finds that on net, the effect of noncompetes on innovation is in the opposite direction.

By preventing workers from leaving their employers to create new businesses, noncompete agreements reduce business formation, reducing dynamism in the economy. An analysis based on the findings in Jeffers (2024) [12] shows that banning noncompetes will increase the rate of new business formation by 2.7 percent, which, in the U.S. economy, would translate into an additional roughly 8,500 new businesses annually.

Noncompete agreements also reduce job mobility—i.e., they keep workers locked in jobs—and, as a result, they reduce productivity growth by blocking the efficient reallocation of labor from less productive to more productive job matches. For example, Johnson et al. (2023) finds that noncompete agreements cause a significant decrease in job-to-job mobility. [13] Eliminating noncompete agreements will allow workers to find firms, and firms to hire workers, that yield the most productive matches.

Declines in business formation and labor mobility as a result of noncompetes contribute to an overall decline in innovation. A study by Johnson, Lipsitz, and Pei (2023), finds that an average-sized increase in the enforceability of noncompetes leads to an 110919 percent reduction in patenting—including reductions in "breakthrough" inventions—over the following 10 years. [14] Based on this research, it is estimated that banning noncompetes will lead to more than 17,000 patents each year. Other research, for example Reinmuth and Rockall (2024), also find that noncompetes have a significant negative impact on patenting and innovation by "reducing labor mobility as a channel of idea diffusion that increases overall innovation." [15]

Banning Noncompetes Will Reduce Inflation

While eliminating noncompete agreements will raise wages, the net effect will likely be to reduce prices paid by consumers. Noncompete agreements increase concentration in the markets for goods and services by preventing workers from leaving their employers to create new businesses or join other firms that can increase the market supply and intensify competition. Banning noncompete agreements will reduce market concentration, thereby reducing market prices.

Noncompete agreements also reduce productivity growth by blocking the efficient reallocation of labor from less productive to more productive job matches. Eliminating noncompete agreements will allow workers to find firms, and firms to hire workers, that yield the most productive matches. The increased firm and economywide productivity will reduce consumer prices.

One area where direct evidence is available on the price effects of noncompetes is around the effect of noncompetes on prices in health care. Research shows that noncompetes significantly increase the cost of physician services (in particular, a 10 percent increase in the enforceability of noncompetes causes 4.3 percent higher phy-

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[11] Balasubramanian, Natarajan, 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", *Journal of Human Resources*, April 2020.

[12] Jessica Jeffers. "The Impact of Restricting Labor Mobility on Corporate Investment and Entrepreneurship", *The Review of Financial Studies*, July 2024.

[13] Matthew S. Johnson, Kurt Lavetti, and Michael Lipsitz, "The Labor Market Effects of Legal Restrictions on Worker Mobility", National Bureau of Economic Research Working Paper no. 31929, December 2023.

[14] Matthew S. Johnson, Michael Lipsitz, and Alison Pei, "Innovation and the Enforceability of Noncompete Agreements", National Bureau of Economic Research Working Paper no. 31487, July 2023.

[15] Kate Reinmuth and Emma Rockall, "Innovation Through Labor Mobility: Evidence From Noncompete Agreements", May 2024.

sician prices).[16] Based on that research, the FTC estimates that banning noncompetes will reduce health care costs by at least $74 billion over the next decade.

Noncompetes Are Often Bundled With Other Restrictive Contracts

Employers who require their workers to sign noncompete agreements are more likely to require their workers to sign additional restrictive contract provisions. My research with Alexander Colvin finds that over half of firms that require noncompetes for at least some of their employees also require at least some employees to agree to mandatory arbitration.[17] Further, Balasubramanian, Starr, and Yamaguchi (2023, table 2) analyzed data from the 2017 version of Payscale.com's annual firm-level survey of publicly traded in the United States and found that almost one in four firms used noncompete agreements together with nondisclosure agreements, nonsolicitation agreements, and nonrecruitment agreements for all employees, while more than half used all four types of agreements for at least some of their employees.[18]

The reflexive bundling of noncompetes with mandatory arbitration, nondisclosure, nonsolicitation, and nonpoaching agreements provides further evidence that the primary purpose of noncompetes is often to restrict employee options rather than being a tailored strategy for protecting beneficial investments in and information held by employees.

Relatedly, and as John Lettieri highlighted while employed at the American Enterprise Institute, workers often enter into noncompete agreements after little or no bargaining with their employer and without full information about the rights they are signing away:

> The vast majority of noncompete agreements are not subject to any negotiation between the employer and employee, suggesting that the employee is unlikely to receive any benefits in return for their signature. A large share of these agreements are presented for signature only after the employee has already accepted the job offer—often on the first day of work. Employers frequently exploit workers' lack of knowledge and resources when crafting noncompetes. For example, employers commonly request that workers sign noncompetes even in States where they are completely unenforceable—and workers nevertheless sign the agreements assuming they are valid. Likewise, employers often craft extremely broad provisions knowing that employees generally lack both an understanding of what is enforceable and the wherewithal to challenge the terms in court.[19]

Employers Who Need To Protect Trade Secrets Have Other Options

Employers do not need noncompete agreements in order to protect trade secrets. California, for example, made noncompete agreements unenforceable in 1872, but the State has still become a global technology hub—something that would be difficult to imagine if businesses in California faced misappropriation of trade secrets and other confidential information at a meaningfully higher rate than in other States.

That is because there are intellectual property laws that provide businesses with significant legal protections for trade secrets. Further, employers are still able to use tailored nondisclosure and nonsolicitation agreements. Policies like these, that directly address what employees may and may not do with company secrets, allow businesses to protect trade secrets while not harming competition by taking away workers' freedom to seek other work or to start a business after they leave their job.

And of course, employers concerned about worker departure and the associated loss of firm knowhow and knowledge can retain staff by paying fair wages and salaries and treating them with respect. Many employers do not use noncompete clauses and have had no difficulty keeping employees using these salutary methods.

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[16] Naomi Hausman and Kurt Lavetti, "Physician Practice Organization and Negotiated Prices: Evidence From State Law Changes", *American Economic Journal: Applied Economics*, Vol. 13, No. 2, April 2021.

[17] Alexander J.S. Colvin and Heidi Shierholz, "Noncompete Agreements: Ubiquitous, Harmful to Wages and to Competition, and Part of a Growing Trend of Employers Requiring Workers To Sign Away Their Rights", Economic Policy Institute, December 2019.

[18] Natarajan Balasubramanian, Evan Starr, and Shotaro Yamaguchi, "Employment Restrictions on Resource Transferability and Value Appropriation From Employees", January 2023.

[19] John W. Lettieri, "A Better Bargain: How Noncompete Reform Can Benefit Workers and Boost Economic Dynamism", American Enterprise Institute, December 2020.

The Broad-Based Nature of the FTC's Rule Is Important

The FTC's rule is a complete ban on new noncompetes for nearly all workers, including independent contractors and senior executives, while existing noncompetes for the vast majority of workers will no longer be enforceable (a key exception is senior executives, for whom already existing noncompetes will be allowed to remain in force—this group represents less than 1 percent of all workers).

Some have questioned whether it is reasonable to ban noncompetes for senior executives or other highly paid workers, who may be particularly likely to have confidential information. But as mentioned above, employers do not need noncompete agreements to protect trade secrets, because they have other options. And while senior executives or other highly paid workers are likely in a much better position than other workers to negotiate over their full employment package—including restrictive agreements like noncompetes—and are therefore less likely to themselves be made worse off by noncompetes, the broader economic harms caused by noncompetes mentioned above are still present, including reduced business formation, economic dynamism, labor mobility, and productivity, and increased inflation. Many of these harms may in fact be stronger as a result of noncompetes among this group than among other workers, as, for example, workers in this group may be more likely than other workers, in the absence of noncompetes, to be in the position to start a new firm, and to innovate and grow it.

It is also important that new noncompetes are banned under the rule, not just made unenforceable. The very existence of a noncompete, even if it could not ultimately be enforced, can deter workers from going to work for, or starting, a competing business. The high costs—financial and otherwise—of noncompete-related litigation means noncompetes create a chilling effect on new firm formation and worker mobility that exists whether or not the noncompete would be enforced by a court. Notably, the chilling effects of unenforceable noncompetes do not just deter workers from going to work for, or starting, a competing business, they can also deter other businesses from hiring a worker who had been working for a competitor and had signed a noncompete, due to fear of legal complications.

FTC Has the Authority To Ban Noncompetes

Business groups suing to block the FTC's noncompete rule have claimed that the FTC does not have the authority to ban noncompetes. But as a Federal judge in Pennsylvania stated last Tuesday in a decision declining to issue a preliminary injunction against the rule, "the FTC is empowered to make both procedural and substantive rules as is necessary to prevent unfair methods of competition."[20]

The FTC Act states that unfair methods of competitions are illegal, and it authorizes the FTC to issue rules and regulations to prevent their use. Further, the Supreme Court in 1986 confirmed that the FTC can not only challenge traditional antitrust violations but can also outlaw practices "the Commission determines are against public policy for other reasons."[21] With the noncompete rule, the FTC is doing exactly what it was empowered (and directed) to do by the FTC Act—take action, based on the best evidence available, to protect fair competition.

Noncompetes are not trying to hide that they are contrary to open and fair competition—it's in their name. They bar workers from leaving to accept a position in their line of work in their community, stifle the creation of new businesses, and depress employer competition for workers' services. There is a large body of evidence, described above, that noncompetes hinder competition, disadvantaging consumers, workers, and competing businesses. Banning these coercive and unfair agreements is fundamental to the FTC's mandate.

Conclusion

In closing, it's worth considering who wins from having noncompetes. One might believe it is businesses who want to protect trade secrets—but, as described above, noncompetes are not needed for that; firms have other options for protecting their intellectual property.

A core group that does indeed benefit from noncompetes is existing firms who want to stop new firms from forming and competing with them. Noncompetes strongly benefit those incumbent firms who want to protect their advantage, but they make it harder for new firms to start, grow, and innovate, and, as a result, they are bad for consumers and the overall economy, both of which benefit from competition and innovation.

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[20] Tomasz Mielniczuk and Craig Minerva, "FTC's Noncompete Ban Survives Preliminary Challenge in Pennsylvania Federal Court", JD Supra, July 26, 2024.

[21] Federal Trade Commission (FTC), "Section 5 of the FTC Act as a Competition Statute" (web page), October 17, 2008.

Another group that benefits from noncompetes is existing firms who want to prevent other firms from being able to hire away their workers by offering them higher wages, better working conditions, and better opportunities. Noncompetes clearly benefit those incumbent firms, but are harmful to workers and the overall economy, both of which benefit from employer competition for workers' services.

Given all this, it is not a surprise that groups representing existing businesses are fighting tooth-and-nail to keep their ability to require workers to sign noncompetes. That, however, does not mean noncompetes are good for the Nation. In fact, noncompetes are bad for economic dynamism and innovation, they depress business formation and labor mobility, they hurt productivity and growth, they raise prices, they shrink for workers' wages, and they restrict workers' freedom. Banning these coercive and unfair agreements is fundamental to the FTC's mandate, and the workforce, consumers, and the broader economy will be better off for it.

Thank you for holding this important hearing and I look forward to your questions.

PREPARED STATEMENT OF R. JAMES TOUSSAINT

MD FAAOS, ORTHOPEDIC SURGEON

JULY 30, 2024

Good afternoon Chair Warren, Ranking Member Kennedy, and Members of the Subcommittee. Thank you for inviting me. I am here to discuss my experience with noncompete agreements from a physician's perspective. It is an honor to share my story with you today.

My name is Rull James Toussaint. I have spent 2 years at the University of Florida where I am an orthopaedic surgeon. I would like to state for the record that the opinions expressed herein are my own and do not reflect the views or positions of the University of Florida or University of Florida Health.

I was born in Haiti, and emigrated to Florida where I learned to speak English while excelling in academics. I achieved the American dream when I was the first in my family to be accepted to college at the University of Chicago. Thereafter, I went to work on Wall Street in an effort to pay off my student loans. After an additional 4 years of hard work, I was blessed to be accepted to medical school at NYU where I was among the top of my class. As a result, I matched at Harvard University's prestigious orthopaedic surgery residency program and subsequently completed an orthopaedic foot and ankle fellowship at Ortho Carolina in Charlotte, North Carolina. At this point, my life goal was simple: to return to Florida as a well-trained orthopaedic surgeon who would treat his community, including the underserved.

In 2014, I returned to Florida and joined a private practice multispecialty musculoskeletal group as their only foot/ankle-trained orthopaedic surgeon. In fact, at the time, I was only one of two orthopaedic surgeons with this expertise across a dozen mostly rural counties in Florida, serving over 850,000 people.

Over the next few years, the partners of my practice and I felt the pressures of decreasing reimbursements from insurance companies coupled with the increased burden of pre-approval requirements from insurers, as well as intense competition from other practices. We felt that an infusion of capital was necessary to remain competitive. As a result, the partners entered into a purchase agreement with a private equity firm headquartered in California. The deal closed in 2017.

Although I am legally bound from disclosing the terms of the transaction, I can say that it included a restrictive covenant (i.e., a noncompete clause). Per the noncompete, I would be restricted from practicing orthopaedic surgery within 25 miles of:

1. Any facility in which the group is currently providing medical services;
2. Any facility in which the group has previously provided medical services;
3. Any facility in which the group has targeted for expansion within the entire State of Florida, or;
4. Any facility the group was in discussions with related to a potential acquisition.

This noncompete clause was valid for 2 years from the date of termination of employment for any cause.

At this point, one might wonder why we would sign such a deal. The reality is that the nuances of the noncompete were not known until we, the doctors, had spent hundreds of thousands of dollars in transaction expenses related to the acquisition.

As a group, we felt backed into a corner and believed our only choice was to proceed with the transaction in good faith.

Unfortunately, one of the private equity group's first actions after the deal was set was to install its own board and management team. The private equity group promised us that the new management team would have years of orthopaedic expertise. Unfortunately, none of the new leadership had any notable experience with running an orthopaedic practice.

Within months after the deal's closing date, the morale of the physicians and their staff changed for the worse. Many of the long-time employees were laid off or fired to make room for new hires by the private equity group. This led to patient dissatisfaction and significant disruptions in the physicians' day-to-day clinical practice.

Next, instead of cost savings, the practice's overhead expenses increased significantly. The increase was due to more layers of administrators, management fees, and millions of dollars of debt. The overhead increased so substantially that some physicians not only did not receive a paycheck, but instead actually paid the group to work, despite the physician taking on all the risks and responsibilities of patient care. After endless complaints from the physicians about the insurmountable overhead expenses, the private equity group finally responded. To the physicians' dismay, one of the methods of cost savings was to change malpractice coverage to a lower-tier, less-expensive insurance carrier.

Furthermore, the physician take-home pay decreased dramatically. As previously mentioned, some doctors indeed had to pay for the privilege to work. Unfortunately, some doctors were tempted to find other ways to pay their overhead. All the while, the cost to the patients continued to rise while they noticed their quality of care decreased. I had many patients complain to me about surprise billing and unexpected increases in their medical bills, as well as how they were unhappy with their treatment outcomes from overworked surgeons.

Since the private equity deal closed, nearly half of the group's original partners left the group. To save face, the private equity group's management team would lie to patients and say that the doctor retired, even though the doctor had not actually stopped practicing medicine. In my case, I was disillusioned by private equity's mismanagement of the practice and the group's focus on dollars instead of the quality of health care. I eventually put in my resignation letter highlighting my intention to leave private practice and enter academic medicine at the nearby nonprofit State-run institution. This decision made sense given that the only other orthopaedic foot and ankle subspecialist in the entire region was retiring, and I would be able to help educate the next generation of surgeons in my specialty. Despite this, the private equity group quickly sued to enforce the noncompete agreement to prevent me from practicing medicine at another facility. It did not matter to the private equity group that the local community and entire region—an already underserved community—would not have a specialist surgeon to care for their injured patients.

It did not matter to the private equity group that the academic medical center was the only provider of orthopaedic care for the Medicaid patients in the region and without me, the Medicaid patients would have to travel hours away for treatment.

And finally, it didn't matter to the private equity group that the State of Florida had enacted a statute (Chapter 542 Section 336) stating that if one entity employs all physicians who practice a particular medical specialty in a county, then restrictive covenants the entity enters into with those physicians are void and unenforceable.

Despite all of what I stated, within days of my leaving the practice, the private equity group threatened legal action to prevent me from entering academic practice. Despite the existing State of Florida statute negating the enforceability of the noncompete, the private equity firm's goal was clear. Their goal was to wage an expensive and prolonged legal battle in the hopes that I would capitulate and leave my community even before a final judgment was rendered.

After a 4-month dispute, a legal settlement was achieved, and I was able to join the faculty at the university. Not surprisingly, many patients from the private practice who seek my care at the university tell me of the frustrations they encountered when they called the old practice trying to find me. They said that the private equity group lied to them and stated I retired from medicine or left the State.

Because of my concerns with PE and health care, including their use of noncompete agreements, I'm a member of the Coalition for Patient-Centered Care (CPCC). CPCC represents a diverse group of health care industry stakeholders who stand together in opposition to private equity's acquisition and influence over independent physicians that can result in an emphasis on profits and revenue growth over patient interests. We call on other stakeholders who share our concerns about PE to

visit our website at www.patientcenteredcare.com, follow us on Twitter/X@CPCC—America and our LinkedIn page to join our cause.

Unfortunately, I have experienced the negative consequences that noncompete agreements have on patients, physicians and communities. My noncompete agreement restricted my ability to care for patients, and restricted patients' ability to seek medical care. I have concluded that these restrictive covenants negatively impact patient access to physicians, limit the quality of care, and increase costs to all parties. I look forward to the FTC's Noncompete Rule going into effect, because I know firsthand that banning noncompete agreements will benefit both physicians and their patients.

PREPARED STATEMENT OF HAYLEY PAIGE

SMALL BUSINESS FOUNDER AND WEDDING DRESS DESIGNER

JULY 30, 2024

Introduction

I am Hayley Paige, a wedding dress designer and the cofounder of SHE IS CHEVAL. From a young age, I was destined to design wedding dresses. My journey through childhood, education, and industry experience was dedicated to perfecting my craft and bringing joy to women through my designs. Wedding dress design is my identity, passion, and contribution to society.

The bridal fashion industry and brides embraced me. My designs graced the racks of over 250 stores, including Nordstrom and Anthropologie, and gained international acclaim. I was featured on "Say Yes to the Dress" and named one of Vogue's Top Ten bridal designers. The success and recognition I achieved were a testament to my dedication, hard work ethic, and the American Dream.

However, my journey took a harrowing turn when I faced a restrictive noncompete clause. This clause not only stifled my ability to work but also shook my faith in the justice system, left me financially devastated, and prevented me from designing and sharing my creativity with brides across the country. My experience underscores the critical need to ban noncompete agreements, which hinder creativity, suppress innovation, and restrict the potential of individuals and the economy.

This testimony reflects my personal battle and magnifies why banning noncompete agreements is essential for fostering a vibrant, competitive, and innovative economy.

Background and Personal Experience

In 2011, at the age of 25, I signed an employment contract that included a noncompete clause. At the time, I believed this noncompete was reasonably restricted to the duration of my employment. The contract seemed like the opportunity of a lifetime, and I felt compelled to accept its terms or I would lose the opportunity entirely. The imbalance of negotiation power and my intimidation by the prospect of hiring an expensive lawyer left me vulnerable. I could not foresee how this contract—including a separate intellectual property clause—would later be interpreted to strip me of my ability to use my own birth name, threaten my connection to women worldwide, stifle my skill set, and rob me of my livelihood.

My contract did not just impose a restriction during my employment but, as I later discovered, was interpreted in a way that limited my ability to practice my chosen trade in the future. In essence, to secure my dream job, I forfeited my dream once that job ended—or in my case, once my former employer sued me in Federal court.

In 2020, I faced a lawsuit and subsequent injunction that prohibited me from using my own birth name in commerce and required me to relinquish control of my personal social media accounts, including my Instagram account which had grown to over 1 million followers. I was also barred from working in my chosen field for 5 years because of a noncompete provision. Without question, the noncompete provision was the most devastating of the three. I could start over with a new name, I could open new social media accounts and rebuild, but I could not work in my chosen craft.

While this was shocking and devastating, I refused to succumb to victimhood. I publicly changed my name to Cheval and started a new Instagram account. However, the notion of having to learn an entirely new trade after dedicating my life to this industry was unconscionable and unjust.

This lawsuit, coupled with the broad interpretation of my contract, led to a three-and-a-half year long legal battle that led me to incur millions of dollars in legal fees—an amount far beyond what many individuals (myself included) could afford.

I spent every dollar I ever earned designing wedding dresses to fight for my right to do so once again.

Being stripped of the talent I had worked so hard to cultivate and encourage has shown me how devastating noncompetes are to personal development and the economy.

Impact of the Noncompete

Where I once found creative freedom and incentive to advance, I soon encountered unreasonable confines that limited my freedom of speech and my ability to publicly practice a trade I had passionately cultivated since childhood. More dramatically, I was limited in my creative expression on social media due to the broad interpretation of my contract. At one point during my litigation, I was even held in contempt of court for sketching dresswear on social media. This harmful restriction on my personal expression was a stark threat to my First Amendment rights.

The residual stress my situation caused brides was devastating to witness. Many women who had followed my personal social media account, @misshayleypaige, from its inception and watched me interact with all types of brides on "Say Yes to the Dress" had their own diverse dreams of one day choosing a Hayley Paige gown for their most special day. The harsh reality was that they were no longer getting a dress from me, the designer they personally connected with and inspired, and there would be no new dresses to choose from. This tarnished what should have been an emotional and genuine purchase.

Moreover, the noncompete adversely affected bridal retailers who had financially invested in my collections on the premise that I would be the designer providing the work. Many refused to support new Hayley Paige collections that were not designed by me. The market, which demands the freshest and most dazzling designs twice a year during bridal fashion week, was deprived of healthy competition. The industry lost the benefit of my creative contributions and a unique design aesthetic not practiced by other designers in the industry.

Broader Implications and Unfairness

My case exemplifies how noncompetes can be weaponized to the detriment of individuals and industries. The broad interpretation of these agreements leads to outcomes that stifle creativity and innovation. While I had the rare resources to fight for my rights and a legal team that was willing to keep fighting when my financial resources ran dry, many others do not share that privilege. Individuals like myself are often at a stark financial disadvantage to those seeking to enforce noncompetes. The financial and emotional toll of the legal battle alone is a burden that most people cannot bear, making this issue all the more pressing.

Noncompetes are detrimental not only to high-profile professionals but to workers across all sectors. They hinder economic growth by preventing talented and hard-working individuals from contributing to the marketplace, which stifles competition. If we want to encourage innovation and ensure that the American Dream remains accessible, we must eliminate these restrictive practices.

Living in a country where freedom and fairness should ring true, I want to demonstrate how noncompetes operate shamelessly on a one-way highway: if we are not limiting competition among corporations, why are we limiting it among individuals? As I sought a way forward in my lawsuit, I started a small business and, as a founder, I depend on competition to inspire and elevate my performance.

Another example of this one-way highway is the unilateral benefit for corporations to continue hiring and profiting, while the employee is restricted from working and earning a living. In my situation, I was replaced by a new designer who took over my brand and collections in a matter of months, but I was restricted from making a living doing what I had dedicated my life to for years.

Due to the broad interpretation of my employment contract, my life's work and passion were halted. All my hard work seemed to amass an unreasonable debt, requiring me to sit on the sidelines and cease my progress. The idea that my contribution to society was no longer my choice or in my hands was unfathomable.

Alternative Protections and Innovation

The last area I wish to focus on with respect to the threat noncompetes pose to our economy is the plethora of thoughtful ways to protect intellectual property without stifling innovation and personal growth. Nondisclosures and privacy policies allow corporations to safeguard valuable trade secrets effectively. These measures can be implemented without resorting to harmful noncompetes or preventing people from working, earning a living, and pursuing their passions.

As a small business founder and capitalist, I fully recognize the importance of protecting sensitive information. But I firmly believe in our ability to achieve this while also allowing individuals to continue working and contributing to their fields. We

can preserve corporate interests without constraining the creative and entrepreneurial spirit that drives our economy.

States like California have already banned noncompete agreements, serving as proof that innovation and economic growth can thrive without these restrictive clauses. Silicon Valley, an area I grew up in, is a testament to the power of human intelligence and greatness. Imagine the stagnation that would ensue if we were to stifle that innovation with noncompetes. Healthy competition is not only beneficial but essential for a robust and dynamic economy.

In my previous employment role, I signed a nondisclosure agreement to protect the company's financial and other sensitive information. This demonstrates that there are already effective tools in place to safeguard corporate interests without hindering individuals' careers. Noncompetes are an unnecessary and harmful redundancy.

Conclusion

My experience of being constrained by a noncompete clause has profoundly reinforced my belief in the necessity of banning these provisions. Often disguised as genuine agreements, they are harmful tools that undermine fair competition and threaten the American Dream. These provisions silence voices, stifle creativity, and suffocate the entrepreneurial spirit that has always driven our Nation forward.

Imagine a world where the next great innovation is left unrealized, where the brightest minds are left idle, and where the American Dream is nothing more than a distant memory. This is the world noncompetes create—a world where potential is capped and progress is halted. We owe it to ourselves and to future generations to dismantle these barriers and build a marketplace that thrives on the free exchange of ideas and the relentless pursuit of excellence. If the next great American inventor, creator, or entrepreneur is constrained by a noncompete, it is likely that innovation will happen elsewhere and America will fall behind.

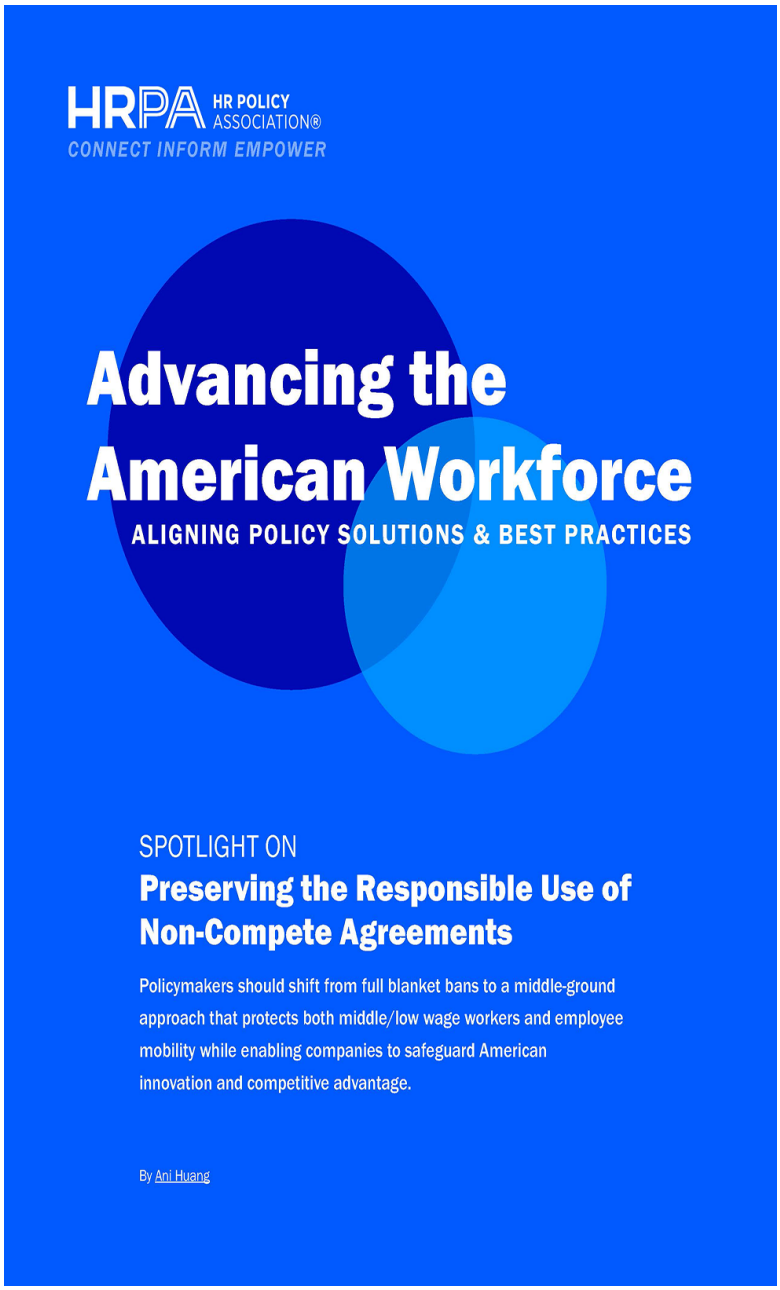
I urge the Committee to consider the broader implications of noncompete clauses. These agreements do more than restrict individual careers; they erode the very foundation of a free and dynamic economy. They are antithetical to the spirit of competition and innovation that defines us as a Nation.

Let us champion measures that promote a more equitable and vibrant marketplace, one where every individual has the chance to pursue their passions, contribute to their industries, and drive economic growth. Let us create an environment where talent and hard work are rewarded, where dreams are not deferred but achieved, and where the American Dream is not just a promise but a reality for all.

In the words of the great Robert F. Kennedy, "Each time a man stands up for an ideal, or acts to improve the lot of others, or strikes out against injustice, he sends forth a tiny ripple of hope." Let us be those ripples. Let us stand up for what is right. And for sparkle sakes, let the girl design a dress.

Thank you.

ADDITIONAL MATERIAL SUPPLIED FOR THE RECORD



About this Series

HR Policy Association (HRPA) represents nearly 400 of the largest companies worldwide. Members employ more than 10 million individuals in the U.S. This report articulates the perspectives of our members regarding the trajectory of work in the U.S. and the need for specific changes in both corporate and public policies to effectively advance the future of the American workforce.

HR Policy Association's "Advancing the American Workforce" series equips policymakers and business leaders with insights from Chief Human Resource Officers (CHROs) of major companies. The profound changes employers and society have experienced over the past five years have transformed the way large employers and their employees think about work, the workforce, and the workplace and how each needs to be structured for long-term success. HR Policy provides the perspective, not only from employers, but from CHROs who bridge the goals of their companies with the talents and needs of its greatest asset: employees.

New technologies, evolving demographics, and shifting political winds demand a strategic approach to HR. Chief Human Resource Officers are at the forefront of navigating these changes, and their perspective provides invaluable insights for policymakers. This multi-part series offers practical experiences and perspectives on the critical trends shaping the future of work, and suggests policy approaches to ensure the American workforce remains at the vanguard of global excellence in the years to come.

Executive Editor: Timothy J. Bartl

Series topics include:

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- Human Capital Management
- Immigration
- *Non-Compete Agreements*
- Pay Transparency
- Retirement
- Workplace Flexibility

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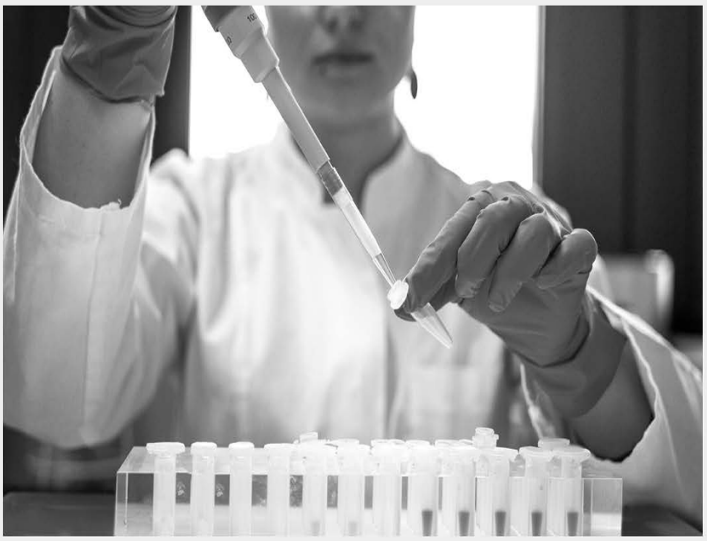

EXECUTIVE SUMMARY

Preserving the Responsible Use of Non-Compete Agreements

Non-compete agreements are an important tool that help companies protect vital investments in their employees, while ensuring the security of research and development, trade secrets, and institutional knowledge.

Increasingly, certain policymakers have focused on blanket bans on non-compete agreements, with the well-intentioned but misguided belief that these bans will protect employee mobility and promote labor market competitiveness.

The legislative and regulatory landscape around non-competes in the United States is complex and constantly evolving, with a mix of federal and state laws addressing the issue. As we look to 2030 and beyond, policymakers should take a middle-ground approach to non-compete legislation that protects both middle/low wage workers and employee mobility while also enabling companies to safeguard their intellectual property and competitive advantage.

HRPA

Companies Rely on Non-Competes to Protect American Innovation

Large employers use non-compete agreements for executive-level employees or those with access to sensitive information; the agreements are limited in time and are often tied to specific benefits.

In a January 2023 survey of HR Policy Association members, 75% of respondents indicated that fewer than 10% of their employee population were subject to non-compete restrictions (28% of these respondents utilized non-compete agreements for fewer than 1% of their workforce). HRPA's survey also showed that member companies, in nearly all cases, used non-compete agreements solely for executive or leadership level employees or those employees with specific access to confidential and proprietary information.[1] Further, most companies reported that their non-compete agreements remain in effect for no more than one year after an employee's departure, and as little as six months for non-executive officers.

Large employers typically use non-compete agreements for executive-level employees or other employees with access to sensitive information. The agreements are limited in time and are most often included as consideration for equity awards or severance agreements (*i.e.*, tied to a specific benefit). These agreements are the result of negotiation between sophisticated parties often represented by legal counsel, not an imbalance in bargaining power between the employer and the employee. Finally, these agreements are entered into to protect trade secrets, intellectual property, and proprietary information and (to a lesser extent) the company's goodwill and reputation with its customer base. Each of these are reasonable justifications recognized under state law and by the courts.[2]

There has been a recent explosion of state and federal action to completely ban the use of non-compete agreements at all levels of a company. The FTC finalized its sweeping ban in 2024, while New York may join California and a number of other states with total non-compete bans, not to mention the existing patchwork of limited bans in a slew of other states.

A blanket ban on non-compete agreements, such as the FTC's rule, while intended to protect employee mobility and promote labor market competitiveness, would in fact present significant challenges for companies and the safeguarding of intellectual property.

75% of large employers report that fewer than 10% of their employee population is subject to non-compete agreements.

Most non-compete agreements remain in effect from 6 months to 1 year after an employee's departure.

SOURCE: HR POLICY ASSOCIATION'S CHRO SURVEY, 2023

HRPA

The FTC's Blanket Ban is Not the Answer

While intended to protect employee mobility and promote labor market competitiveness, a blanket ban on non-compete agreements – such as the FTC's rule – would in fact present significant challenges for companies and the safeguarding of intellectual property.

Protection of Trade Secrets and Proprietary Information: Non-compete agreements serve as a critical tool for protecting trade secrets and proprietary information. Without them, companies face heightened risks of employees leaving to work for competitors and potentially taking sensitive information, leading to unauthorized use or disclosure of valuable intellectual property. Such agreements are often the only protection available to a company, since it can be virtually impossible to determine what proprietary information the former employee has shared with the new employer.

Innovation and Research & Development: Companies heavily invested in research and development, particularly in industries with long product development cycles, such as medical device development, rely on non-compete agreements to retain talent and protect their innovation. A blanket ban would enable employees critical to the development of the product, technology or research to take proprietary information to competitors, hindering innovation and impeding technological advancements in industries reliant on intellectual property.

Competitive Disadvantage: Companies may face a competitive disadvantage without the ability to limit employees' immediate entry into competing firms. This unrestricted mobility could allow competitors to poach key talent, benefiting from the knowledge and expertise gained from a former employer, thus eroding a company's market share or competitive edge.

Impact on Training and Investment: Companies invest significantly in training and development of employees. Without non-compete protections, there's a risk of employees leaving shortly after substantial investments in their skills and knowledge, leading to losses for the company.

Regional Competitiveness: In jurisdictions where non-competes are banned, local companies might struggle to compete against counterparts from regions with more favorable IP protection laws. This could result in talent drain and economic challenges for companies with facilities in these regions.

Non-competes are a vital tool

A full ban presents significant challenges for companies and the safeguarding of intellectual property

HRPA's Policy Recommendations

Properly tailored federal legislation could achieve the goals of both opponents and proponents of non-compete agreements.

A middle ground solution would prohibit their use for lower-wage, entry-level employees with little to no economic leverage, while retaining their use for more sophisticated, highly compensated employees. The latter group generally consists of employees with significant economic leverage and access to the types of information companies are seeking to protect.

A framework for potential model legislation should encompass the reforms below.

HR Policy Association Supports the Following Reforms:

1. **Reform non-compete agreements to apply to specific populations**
   Non-compete agreements would be presumed lawful for protection of specific business interests for all employees making more than the average wage in the state in which the agreement is operative.

2. **Eliminate non-compete agreements for lower-wage employees**
   Non-compete agreements would be prohibited for employees making below the average wage in the state in which the agreement is operative.

3. **Define lawful protectable business interests**
   Lawful protectable business interests would include trade secrets (broadly defined), ongoing client and customer relationships, as well as certain specific business sales or business creations.

4. **Narrowly tailor the geographical area and scope of the competition**
   For agreements to be lawful, they must be narrowly tailored in geographical area and type of work or services impacted to protect a lawful protectable business interest.

5. **Limit the time that agreements are in effect after work relationships end**
   For trade secrets and client and customer relationships, non-compete agreements cannot be in effect for more than one year after the work relationship ends.

6. **Extend the effective period for specific cases**
   For business creation and business sales, the period would be extended to five years.

HRPA

A Final Thought on Non-Compete Agreements

In the absence of federal action, replicating current, workable state laws (such as in Georgia) across different jurisdictions would be the most effective option to preventing a proliferation of more restrictive actions, including blanket bans. In any case, creating more uniformity and harmony across the states should be a priority.

Endnotes

[1] Nearly half of respondents also reported using non-compete agreements for equity recipients, as a condition of receiving such equity.

[2] *Noncompete Agreements and American Workers: Hearing Before the Subcomm. On Small Business and Entrepreneurship*, 116th Cong. 70-84 (2019) (Written Testimony of Russell Beck, Partner, Beck Reed Riden LLP).

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HRPA's Board of Directors

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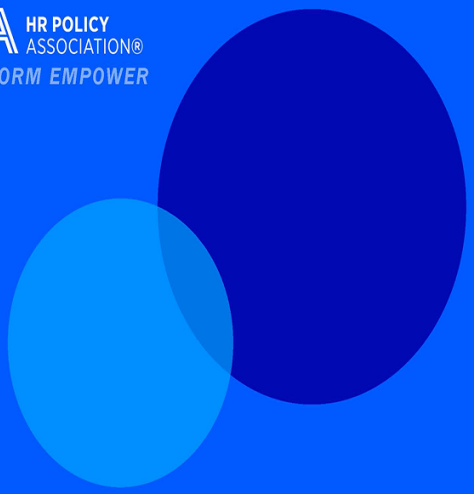

ABOUT

HR Policy Association

For more than 50 years, HR Policy Association has been the lead organization representing Chief Human Resource Officers of major employers. HRPA consists of nearly 400 of the largest corporations doing business in the United States and globally. These companies are represented in the organization by their most senior human resource executives. Collectively, HRPA member companies employ more than 10 million employees in the United States, over nine percent of the private sector workforce, and 20 million employees worldwide. These senior corporate officers participate in the Association because of their unwavering commitment to improving the direction of human resources policy. To learn more, visit hrpolicy.org.

July 30, 2024

The Honorable Elizabeth Warren
Chair
Senate Banking Subcommittee on Economic Policy
534 Dirksen Senate Office Building
Washington, D.C. 20510

The Honorable John Kennedy
Ranking Member
Senate Banking Subcommittee on Economic Policy
534 Dirksen Senate Office Building
Washington, D.C. 20510

Chair Warren, Ranking Member Kennedy:

Thank you for holding today's hearing on "Banning Noncompete Agreements: Benefits for Workers, Businesses, and the Economy." For too long, corporations and predatory employers have used restrictive noncompete clauses in employment contracts to limit economic mobility, unfairly disadvantage small and emerging businesses, and restrict innovation across the economy. We applaud you for holding today's hearing to shine a light on the Federal Trade Commission's work to restore workers' power in the economy, fight greedy corporations, and lower prices for hardworking Americans.

Over the last few decades, noncompetes have become ubiquitous across the American economy. Today, approximately 30 million people – one in five workers – is subject to a noncompete clause signed as a condition of employment.[1] While most imagine noncompetes primarily affecting corporate executives and other high-powered individuals,, the average worker saddled with a noncompete makes only $14 an hour.[2] Additionally, noncompetes have been found by multiple researchers and studies to have a disproportionate impact on marginalized communities.[3] This can leave workers trapped in jobs in which they are underpaid or are discriminated against based on their gender, race, or sexual identity.

Earlier this year, the FTC finalized a long-awaited rule to ban the use of noncompetes in almost all employment contracts.[4]According to the FTC, this rule would have broad, economy wide benefits for workers and small businesses. They anticipate that over the next ten years this rule will generate up to $488 billion in increased wages for workers, with the average American

[1] Michelle Long, et. al, "What the FTC's New Protections From Non-Compete Agreements Mean in a Mostly Non-Profit Hospital Industry," KFF (July 24, 2024).
[2] Elizabeth Schuze, "FTC bans noncompete agreements for many Americans but legal battle looms that would delay change," ABC News, (Apr. 23, 2024).
[3] Jessica Guynn, "How noncompete agreements harm women and people of color: 'Consequences can be devastating.'" Jan. 19, 2023.
[4] Federal Trade Commission, "FTC Announces Rule Banning Noncompetes," (Apr. 23, 2024).

making almost $600 more per year.[5] Approximately 8,500 new businesses will open their doors every year because of this rule, according to experts at the FTC.[6]

Unsurprisingly, this rule faces a number of frivolous legal challenges from big business interests who are working to maintain this powerful tool to control workers' lives. We were encouraged to see Judge Hodge in the Eastern District of Pennsylvania deny an attempt to pause the FTC's rule and state in no uncertain terms that issuing this rule is well within the FTC's authority.[7] However, the rule's future is in jeopardy because of a misguided decision in another case brought by a tax consulting firm in the Northern District of Texas.[8]

We strongly support the FTC's rule, as well as any legislation to outlaw noncompete clauses and related restrictions on worker mobility. Congress could move to codify the FTC's sweeping, historic rule, protecting millions of Americans from a potential attempt to nullify the rule through the Congressional Review Act.

Once again, we commend you for holding today's hearing to reveal the impact noncompete clauses have on our economy and advance workers' rights. Eliminating noncompetes is a necessary step towards building a strong, vibrant economy for all Americans.

Sincerely,

Accountable.US
American Economic Liberties Project
Economic Security Project Action
Demand Progress
Jonathan Harris, Associate Professor of Law, Loyola Law School Los Angeles
Open Markets Institute
P Street
Public Justice
Public Knowledge
Small Business Majority

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[5] *Id.*
[6] *Id.*
[7] Daniel Weissner, Brandon Pierson, "US judge will not block Biden administration ban on worker 'noncompete' agreements," (July 23, 2024).
[8] Alex Lau and Lauren Leyden, "FTC Non-Compete Ban Preliminarily Enjoined by Texas District Court," Akin Gump (July 8, 2024).

July 30, 2024

Re: Economic Policy Subcommittee Hearing: Banning Noncompete Agreements: Benefits for Workers, Businesses, and the Economy

Dear Chair Warren, Ranking Member Kennedy, and members of the Senate Committee on Banking, Housing and Urban Affairs' Subcommittee on Economic Policy,

Engine is a non-profit technology policy, research, and advocacy organization that bridges the gap between policymakers and startups. Engine works with government and a community of thousands of high-technology, growth-oriented startups across the nation to support the development of technology entrepreneurship through economic research, policy analysis, and advocacy on local and national issues. The ability to launch and grow a startup, including through talent acquisition, is critically important to the success of U.S. innovation. And the use of restrictive noncompete agreements has a direct impact on founders and would-be entrepreneurs. We are thankful to the subcommittee for taking the time to consider this important issue, particularly as conflicting federal court rulings underscore the need for Congressional action to broadly ban noncompete agreements.

As we explained in comments to the Federal Trade Commission (FTC), the use of noncompete agreements harms the innovation ecosystem in multiple ways: noncompetes are governed by a patchwork of state laws, establishing geographic distortions in a national startup ecosystem where talent can be found in any state; noncompetes interfere with the natural progression of the startup lifecycle, both hindering would-be founders from launching startups and preventing founders from assembling teams; and finally, noncompetes protect today's "winning" companies, limiting the ability of startups to grow and preventing former employees from launching competing companies using the talents they've developed.[1] Simply put, broadly banning noncompete agreements will allow the startup ecosystem to flourish as it should, permitting worker mobility, facilitating the generation of new, innovative companies, and will help underrepresented founders and talent succeed in the startup ecosystem, especially women, who disproportionately bear the impacts of noncompete agreements.[2]

Implementing a noncompete ban will create geographic uniformity, and, as we've previously stated, "[i]n truly healthy and competitive national markets, differences in outcomes should result from differences in the fundamental quality of firms—not exogenous legal factors."[3] Patchworks of state law, coupled with existing regional differences affecting the growth of startups, means that geography can be a deciding factor in the success of a startup.[4]

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[1] See comments from Engine to the Federal Trade Commission, available at: https://static1.squarespace.com/static/571681753c44d835a440c8b5/t/643efcca92c89d3e76e8711d/1681849546779/Engine_FTC+Non-Compete+Comment_Filed_04172023.pdf

[2] *Id.*

[3] *Id.*

[4] *Id.*

Perhaps most significant to the startup ecosystem, noncompetes often serve as a legal tool that prevents would-be founders from launching companies and prevents current entrepreneurs from hiring needed talent. Startups drive American innovation and job creation, but noncompetes hinder a startup's generation and success. Research bears out the benefits of a noncompete ban on business formation in the technology industry.[5] As we previously told the FTC, according to research by the Economic Innovation Group:[6]

> In 2015, Hawaii banned non-competes for "any employment contract relating to an employee of a technology business." The reform also included a ban on co-worker non-solicitation covenants. EIG's study found that Hawaii's ban on non-competes for tech workers resulted in a 10.2 percent increase in the number of "technology establishments" and seeded skilled technology workers across the labor market. To no one's surprise, more mobile tech workers led to more tech startups.

And, in leading to the formation of more tech startups, there are naturally more competitors in the startup ecosystem. When top-talent is free to launch their own ventures, they are uniquely positioned as within-industry founders to support competition and drive innovation.[7] Founders are able to put together better teams, who have developed wells of knowledge working in their fields. And, importantly, noncompete agreements are inessential to safeguarding innovation—companies are still protected under trade secret law and non-disclosure agreements, which "are existing legal tools specifically designed to address investment, R&D and innovation concerns."[8]

Attached, you will find Engine's comments to the Federal Trade Commission which delve more deeply into how noncompete agreements impact innovation. Once again, thank you for holding this important hearing. We urge policymakers to take action, including by passing the Workforce Mobility Act, because a nationwide ban on noncompete agreements is essential to the strength of the U.S. startup ecosystem.

Sincerely,

Engine Advocacy
700 Pennsylvania Ave SE
Washington, D.C. 20003

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[5] *See* Benjamin Glasner, The Effects of Noncompete Agreement Reforms on Business Formation: A Comparison of Hawaii and Oregon (2023).
[6] Engine, *supra* note 1.
[7] *Id.*
[8] *Id.*

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Before the

FEDERAL TRADE COMMISSION

In the Matter of Non-Compete Clause Rulemaking

Matter No. P201200

Comments of Engine Advocacy

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Executive Summary

Startups Drive American Innovation.

Today's stars were yesterday's startups.

- Apple, Microsoft, Google, Amazon, Meta, Tesla, Netflix, Uber, Airbnb, and other innovative giants were once conventional startups—small, scrappy, and backed by funding that believed in founders, a pitch deck, and a dream.
- Of companies founded after 1968 and went public after 1978, venture-backed startup companies account for 92% of R&D spending and 93% of patent value. And these stats underestimate the impact of startups—the vast majority of startups will never receive venture capital, and some startups never seek VC funding in the first place.
- The top 6 companies on Forbes' 2022 list of the World's Most Innovative Companies are US companies that were once conventional startups.

Noncompetes Saddle America's Startup Ecosystem with Unnecessary Legal Complexity.

Non-competes are governed by a patchwork of uncertain state law.

- Only three states categorically ban non-competes, while the remaining 47 use complex "reasonableness" tests that vary from state-to-state, time-to-time, and industry-to-industry.

Navigating the patchwork of state law has costs: money, time, and opportunity—three things startups cannot afford to lose.

- If the startup wants to do the legal analysis, it will spend ***money*** on counsel fees.
- Whether the startup pays for the legal analysis or moves on to the next applicant, it will spend more ***time*** making the hire.
- And where the startup passes over an applicant subject to an unenforceable non-compete (whether due to incorrect legal advice or a strategy of absolute avoidance), it loses an ***opportunity***.

Banning Non-Competes Will Create a Freer Market for Startups to Thrive.

More founders from more backgrounds will start new, promising companies.

- Banning non-competes will free top talent at established companies to become founders—within-industry founders are best positioned to increase competition and drive innovation.
- Non-competes disproportionately harm women, limiting women from becoming founders.

Startups will have a freer talent pool to draw and learn from, leading to better teams and greater success.

- Non-competes restrain founders from recruiting talented employees that currently work in related fields—the exact employees with expertise that startups need.
- Mentorship is critical to startup success, and non-competes can restrain seasoned founders from counseling, advising, and investing in new founders.

Introduction

Engine is a non-profit technology policy, research, and advocacy organization that bridges the gap between policymakers and startups. Engine works with government and a community of thousands of high-technology, growth-oriented startups across the nation to support the development of technology entrepreneurship through economic research, policy analysis, and advocacy on local and national issues. Engine appreciates the opportunity to submit this response to the Federal Trade Commission's request for comment on the Commission's notice of proposed rulemaking banning most non-compete clauses in employment contracts.

The Commission's Proposed action on non-competes is an opportunity to make our markets more competitive and our workforce more dynamic. It is also an opportunity to bring clarity and freedom to American startups and entrepreneurs to maximize innovation.

First, as a legal instrument governed by a patchwork of state laws, non-competes create geographic distortions in an increasingly national startup ecosystem. Talent is everywhere, and the advent of practices like remote work should create an era of unprecedented talent mobility. And yet, non-competes distort the playing field by creating "unfavorable" geographic regions. What's more, navigating the legal uncertainty created by the patchwork of state law especially harms resource-strapped firms like startups.

Second, non-competes interfere with two critical stages in a startup's lifecycle: formation and team assembly. Any time that a would-be founder is kept from starting a potential competitor is time wasted. Competition and innovation are sacrificed at the altar of protectionism. And, in some cases, competition and innovation are estopped altogether when would-be founders never return to the fold after being sidelined by a non-compete. Even once a startup has overcome the barrier of formation, non-competes still meddle by impeding—or altogether preventing—the founder from assembling the right team. And without the right team, a startup is destined for failure.

Finally, non-competes insulate today's winners from competition, denying startups the meritocratic marketplaces in which they can compete with bigger players. However, a ban on non-competes will free up more than just our competition markets: It will free groups of underrepresented would-be founders—particularly women—from the restrictive impacts of non-competes that they disproportionately bear. More diversity means more and better innovation, but non-competes only get in the way.

Although startups would benefit most from Congressional legislation, the FTC's proposed ban is a good first step in creating a freer and more diverse startup ecosystem to do what it does best: drive American innovation.

The FTC Should Ban Non-Competes with Extremely Limited Exceptions

I. A National, Categorical Ban Will Create the Clarity that Startups Need to Succeed.

Navigating the current law of non-competes challenges startups in two major ways. First, non-competes are governed by a patchwork of state laws despite startup operations, employees, and contractors increasingly being spread throughout the country. Second, in the vast majority of states, the non-compete law is built on a "reasonableness" standard—resource-strapped startups do not have the time or resources to get counseled on what this means for hiring their next engineer. Federal policymakers should establish a clear rule across the country.

A. A National Ban Will Create Geographic Uniformity and Level the Playing Field Across the Startup Ecosystem.

Startups are everywhere because talent and ideas are everywhere.[1] But non-competes keep that talent from being *accessible* everywhere. Startup success must reflect the merits of ideas and not the zip codes of operations and talent.

Despite startups and talent being spread across the country, non-compete enforceability is a patchwork of state law. The Commission has compiled an extensive survey of the state statutory and common law governing non-compete enforceability and highlighted the many differences between them.[2] These differences distort the starting line in a competitive race to bring innovation to market.

Startups constantly operate at the intersection between breakthrough and failure, often battling competitors on their merits to establish the best product or service. In an ecosystem built on the slimmest of margins, any daylight between one startup and the next can be the difference between success and failure. In truly healthy and competitive national markets, differences in outcomes should result from differences in the fundamental quality of firms—not exogenous legal factors. The disparate enforceability of non-competes coupled with existing regional biases unnecessarily renders the steep climb of some startups even steeper.

Consider the Washington, D.C. metro area. D.C. is a rapidly growing and Top 10 startup ecosystem by deal count and deal value.[3] D.C., Virginia, and Maryland, however, use different methods to determine the enforceability of non-competes, and the disparity has consequences for startups: a starting software engineer making $125K in salary could be subject to an enforceable non-compete

[1] Engine currently serves startups in all 50 states.

[2] Non-Compete Clause Rule, 88 Fed. Reg. 3482, 3493, 3496 (Jan. 19. 2023) (to be codified at 16 C.F.R. pt. 910) [hereinafter NPRM].

[3] *See* PITCHBOOK, VENTURE MONITOR: Q4 2022, at 19.

in Maryland and Virginia, but not in D.C.[4] A young engineer should not have her career mobility restricted only because she took her first job across the Potomac. What's more, the disparate treatment unnecessarily undermines remote worker mobility and tees up complex choice-of-law issues (discussed in greater detail below).

By taking federal action, the Commission's proposed ban would help to level one critical aspect of the competition playing field: access to talent. With remote work and investment attention increasingly directed to new and diverse startup ecosystems, we should be entering into a golden era of startup growth and talent mobility across the country. Startups everywhere should be able to rely on a clear playbook for talent acquisition.

B. A Categorical Ban Minimizes Uncertainty for Resource-Strapped Startups.

A Texas startup wants to hire a remote engineer in Washington state, who is subject to a non-compete clause with a former employer that claims to be governed by the law of Delaware. Which law applies? What is the result under that state's law? And does it matter whether the engineer is hired as an employee or a contractor? That the engineer was highly compensated at their previous employer? That the previous employer is a Delaware corporation and has a small, satellite office in Austin?

This is a real-world issue faced daily by countless startups across the country—and the possible permutations of the issue are endlessly complex and fact-intensive. So not only is national direction necessary, but that direction must also be clear and categorical to the greatest extent possible. The FTC correctly embraces a categorical ban on non-competes that greatly reduces legal uncertainty across three dimensions: (1) which ***law*** applies, (2) is the non-compete ***enforceable*** under that law, and (3) what is the ***remedy*** if the non-compete is unenforceable?

Three states have used statutes to make non-competes mostly unenforceable and to resolve choice-of-law conflicts. Everywhere else, it remains a headache. Out of the 47 states that have not statutorily banned non-competes, most employ a reasonableness inquiry in determining enforceability. As a fact-intensive standard, there is no clear rule in how the law will be applied case by case. Over time, what is "reasonable" has differed from state to state and from industry to industry.[5]

But the patchwork issue runs even deeper than mere enforceability standards: Legal analysis may also face a complex choice-of-law question. The Commission, too, has examined this issue in great detail and has explained that the choice-of-law question can be outcome determinative, can place a greater burden on the less sophisticated employee, and can even create a race to the courthouse.[6]

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[4] *Compare* District of Columbia, D.C. Code sec. 32-581.02(a)(1) (effective Oct. 1, 2022) (non-competes are unenforceable for employees whose compensation is less than $150,000, or less than $250,000 if the employee is a medical specialist), *with* Maryland, Md. Code Ann., Lab. & Empl. sec. 3-716(a)(1)(i) (effective Oct. 1, 2019) (non-competes are unenforceable for employees who earn equal to or less than $15 per hour or $31,200 per year), *and* Virginia, Va. Code Ann. sec. 40.1-28.7:8(B) (effective July 1, 2020) (non-competes are unenforceable for employees whose average weekly earnings are less than the Commonwealth's average weekly wage).

[5] *See generally* ORLY LOBEL, TALENT WANTS TO BE FREE 53-57 (Yale Univ. Press 2013).

[6] *See* NPRM, *supra* note 2, at 3495-96; Application Group, Inc. v. Hunter Group, Inc., 61 Cal. App. 4th 881 (1998).

Forum-selection and mandatory arbitration clauses create even more uncertainty, which the Commission has also noted.[7]

And even if the *enforceability* of a non-compete is relatively predictable, courts may inject fresh uncertainty in creating the remedy. Again, the Commission has noted the differences between the "equitable reform," "blue pencil," and "red pencil" methods for reforming an unenforceable non-compete,[8] but none offer sufficient clarity.

This is a complicated legal landscape. **Navigating each stage in this uncertain patchwork has costs: money, time, and opportunity—three things startups cannot afford to lose**.

> **Founder Testimony**: "We made an executive hire who was covered by a noncompete from a larger company. We had to think very hard about whether, as a startup, we could afford to take on the risk. Ultimately we relied on goodwill, but the uncertainty the noncompete created was in no one's best interest."
> Matthew Caywood, Actionfigure. Washington, DC

Startups operate with finite resources, slated to last a short period of time. Time is money, and that money is almost always coming from the founders' own pockets, investors, or alternative forms of financing. It is in tight supply—for many underrepresented founders, it is even tighter[9]—and unless the business shows continual progress, it will dry up.

No startup enjoys paying fees for legal counsel. Few startups even have the luxury. Money spent on counsel can be necessary and worthwhile, but it always represents an opportunity cost—products and services need to be developed and brought to market, and time and money unnecessarily spent on anything else impedes progress.

The average seed stage startup, for example, only has $55,000 a month in resources.[10] After payroll and expenses, startups have extremely little wiggle room to cover additional costs like hourly fees from legal counsel.

For these reasons, many startups (outside of states with statutory bans, like California) will see that a prospective hire has a non-compete and end recruitment right there. The startup does not have the time or the money to figure out whether the non-compete is enforceable. In many cases, it likely isn't, so the startup has lost the opportunity to hire talent.

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[7] NPRM, *supra* note 2, at 3495-96.

[8] *Id.* at 3495.

[9] *See, e.g.*, PITCHBOOK, ALL IN: FEMALE FOUNDERS IN THE US VC ECOSYSTEM 4-5 (2022) (showing lower pre-money valuations for female-founded startups as compared to male-founded startups at similar points in their lifecycle).

[10] ENGINE, STARTUP POLICY AGENDA: HOW POLICYMAKERS CAN BE STARTUP CHAMPIONS 4 (2023), https://perma.cc/S2H8-WLFY.

This means that the patchwork of state law and enforceability poses a triple threat to resource-strapped firms like startups:

- If the startup wants to do the legal analysis, it will spend ***money*** on counsel fees.
- Whether the startup pays for the legal analysis or moves on to the next applicant, it will spend more ***time*** making the hire.
- And where the startup passes over an applicant subject to an unenforceable non-compete (whether due to incorrect legal advice or a strategy of absolute avoidance), it loses an ***opportunity***.

By adopting a rule with a categorical ban as its cornerstone, the FTC is building a foundation of certainty on which startups and other resource-limited firms can rely on in their uphill fight to secure top talent.

II. A Categorical Ban Will Free Startups to Maximize Innovation.

It's no secret that America's startups of yesterday are to thank for many of the world's innovations of today: the smartphone, the electric car, cloud computing, the reusable rocket, and more. If innovation is a race, startups are behind the wheel. But non-competes are a redundant roadblock: they hinder both the formation and talent recruitment of startups, just as other sufficient legal mechanisms stand ready to protect innovation and investment.

A. Startups Drive American Innovation.

Apple. Microsoft. Google. Amazon. Meta. Tesla. Netflix. Uber. Airbnb. These American companies represent a rich history of innovating across devices, computing, virtual reality, electric vehicles, entertainment, travel, and more. But these companies also were, at one point in time, conventional startups—small, scrappy, and backed by funding that believed in founders, a pitch deck, and a dream. **Today's stars were yesterday's startups.**

In 2015, companies that were once venture-backed startups accounted for 41% of total US market capitalization and 63% of R&D spending by US public companies.[11] If the universe of companies is confined to the modern era of startups and venture capital (i.e., companies that were founded after 1968 and went public after 1978) the impact is staggering: "VC-backed companies account for half of these recent companies by number and three quarters by value, as well as, remarkably, generating 92% of R&D spending and 93% of patent value."[12] Given the onward march of technology and high-growth companies since then, the economic impact is likely even greater today. And these stats underestimate the impact—the vast majority of startups will never receive venture capital (and even most of those that do will fail), and some startups never seek VC funding in the first place. And yet, their positive impacts across American innovation, labor markets, and entrepreneurship are immense. It takes startups of all stripes to fill the many diverse niches of a vibrant ecosystem.

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[11] Will Gornall & Ilya A. Strebulaev, The Economic Impact of Venture Capital: Evidence from Public Companies 3 (June 2021) (unpublished manuscript), https://perma.cc/M4QD-BPES.

[12] Gornall & Strebulaev, *supra* note 111111, at 3, 17.

Economic impact is often a proxy for innovative impact, but the case is even clearer for startups and venture-backed companies: **The top 6 companies on Forbes' list of the World's Most Innovative Companies are US companies that were once startups receiving extensive venture backing during their early stages.**[13]

There is no shortage of literature hypothesizing *why* startups have such an outsized impact on American innovation.[14] And while the reasons for the innovativeness of a particular startup can only be guessed at, the outsized impact of a healthy startup ecosystem on nationwide innovation requires no guesswork.

B. By Hindering Startup Formation and Success, Non-Competes Hinder National Innovation.

Worker mobility is a critical feature of a vibrant startup ecosystem. The story of success of the American startup ecosystem is a story of unfettered worker mobility—when nothing can come between the right idea attracting the right talent, innovation takes place on a staggering scale.

When worker mobility is constrained, fewer startups are formed, and those that are formed struggle to secure talent. When startups suffer, innovation suffers. As perhaps the single most restrictive legal device on worker mobility, non-compete agreements hinder national innovation by hindering startup formation and success.

1. Company Formation

Worker mobility is key at every stage of a startup's lifecycle. Workers unable to leave their current employers—including by way of a non-compete—cannot start their own competitor companies. Recent research from the Economic Innovation Group (EIG) shows that a ban on non-compete agreements can positively impact business formation in the technology industry.[15]

In 2015, Hawaii banned non-competes for "any employment contract relating to an employee of a technology business."[16] The reform also included a ban on co-worker non-solicitation covenants. EIG's study found that Hawaii's ban on non-competes for tech workers resulted in a 10.2 percent increase in the number of "technology establishments" and seeded skilled technology workers across the labor market.[17] To no one's surprise, more mobile tech workers led to more tech startups.

While it is too early to gauge the positive innovation and economic impacts that will come out of Hawaii's revitalized startup scene, it is likely to ripple across the technology industry. Due to the specialized skills and know-how that employees develop within their industry, the most successful

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[13] *The World's Most Innovative Companies*, FORBES, https://perma.cc/L9L3-AVW2 (last updated May 12, 2022).

[14] *See, e.g.*, Jeremy Jurgens, *How Startups Drive Economic Recovery While Growing Responsibly*, World Econ. Forum (May 12, 2022), https://perma.cc/GE58-KMAM ("Technology startups are more than catalysts for growth. They are the engine of growth itself. They solve problems no other sector is addressing with innovative thinking, thus pushing society forward - all while creating jobs, stimulating the economy, and attracting foreign investment."); KPMG, WHY ARE BIG BUSINESSES LOOKING TO START-UPS FOR INNOVATION? 12 (2015), https://perma.cc/3Z35-3R6J ("Start-ups are at the forefront of innovation. They disrupt the market and represent everything big business isn't.").

[15] *See* BENJAMIN GLASNER, THE EFFECTS OF NONCOMPETE AGREEMENT REFORMS ON BUSINESS FORMATION: A COMPARISON OF HAWAII AND OREGON (2023).

[16] *Id.* at 4.

[17] *Id.* at 2, 6.

and innovative startups tend to have within-industry alumni as their founders. The numbers speak volumes:

Company Alumni	Number of Startups Founded	Unicorns	Investment Raised
Google[18]	2,801	65	$108.09B
Microsoft[19]	3,579	47	$67.66B
Meta[20]	812	24	$38.13B
Amazon[21]	1,405	18	$24.23B
Apple[22]	984	6	$16.89B

The Commission, too, has collected literature on this phenomenon, including the connection between VC investment and new business formation,[23] as well as the success of within-industry spinouts (WSOs).[24] Yet despite the staggering impact, there is reason to think it could have been greater—leaders in Boston's startup scene, for example, have seen Massachusetts's prior history of strictly enforcing non-competes delay new entity formation, thus explaining "why Boston didn't become the next Silicon Valley."[25] And despite the success, establishing within-industry competitors is exactly the type of entrepreneurship that highly enforceable non-competes quashes.

Consider aerospace, one of the most cutting-edge, innovative industries. Modern-day aerospace companies are building 3D printed rockets, hypersonic passenger aircraft, carbon-fiber rockets, and more. An observer would be hard-pressed to find an innovative startup that was not founded by a senior employee at a larger within-industry competitor.

[18] *Startups by Google Alumni*, TRACXN, https://perma.cc/M5K7-ZB3C, (last updated Jan. 11, 2023).
[19] *Startups by Microsoft Alumni*, TRACXN, https://perma.cc/KP4A-ZPFR, (last updated Jan. 11, 2023).
[20] *Startups by Facebook Alumni*, TRACXN, https://perma.cc/LP4N-LN9P, (last updated Jan. 11, 2023).
[21] *Startups by Amazon Alumni*, TRACXN, https://perma.cc/7C9H-2JY5, (last updated Jan. 11, 2023).
[22] *Startups by Apple Alumni*, TRACXN, https://perma.cc/A36W-BRCT, (last updated Jan. 11, 2023).
[23] *See* NPRM, *supra* note 2, at 3491-92.
[24] *Id.*
[25] Imani Webb, *#StartupsEverywhere: Boston, Mass.*, ENGINE (July 7, 2022), https://perma.cc/CF88-BASC.

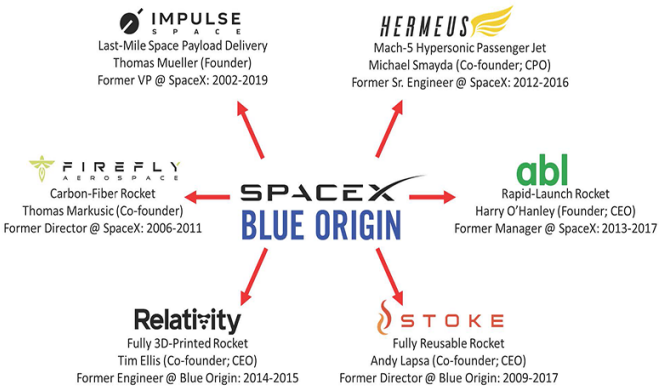

Figure 1: Sample of aerospace startups founded by senior alumni of SpaceX and Blue Origin

While we have no way of knowing whether these founders were theoretically restrained by a non-compete, their self-reported employment history[26] suggests that they moved between companies as if they had little to no constraints. The transitions also speak to another truth: Often, even a "short" non-compete (say, six months) would result in irreparable loss for entrepreneurs in industries that rapidly evolve day-to-day, let alone from winter to summer.

Even if these founders were subject to non-competes that simply weren't enforced against them, what role does the non-compete even serve? If reputational or other factors would keep an employer from enforcing the non-competes of its former employees, then those non-competes only

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[26] Tim Ellis, LINKEDIN, https://www.linkedin.com/in/tim-ellis-11167172 (last visited Mar. 14, 2023).
- Relativity Space (Co-founder/CEO): Jan 2016 – Present
- Blue Origin (Engineer): Jan 2015 – Dec 2015

Andy Lapsa, LINKEDIN, https://www.linkedin.com/in/andylapsa (last visited Mar. 14, 2023).
- Stoke Space (Co-founder/CEO): Oct 2019 – Present
- Blue Origin (Director): Apr 2009 – Sep 2019

Thomas Mueller, LINKEDIN, https://www.linkedin.com/in/thomas-mueller-2094513b (last visited Mar. 14, 2023).
- Impulse Space (Founder/CEO): June 2021 – Present
- SpaceX (VP): May 2002 – Jan 2019

Harry O'Hanley, LINKEDIN, https://www.linkedin.com/in/harry-o-hanley-27087382 (last visited Mar. 14, 2023).
- ABL Space Systems (Founder/CEO): Aug 2017 – Present
- SpaceX (Manager): Mar 2013 – May 2017

Thomas Markusic, LINKEDIN, https://www.linkedin.com/in/thomas-markusic-81a5889 (last visited Mar. 14, 2023).
- Firefly (Co-founder): Jan 2014 – Present
- Virgin Galactic (VP): Dec 2013 – Present
- Blue Origin (Sr. Engineer): Apr 2011 – May 2011
- SpaceX (Director): Jun 2006 – Apr 2011

Michael Smayda, LINKEDIN, https://www.linkedin.com/in/michaelsmayda (last visited Mar. 14, 2023).
- Hermeus (Co-founder; CPO): Nov 2018 – Present
- SpaceX (Sr. Engineer): June 2012 – Apr 2017

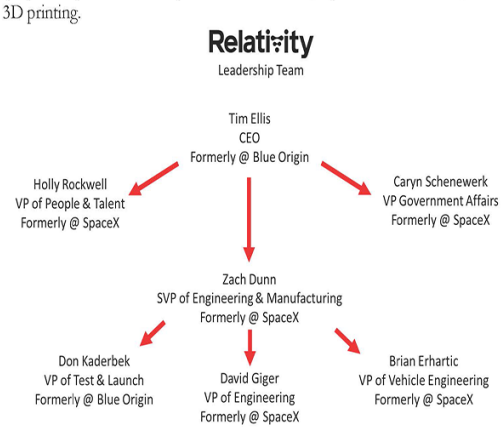
serve to chill the mobility of employees who *think* they might be enforced—and studies have shown this disproportionately harms women.[27]

Put simply, non-competes delay and prevent would-be founders from ever pursuing their vision, whether that be developing a new idea or improving an existing product. Delays keep star talent on the bench for longer than necessary and slow the innovation race. But for those entrepreneurs for whom a non-compete tips the scale from ever taking up the founder's mantle, the harm to the startup ecosystem is irreparable.

2. Team Assembly, Development, and Success

Forming a startup is only the beginning. Founders are then tasked with assembling talented employees to turn their innovative visions into reality. Non-compete agreements, however, impede team formation by restraining talent from finding its way to where it will have the greatest impact—to where it is needed *now*. Again, even enforceable yet short duration non-competes cause major problems—6 months is an eternity in today's startup ecosystem. The stakes of being restrained from assembling the best, talented team could not be clearer: The Commission will be hard-pressed to find a write-up on "Why Startups Fail" that does not list some variation of "Failure to Assemble the Right Team" as a principal reason.[28]

Relativity Space, an aerospace company preparing to launch the first ever 3D-printed rocket, has assembled an internal team of SpaceX veterans. These "ex-SpaceXers" already learned to build production-grade rockets while at SpaceX. That experience has proven invaluable as these same employees prepare to push the envelope further at Relativity Space: to do what they already did, but now, with 3D printing.



[27] *See infra* Part III.B.

[28] *See, e.g.*, TOM EISENMANN, WHY STARTUPS FAIL (2021) ("Good Idea, Bad Bedfellows"); *The Top 12 Reasons Startups Fail*, CBInsights (Aug. 3, 2021), https://perma.cc/CHS3-F8TX ("Not the right team"); Ranjay Gulati & Vasundhara Sawhney, *Why Your Startup Won't Last*, Harv. Bus. Rev. (Dec. 16, 2019), https://perma.cc/3DMA-C9LG ("Spotting the Right Talent"); *Why Do Startups Fail?*, BBVA (June 25, 2018), https://perma.cc/P5RG-TURL ("Team failure").

Figure 2: Relativity Space Leadership Team[29]

If non-competes were strictly enforced, startups like Relativity Space would have needed to spend more time, money, and energy to assemble their teams of experienced employees.

Related to the issue of team assembly is the issue of mentorship. Approximately 70% of small business founders who receive mentoring survive for at least five years—twice the survival rate of those without mentorship.[30] Mentoring startups has even been called "the 'secret sauce' of corporate innovation,"[31] and who better to mentor a new founder than a founder who has been there before? And yet, when broadly applied, non-competes can even keep exited founders from counseling, advising, or investing in other startups. This slows both knowledge sharing and the development of collaboration networks, both of which are critical to idea generation, innovation, and ecosystem development.[32]

C. Non-Competes Are Unnecessary to Safeguard Innovation.

Trade secret law and NDAs render non-competes unnecessary. Advocates for non-competes argue that a ban could somehow hinder innovation.[33] They worry that a ban would deter employers from investing in employee-development and R&D, fearing that those employees will soon go somewhere else, taking the training and knowledge with them. And without investment in human capital and R&D, innovation will suffer. But the exact opposite might be true—employers might invest more in human capital in order to increase employee satisfaction and retain talent. Furthermore, trade secret protections and NDAs are existing legal tools specifically designed to address investment, R&D and innovation concerns.

1. Trade Secret Law

Both federal and state law protect trade secrets from misappropriation. Federal law not only provides a civil cause of action for trade secret misappropriation, but it also provides for criminal liability in specific circumstances.[34] Additionally, every state protects trade secrets under state law, whether through adoption of the Uniform Trade Secrets Act (UTSA), common law, or statute.[35] Employers can rely on this double-layered safety net to ensure company secrets do not leave, but

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[29] This leadership team chart is inferred from public information on the Relativity Space website. *See Expanding the Possibilities for Human Experience*, RELATIVITY, https://web.archive.org/web/20230120162826/https://www.relativityspace.com/mission.

[30] Abdo Riani, *Why Mentors Are Vital for New Startup Founders*, FORBES (Aug. 29, 2022, 4:59 PM), https://perma.cc/PDM6-VN4N.

[31] Illai Gescheit, *Why Mentoring Startups Is the 'Secret Sauce' of Corporate Innovation*, SIFTED (Feb. 15, 2022), https://perma.cc/H8MF-QZZ5.

[32] *See* Sharon Belenzon & Mark Schankerman, *Spreading the Word: Geography, Policy, and Knowledge Spillovers*, 95 REV. ECON. & STAT. 884, 886 (2013) ("showing that noncompete statutes [negatively] affect not only labor mobility directly, but also the knowledge diffusion that labor mobility generates."); Orly Lobel, *Noncompetes, Human Capital Policy & Regional Competition*, 45 J. OF CORP. L. 931 (2020).

[33] NPRM, *supra* note 2, at 3505 (explaining that "the most commonly cited justifications for non-compete clauses are that they increase an employer's incentive to make productive investments—such as investing in trade secrets or other confidential information, sharing this information with its workers, or training its workers—because employers may be more likely to make such investments if they know workers are not going to depart for or establish a competing firm.").

[34] *See id.* at 3506.

[35] *Id.*

that a worker's skills and general knowledge can. Trade secret law directly protects the former without impeding the latter.

Proponents for non-competes raise two main concerns for relying on trade secret law: (1) the law only operates once the secret has been leaked, and (2) the law only operates if an employer proves that a trade secret exists in the first place, a potentially difficult feat. Neither of those concerns carries weight.

First, several states allow employers to invoke the "inevitable disclosure" doctrine under their state law. In such states, a preliminary injunction can prevent a worker from taking up a new job if their previous employer can show that the employee will "inevitably disclose" trade secrets to the new employer.[36] This creates a *preventative* tool for employers to preserve their secrets by invoking trade secret law *before the secret gets leaked*. However, some states—including California—do not adopt this doctrine.[37] But the success of California-based technology companies proves that neither enforceable non-competes nor an "inevitable disclosure" doctrine is necessary to spur innovation.

Second, the burden of proving the existence of a trade secret does not render trade secret protections unattainable—even for startups—nor does it require significant costs. Startups already rely on trade secrets for protection,[38] often for their simplicity and the breadth of subject areas that they can reach: everything from algorithms to recipes.[39] All companies—from multi-national behemoths to scrappy startups—can rely on robust and accessible trade secret law protections for their valuable know-how that does not already fall under other IP protections.

2. Non-Disclosure Agreements

Employers can also rely on non-disclosure agreements (NDAs) to protect their ideas. These agreements prevent the employee from disclosing any information the contract designates as confidential, which will almost always include trade secrets and know-how not broadly shared in the industry.[40] Like a non-compete, an NDA prevents an employee from sharing certain information with other employers or competitors. Unlike a non-compete, NDAs do not restrain the geographic mobility of the worker. NDAs rightfully restrain *what* the employee says, not *where* the employee goes. And while no "inevitable disclosure" doctrine exists for NDAs, NDAs can provide for liquidated damages like any other contract, creating some additional shield disincentivizing disclosure in the first instance.

All major companies, including startups, are accustomed to relying on the ease of NDAs for protecting sensitive information. A variety of accessible NDA templates exist online for those small

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[36] *See e.g.,* PepsiCo, Inc. v. Redmond, 54 F.3d 1262, 1272 (7th Cir. 1995) (affirming an injunction barring an employee from working for a competitor for six months because it was inevitable that he would rely on PepsiCo's information).

[37] California courts, for example, refuse to apply the inevitable disclosure doctrine because of its restrictive effect on worker mobility. *See Whyte v. Schlage Lock Company*, 101 Cal.App.4th 1443 (2002) (holding that California rejects the inevitable disclosure doctrine).

[38] David S. Levine & Ted Sichelman, *Why Do Startups Use Trade Secrets?*, 94 NOTRE DAME L. REV. 751, 754 n.6 (2019).

[39] *Id.* at 756-57.

[40] NPRM, *supra* note 2, at 3506-07.

businesses and startups looking to craft an NDA.[41] And while NDAs are a reliable and cheap form of protection, the FTC's "functional test" will appropriately constrain the weaponization of overly broad NDAs as de facto non-competes.[42]

With legal tools like trade secrets and NDAs already available to protect the sensitive ideas that lead to innovation, non-competes' only purpose is to restrain worker mobility and competition, making our markets less free.

III. A Categorical Ban Will Grow and Diversify the Startup Ecosystem.

A. Non-Competes Pose an Additional Barrier to Diversifying the Startup Ecosystem.

A federal ban on non-competes will help diversify the startup ecosystem, and an inclusive economy spurs greater innovation.

Mobility is always good for the marketplace.[43] A freer labor market not only helps startups thrive, but also fosters dynamism that leads to economic prosperity for the whole country. When non-competes hinder mobility, they also adversely restrict the free flow of diverse talent. Data show, for example, that non-competes disproportionately harm women.[44] A ban on non-competes will remove one more of the many barriers historically underrepresented founders face, helping the startup ecosystem reach its full potential.

As it stands, the startup ecosystem is not diverse enough to operate at its full potential. Women and racial minorities are woefully underrepresented on founding teams. In 2019, Diversity VC reported that 82% of founding teams were all-male and 60.4% of founding teams were all-white, whereas only 1.3% of founders were LatinX and only 1.7% were Black.[45] And funding disparities exacerbate founder disparities. Female founders are funded less often than men, and when they do receive funding, their companies are valued half as highly as those of men (as of 2022, female-founded companies only represented 25.5% of total VC deal count in the US; median late-stage VC pre-money valuation of all-female-founded startups was $49 million compared to $95 million for all startups).[46] Non-competes only create an additional barrier.

A ban on non-competes brings us one step closer to diversifying the startup ecosystem to be more representative of the country as a whole and lead to significant economic growth.

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[41] *See e.g., Non-Disclosure Agreements for Startups*, THOMPSON HINE (Sept. 21, 2021), https://perma.cc/955U-WXHW; Nick Frost, *The Startup Guide to NDAs*, DOCSEND (Sept. 17, 2021), https://perma.cc/2TXS-UJPJ; Kirsty MacSween, *What's an NDA and When Does Your Startup Need One?*, SEEDLEGALS (Sept. 15, 2022), https://perma.cc/R3LT-KDJ3; *NDA (Non-Disclosure Agreement) Template for Startups*, LEGAL NODES (June 30, 2022), https://perma.cc/N7Q5-P9X9.

[42] *See* NPRM, *supra* note 2, at 3507.

[43] *See supra* Part II.B.

[44] Matthew S. Johnson et. al., The Labor Market Effects of Legal Restrictions on Worker Mobility 10-11 (Oct. 13, 2021) (unpublished manuscript), https://perma.cc/E3J4-4W6C (summarizing research finding that non-competes "may have a stronger deterrent or 'chilling' effect for women than for men.").

[45] DIVERSITY VC, DIVERSITY IN U.S. STARTUPS 8, 14-16 (2020), https://perma.cc/EEC4-FG4Y.

[46] PITCHBOOK, *supra* note 9, at 4-5.

B. Non-Competes Disproportionately Harm Women Entrepreneurs.

Non-competes create two main risks for founders: (1) the risk of violating one's own non-compete agreement; and, (2) the risk of hiring other talent with relevant experience who are subject to a non-compete.[47] These risks have costs, and the costs of violating a non-compete are often greater for women than men.

Non-competes often prevent women from becoming founders in the first place. Female founders are disproportionately impacted by non-competes compared to their male counterparts: non-competes have a greater deterrent or "chilling effect" for women than men.[48] For example, empirical data show that "women in states with stricter non-compete enforceability are less likely than men to leave their jobs and start rival ventures."[49] This is in part because women are subject to stricter terms in their contracts than men are,[50] and men are more willing (and able) to violate their non-compete agreements.[51] Non-competes therefore hinder our startup ecosystem from reaching its full potential because they lock up reservoirs of diverse talent, preventing them from ever becoming founders.

Even when women surmount the many hurdles to becoming founders, non-competes still pose challenges for them. Non-competes disproportionately impose legal costs and burdens on women founders, during both formation and talent assembly. As previously mentioned, women-founded companies are valued relatively less than those of their male counterparts and such female founders likely began with fewer resources given the pervasive gender wage gap.[52] When founders are resource-strapped, they have few resources to dedicate to investigating a non-compete—after payroll and expenses, startups have little left to dedicate to legal fees.[53] Thus, women have relatively fewer resources to defend themselves against lawsuits from their previous employer if their non-compete is challenged.

And the challenges don't end after formation. Women founders have fewer resources to hire legal counsel if they would like to investigate the non-compete of potential hires. And for women who shirk their non-competes and start their own business anyway, they are less likely to draw on their prior professional networks to hire employees with relevant experience in order to keep a low profile, because their own non-competes are often stricter than those of men: "Women subject to stricter non-competes are particularly unlikely to hire workers with industry experience from their

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[47] Tom Fleischman, *Women Indirectly Hurt More by Noncompete Pacts*, CORNELL CHRON. (Oct. 5, 2021), https://perma.cc/X2Y2-YYY9 (explaining that Marx's research found that "[s]ame-industry startups founded under stricter noncompete enforcement penalized potentially strong women-owned businesses. That's likely due to the fact that hiring workers with relevant experience – with the threat of legal action due to noncompetes – has a chilling effect on startup growth and sustainability.").

[48] Johnson, *supra* note 44, at 10-11.

[49] Matt Marx, *Employee Non-compete Agreements, Gender, and Entrepreneurship*, 33 ORG. SCI. 1756, 1756-57 (2022) (finding in a study of workers employed exclusively within 25 states and the District of Columbia from 1990 to 2014 that "women subject to tighter non-compete policies were less likely to leave their employers and start rival businesses . . . [and] that women in states with stricter non-compete enforceability are less likely than men to leave their jobs and start rival ventures.").

[50] *Id.* at 1768 (finding that women are subject to more stringent non-compete terms regarding duration or the field of service and that such stricter terms may lead ex-employers to believe that they will prevail in court).

[51] Johnson, *supra* note 44.

[52] PITCHBOOK, *supra* note 9, at 4-5.

[53] *See* ENGINE, *supra* note 10.

own networks, increasing the chances of failure and discouraging them from founding in the first place."[54] If you can't hire great talent, which often comes from the same industry as your former employer, it is hard to succeed. As a result, great women-led startups are more susceptible to failure. This doesn't have to happen.

As Professor Matt Marx of Cornell College of Business said reflecting on the findings of his hallmark study illustrating the disparate impact non-competes have on women entrepreneurs:

> This is the really sad thing…You look at women who start businesses nonetheless, despite the risk. The companies that get blocked are not the companies that would have failed anyway; they're the high-potential, high-risk companies. And that's the real tragedy: The non-competes are actually blocking women from starting the kind of companies that we care about most, the high-growth companies, and that's why they're making the gender gap worse. That's the real point of the study.[55]

Lastly, even after a venture fails, women are disproportionately harmed. Women are more heavily penalized for returning to the labor force following entrepreneurial failure because women who abandon startups might be less well compensated upon returning to paid employment due to the pervasive gender wage gap.[56]

Women already face many barriers to becoming founders and accessing the startup ecosystem—the deleterious effects of non-competes only deepen the problem. Non-competes leave significant economic gains on the table. While there are disproportionately few female founders, we have seen the potential for roaring success. For example, immigrant women founders have started some of today's most successful unicorns: Sherry Wei from China founded Aviatrix valued at $2 billion; and Jen Rubio from Philippines cofounded Away suitcases valued at $1.5 billion.[57] And in 2022, female-founded Deel and Talkdesk became Decacorns, valued at $12.1 billion and $10 billion, respectively.[58] What's more, some of today's most exciting public companies were once women-founded startups: Diane Greene cofounded VMware, Anne Wojcicki and Linda Avey cofounded 23andMe, Lynn Jurich cofounded Sunrun, Katrina Lake founded Stitch Fix, Melanie Perkins founded Canva, Whitney Wolfe Herd founded Bumble—and there are many more.

Non-competes are leaving reservoirs of diverse talent untapped. "Diverse teams generate better economic results, and more—often better—innovation emerges from their unique perspectives."[59]

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[54] Marx, *supra* note 49, at 1757, 1770.

[55] Fleischman, *supra* note 47.

[56] Marx, *supra* note 49, at 1767 ("Moreover, women may face higher relative costs upon returning to paid employment if they abandon their startup—for example, after losing or declining to contest a non-compete lawsuit. . . . If women are penalized more for failure, women who abandon startups might be less well compensated upon returning to paid employment.") (citation omitted).

[57] STUART ANDERSON, IMMIGRANT ENTREPRENEURS AND U.S. BILLION-DOLLAR COMPANIES 3, 8 (Nat'l Found. for Am. Pol'y, July 2022), https://perma.cc/ZT3K-H9XM.

[58] PITCHBOOK, *supra* note 3, at 4.

[59] *See generally* ENGINE, ENGINE'S RESPONSE TO THE CALL FOR COMMENTS ON EXPANDING AMERICAN INNOVATION (2021).

Women talent and entrepreneurship have been sidelined, keeping our startup ecosystem from reaching its full potential. An inclusive economy is a strong one.

IV. Any Exceptions to a Categorical Ban Must Not Frustrate Key Drivers of Innovation

Engine is broadly in favor of a ban on non-competes. In general, the startup ecosystem is better able to promote entrepreneurship, create new businesses, and foster innovation when all talent is free in as many circumstances as possible.

However, the startup ecosystem is not a monolith. Some small, talent-strapped startups are forced to use every tool at their disposal—including non-competes—to hold their own against established companies to attract and retain talent. These startups, accustomed to operating in non-compete enforcing states, might be nervous to imagine a world without this tool. Simply put, the means realistically available to attract and secure talent are leagues different between a four-person, resource-strapped startup, a hundred-person, venture-backed startup, and Google.

Furthermore, non-competes often play a role in startup acquisitions—even in states like California.[60] These sale-of-business transactions are critical to the current startup ecosystem. In general, startups require an "exit" to realize the value built in developing the business and overcoming the risk of failure. The exit is what generates a return for investors and a payout for founders and equity-holding employees. Investors redeploy the returned capital into new ventures, while founders often use their payout to seed their next startup. Acquisitions are by far the most important exit path for successful startups, accounting for approximately 85% of recent successful startup exits.[61] It is possible that some acquisitions today—and their positive externalities for the startup ecosystem[62]—might not happen without the assurance of non-competes.

Still, non-competes can be a net-negative for the startup ecosystem in certain acquisitions, particularly when founders feel coerced into them by miscalculating that the deal could be threatened otherwise. Acquirers generally have other means available to protect themselves and retain talent—particularly stock consideration plus vesting—and some acquired talent only comes to realize the crippling professional restraint of agreeing to a non-compete after-the-fact.

Finally, the Commission has asked if the ban should only apply to low-wage workers.[63] However, new research suggests that a ban on non-competes for higher-earning knowledge workers is key to encouraging entrepreneurship and fostering economic dynamism.[64] Research found that "legislation limiting the enforceability of non-competes among a subset of high-wage workers with in-demand skills resulted in the formation of new businesses and increased transfer of knowledge as workers

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[60] Cal. Bus. & Prof. Code § 16601 explicitly allows non-competes in sale-of-business transactions.
[61] *See* ENGINE, EXITS, INVESTMENT, AND STARTUP EXPERIENCE: THE ROLE OF ACQUISITIONS IN THE STARTUPS ECOSYSTEM (2022), https://perma.cc/5DBC-N6BJ.
[62] *See id.*; John F. Coyle & Gregg D. Polsky, *Acqui-Hiring*, 63 DUKE L.J. 281, 311 (2013).
[63] NPRM, *supra* note 2, at 3512-13, 3516.
[64] *See* Glasner, *supra* note 16, at 2.

changed jobs."[65] Any rule that exempts high-wage workers will miss an opportunity to promote entrepreneurship and support our startup ecosystem.

In short, the relationship between innovation, competition, talent mobility, and a healthy startup ecosystem is extremely complex. To the extent the FTC decides to carve out any exceptions to a broad, categorical ban on non-competes, it must choose and structure such exceptions in a way that protects the startup ecosystem and carefully considers its many nuances.

Conclusion

Non-competes stifle startups. For too long, they have impeded startups from being formed and developing new technologies. The FTC's proposed rule is a good first step for fostering entrepreneurship, seeding greater innovation, and boosting the startup ecosystem.

[65] *Id.*

CLASP
The Center for Law and Social Policy

U.S. Senate Committee on Banking, Housing, and Urban Affairs,
Subcommittee on Economic Policy
Comments on: "Banning Noncompete Agreements: Benefits for Workers, Businesses, and the Economy"
June 30, 2024

On behalf of the Center for Law and Social Policy (CLASP), I submit these comments in support of upholding the Federal Trade Commission's (FTC's) noncompete ban. We applaud the Subcommittee on Economic Policy's decision to hold a hearing investigating how the FTC's noncompete ban will benefit workers, businesses, and the economy. CLASP is a national, nonpartisan nonprofit dedicated to 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 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. We work 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.

The FTC's ban on noncompete agreements is a crucial part of a suite of policies needed to improve job quality and level the playing field for workers. Noncompete agreements are widely used clauses in employment contracts that limit workers' ability to work for "competitor" companies, including starting their own business, for a specific amount of time or within a specific geography. In our current labor market, noncompete agreements are frequently used to essentially trap workers in their current employment, limiting economic mobility by preventing workers from seeking competitive employment opportunities. Noncompetes drive down wages, stifle competition, and allow employers to keep job quality low. The FTC's ban on noncompete agreements combats this common practice by barring employers from creating new noncompete agreements and rendering the vast majority of noncompetes null and void and is therefore essential to improving job quality.

Noncompetes are pervasive in low-quality jobs

There is a common misconception that noncompete agreements are reserved for executive-level employees to protect "trade secrets." In reality, noncompetes are pervasive, spanning every conceivable industry and job level. In fact, one in five workers – an estimated 30 million workers – are subject to noncompete agreements.[1] Among these, the modal worker is an hourly worker earning a median wage of $14.[2] Few if any of these workers have access to information that is not widely known.

In many cases, signing a noncompete comes as a condition of employment. Less than 10 percent of workers negotiate their noncompete agreements, and a whopping 93 percent of workers sign them anyway in order to secure their jobs.[3] Many workers are only given this agreement *after* they've already accepted employment; others are asked to sign non-competes during their onboarding process, often within a mountain of paperwork and rushed through signing so that they're not even aware of the way in which they are binding themselves to their employer.

Noncompetes disproportionately keep job quality low for women and workers of color

Workers most likely to sign a noncompete agreement are those already in low-quality, low-wage jobs. Due to occupational segregation, women, workers of color, immigrant workers, and LGBT workers are overrepresented in such positions. This means that workers already impacted by systems of power are further marginalized by being coerced into signing agreements that limit their bargaining power. Marginalized workers are overrepresented in low-paying industries like customer service, hospitality, and retail – industries that are also the least likely to be unionized and therefore have the power to bargain for better working conditions.[4] Being already at a disadvantage from low pay, around 17 percent of workers in these industries are then subject to non-compete agreements.[5]

Non-competes are a further barrier to racial and gender equity for workers because of the way in which they promote low job quality and prevent competition. When a worker is bound to a noncompete agreement, they cannot leave their job for one with better pay or working conditions. This allows employers to keep job quality and pay low without fear of competition. The prevalence of noncompetes doesn't just depress wages for workers with noncompetes – they instead have a chilling effect that depress all wages.[6] Noncompetes lead to a stagnant economy for both workers and businesses: with workers unable to move freely in the labor market and smaller and newer companies unable to compete against

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[1] Natarajan Balasubramanian, Evan Starr, and Shotaro Yamaguchi, "Employment Restrictions on Resource Transferability and Value Appropriation from Employees," *S&P Global Market Intelligence*, May 2024, https://ssrn.com/abstract=3814403.

[2] Michael Lipsitz and Evan Starr, "Low-Wage Workers and the Enforceability of Noncompete Agreements," *Management Science* vol. 68, no.1, April 2021, https://pubsonline.informs.org/doi/10.1287/mnsc.2020.3918.

[3] Evan Starr, *The Use, Abuse, & Enforceability of Non-Compete and Non-Poach Agreements*, Economic Innovation Group, February 2019, https://eig.org/noncompetesbrief.

[4] Union Members, 2023. Bureau of Labor Statistics, January 2024. https://www.bls.gov/news.release/pdf/union2.pdf

[5] Ibid.

[6] Rajshree Agarwal, Justin Frake, and Evan Starr, "Mobility Constraint Externalities," *Organization Science* vol. 30, no. 5, July 2019, https://pubsonline.informs.org/doi/10.1287/orsc.2018.1252

larger corporations and noncompetes, economic dynamism is stifled, and wages stagnate.[7]

In a job market that already lacks strong worker protections against retaliation, workplace danger, and discrimination, the inability to move to a better-quality workplace dramatically increases the likelihood that women and workers of color will be forced to remain in dangerous or abusive workplaces with poor pay and poor working conditions, perpetuating the cycle of occupational segregation. Noncompete clauses are also detrimental to worker power. When workers know that they cannot find work within their industry outside of their employer, they are less likely to negotiate better wages or working conditions either individually or within a collective bargaining effort. Women in states with strict enforcement of noncompetes are less likely than men to leave their jobs, and women and women of color are less likely to negotiate their non-compete clauses.[8]

Banning noncompetes has already been successful, but state policy is not enough

Researchers have estimated that banning noncompetes nationwide would close racial and gender wage gaps by 3.69 percent.[9] Evidence from state-implemented noncompete bans bears this out. A study of Oregon's noncompete ban found that hourly wages increased by 2 to 3 percent on average.[10] Several states have implemented either bans or limits on noncompetes. States such as Illinois, Maryland, Rhode Island, New Hampshire, and Maine all prohibit noncompetes for workers paid "low wages," with different definitions of what counts as a low wage for each state.[11] Other states have attempted to put guardrails on noncompetes by industry, such as New Mexico within their healthcare industry, or Hawaii's tech industry.[12] Massachusetts has limited noncompetes to a duration of one year.[13] All of these state policies have shown to benefit workers not only in those states, but in border states as well.[14]

Yet, state programs are not enough. Even within states with broad noncompete bans, like the newly enacted Minnesota noncompete ban, not all workers are covered. In Minnesota, the law only prohibits the enforcement of noncompetes entered into after July 2023, leaving nearly 300,000 Minnesota workers trapped in their noncompetes.[15] Relying on a patchwork of state programs creates incomplete

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7 John W. Lettieri, *Noncompete Agreements and American Workers—Testimony before the Senate Committee on Small Business*, Economic Innovation Group, November 2019, https://eig.org/news/testimony-before-the-senate-committee-on-small-business-noncompete-agreements-and-american-workers.

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

9 Matthew S. Johnson, Kurt Lavetti, and Michael Lipsitz, "The Labor Market Effects of Legal Restrictions on Worker Mobility." June 6, 2020, Revised October 13, 2021.

10 Lipsitz supra n. 21.

11 Kevin Burns, "Noncompete Reform Continues in New England: Maine, New Hampshire, and Rhode Island All Pass New Laws", *JDSUPRA*, July 2019, https://www.jdsupra.com/legalnews/noncompete-reform-continuesin-new-18937/.

12 "Enforceability of a Non-compete provision", NM Stat § 24-11-2 (2015), https://law.justia.com/codes/newmexico/2015/chapter-24/article-1i/section-24-1i-2 and "Relating to Employment Agreements", H.B. No. 1090, 28th Legislature, 2015, State of Hawaii, http://www.capitol.hawaii.gov/session2015/bills/HB1090_CD1_.htm.

13 Shira Schoenberg, "What Does Massachusetts' noncompete reform mean for you?", *MASSLIVE*, August 2018, https://www.masslive.com/expo/news/erry-2018/08/d4240441a67183/what-does-massachusettsnoncom.html.

14 Ibid.

15 Mary Hogan and Grace Ryan, "Minnesota's ban on non-competes marks historic change for low- and moderate-income

protections for workers. Workers should not merely hope to have a fair employer or live in a state with a noncompete policy that can apply to them. All workers should have the ability to move freely within their industry, seeking jobs with better pay, better working conditions, and more dignity and respect at work.

The FTC's ban on noncompetes is a much needed rule to increase worker mobility, economic dynamism, and to decrease the gender and racial wealth gap. We thank you for this opportunity to submit this written statement for the record. If you have any questions regarding this topic, please feel free to contact Nat Baldino, Policy Analyst with the Education, Labor and Worker Justice Team at CLASP at nbaldino@clasp.org.

workers," Federal Reserve Bank of Minneapolis, January 2024, https://www.minneapolisfed.org/article/2024/minnesotas-ban-on-non-competes-marks-historic-change-for-low--and-moderate-income-workers#_ftn1

SMALL BUSINESS MAJORITY

WRITTEN STATEMENT FOR THE RECORD BEFORE THE U.S. SENATE COMMITTEE ON BANKING, HOUSING, AND URBAN AFFAIRS SUBCOMMITTEE ON ECONOMIC POLICY

"BANNING NONCOMPETE AGREEMENTS: BENEFITS FOR WORKERS, BUSINESSES, AND THE ECONOMY"

August 8, 2024

John Arensmeyer

Founder & CEO, Small Business Majority

Dear Chair Warren, Ranking Member Kennedy and members of the Senate Subcommittee on Economic Policy:

As a leading representative of America's more than 33 million small businesses, Small Business Majority is pleased to provide written testimony to the Senate Subcommittee on Economic Policy in response to the recent hearing on the importance of banning non-compete agreements for workers, small businesses, and the economy.

Small Business Majority is a national small business organization that empowers America's diverse entrepreneurs to build a thriving and equitable economy. From our nine offices across the country, we engage our network of more than 85,000 small businesses and 1,500 business and community organizations to deliver resources to entrepreneurs and advocate for public policy solutions that promote inclusive small business growth. Our work is bolstered by extensive research and deep connections with the small business community that enables us to educate stakeholders about keys issues impacting America's entrepreneurs, with a special focus on the smallest businesses and those facing systemic inequities.

Small Business Majority is proud to firmly stand in favor of the Federal Trade Commission's (FTC) move to ban non-compete agreements for millions of Americans. Our support is backed by the sentiments of small business owners across the nation who see non-compete agreements as an impediment to hiring talented workers and entrepreneurship rates overall. Over the last few years, we have remained actively engaged in building the business case for banning non-compete agreements. In our network alone, our research shows that 35% of small business owners were prevented from hiring an employee due to a non-compete agreement, and 46% said that they have been subject to a non-compete agreement that prevented them from starting or growing a business of their own.[1] These findings are backed by real stories and anecdotes from our membership which underscore the need for non-compete bans to empower entrepreneurs to start, grow, and expand their business, which we amplify throughout our written testimony.

Non-compete agreements create impediments to small business development and growth

A thriving and equitable economy relies on our ability to foster an economic environment which promotes continued innovation and growth among our nation's small business ecosystem. While small businesses and entrepreneurs are the driving force behind new ideas, products, and jobs, non-compete agreements have been proven to limit innovation through the restrictions they impose on small business development and growth.

Non-compete agreements impede the ability of employees to maximize their skills and technical expertise to either pursue new job opportunities or start their own businesses. The FTC estimates that more than 8,500

[1] "Opinion Poll: Small Business Owners Support Banning Non-Compete Agreements", Small Business Majority, April 2023, https://smallbusinessmajority.org/our-research/fair-competition/opinion-poll-small-business-owners-support-banning-non-compete-agreements

new businesses are prevented from forming annually due to non-competes.[2] In many cases, would-be entrepreneurs must wait months to years to be able to go out on their own. These anti-competitive agreements not only create barriers to entry for prospective entrepreneurs, but also prevent existing small businesses from hiring the most diverse, qualified talent. A Small Business Majority national poll found that nearly half of small businesses (46%) reported being subject to a non-compete agreement that prevented them from starting or expanding their business and more than 1 in 3 (35%) business owners have been prevented from hiring someone due to a non-compete agreement.[3] When workers are held under non-compete agreements, they are forced to make decisions between leaving their chosen profession entirely or continuing to work for their same employer. Without access to a skilled workforce, small businesses oftentimes do not have the capacity to pursue new business opportunities and may be forced to spend more time and resources on workforce training which can have grave impacts on a business's productivity and bottom line.

Small business owners nationwide support efforts to ban non-compete agreements to promote competition and innovation in our economy

Small businesses support banning non-compete agreements because they are antithetical to the free, fair and open competition that is essential to a thriving and equitable economy. Our research shows that nearly 6 in 10 (59%) of small business owners supported the FTC's 2023 proposed rule to ban non-compete agreements. Notably, those who used non-competes in their business at the time of the survey were even more supportive of the ban (67%) compared to those who did not (51%). Furthermore, more than 400 small businesses and business organizations signed a 2023 letter urging the FTC to enact its proposed rule to ban non-compete agreements.[4]

While many argue that non-compete agreements are necessary for protecting a business's proprietary information, such as trade secrets or product designs, business owners have access to alternative, less restrictive methods for protecting their sensitive information. 42% of small business owners report using non-disclosure agreements to protect their confidential information or trade agreements and 69% believe that non-disclosure agreements can protect their confidential information or trade secrets as effectively as a non-compete agreement.[5] It's also important to note that states like California, Oklahoma and North Dakota already prohibit the enforcement of non-compete agreements with no loss of business success and entrepreneurial spirit in any of these states.

The following quotes from small business owners in our network underscore the importance of banning non-compete agreements to foster a free, fair and competitive economy for small businesses and workers alike:

- **Leo Carr – Elite Group, Michigan** "Non-compete agreements tend to only benefit the previous employer. Employees working under the mandates of a non-compete agreement are restricted from seeking new employment, preventing them from opportunities to earn more in wages, upward mobility with another company, etc. It prevents the employee from capitalizing on their own skills and knowledge. This is particularly unfair to people who have worked diligently towards self-improvement and have acquired and developed new skills but are restricted to using them for one employer only. This causes undue stress and psychological burden on employees under the guise of non-compete agreements when they contemplate or actually try to move on from their employer or company. They might need to seek legal employment law assistance and thus incur some costs."
- **Jacob Hanson – PR with Panache, Minnesota** "I see how companies use non-competes as a weapon and harass people. They inhibit their ability to provide for their families. I think that there needs to be more education for employees. From what I've witnessed, I think non-competes are used

[2] "FTC Announces Rule Banning Noncompetes," Federal Trade Commission, April 2023, https://www.ftc.gov/news-events/news/press-releases/2024/04/ftc-announces-rule-banning-noncompetes

[3-5] "Opinion Poll: Small Business Owners Support Banning Non-Compete Agreements", Small Business Majority, April 2023, https://smallbusinessmajority.org/our-research/fair-competition/opinion-poll-small-business-owners-support-banning-non-compete-agreements

[4] "Small Business Community Urges FTC to Ban Non-Compete Agreements", Small Business Majority, April 2023, https://smallbusinessmajority.org/policy/small-business-community-urges-ftc-ban-non-compete-agreements

to penalize employees and people are manipulated. Companies are really smart about how they use them."

- **Shirley Modlin – 3D Design and Manufacturing, LLC, Virginia** "I have never believed that any employer has the right to restrict opportunities of workers.... As workers gain skills and experience throughout their careers, they must be allowed to use that knowledge to further their livelihoods in ways that are in their best interest."
- **Jean Underwood – Design Mavens Architecture, Illinois** "I think it's (non-compete agreements) a hindrance to people that want to start a small business. I think it's ridiculous. I didn't have a choice but to sign it. I was looking at a promotion and was told, "What's the big deal? You're not going anywhere, just sign it." I had to wait one year before being able to start the business with my partners."
- **Clifton Broumand – Man & Machine, Maryland** "I stopped doing non-compete agreements 5-6 years ago with my salespeople because it cost too much money. If I really wanted to enforce a non-compete, I would have to hire and pay a lawyer."

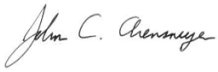
While the FTC's recent ruling to ban non-compete agreements is a victory for small businesses and entrepreneurship, Congress and the courts must act to further codify the ban to support small businesses

The FTC's decision to move forward with the implementation of its final rule to ban non-compete agreements is a win for entrepreneurs and small businesses nationwide.[5] Small Business Majority is thrilled to see the FTC take action to put an end to one of the most directly anti-competitive practices used in today's economy. The FTC estimates that the final rule will increase new business formation rates by 2.7% annually and lead to an increase in the number of patents filed each year, fueling new economic innovation.

While the FTC's final rule is an important step in fostering a competitive and level playing field for the small business ecosystem, the ruling's future is still in question as it faces numerous challenges in federal court. To ensure that the uncertainty of the FTC's final rule does not impact an individual's ability to pursue entrepreneurship or a small businesses ability to hire a qualified workforce, we encourage Congress to pass legislation to reinforce the FTC's final rule by limiting the use of non-compete agreements and charging the FTC and Department of Labor with the enforcement of those limitations. In the courts, we continue to advocate that the FTC's rulemaking is upheld. Small Business Majority has submitted various legal briefs, alongside allies in the small business ecosystem, to underscore our findings for the need to see this rulemaking through.[6] Together, comprehensive regulation and legislation will provide a strong foundation for the successful implementation and enforcement of a nationwide ban on non-compete agreements.

We appreciate the subcommittee for holding this important hearing and shedding light on the negative impact non-compete agreements can impose on entrepreneurship, small businesses, and the economy. For any questions or additional information, please contact Government Affairs Director Alexis D'Amato at adamato@smallbusinessmajority.org.

Sincerely,



John Arensmeyer
Founder & CEO
Small Business Majority

[5] "FTC Announces Rule Banning Noncompetes," Federal Trade Commission, April 2023, https://www.ftc.gov/news-events/news/press-releases/2024/04/ftc-announces-rule-banning-noncompetes

[6] Small Business Majority Legal Briefs, https://smallbusinessmajority.org/our-policy-statements?issue=98