

FTC Non-Compete Agreement Rulemaking

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*The views expressed in this presentation do not necessarily represent
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Background

- FTC issued proposed rule in January 2023 that would ban non-compete agreements.
- FTC estimates that non-competes bind about one in five American workers, approximately 30 million people.
 - Non-competes typically thought to involve senior executives, but we found they apply across job and income levels—from minimum wage workers, to nurses, engineers, and senior executives.
 - One survey found that 35% of workers without a bachelor’s degree and 33% of workers earning less than \$40,000 per year have worked under a non-compete clause at some point in their lives. Another analysis of the same data found that 53% of workers covered by non-compete clauses are hourly workers.
- The FTC estimates that without non-compete restrictions, American workers could earn nearly \$300 billion more in wages.



Harms to Competition

- Non-competes prevent the optimal matching between employers and workers.
 - This can have a profound effect on both wages and working conditions.
 - Non-competes also prevent workers from matching with jobs that better meet their needs in terms of benefits, schedule, location, and other working terms.
- A recent Ipsos poll found 2 in 5 Americans say they are likely to look for a new job if the FTC bans non-competes.
- We also cite evidence that non-compete clauses affect both workers who are and who are not covered by non-compete clauses, reducing wages for both groups, as well as increase racial and gender wage gaps.
- Removing/prohibiting non-competes would require employers to compete more vigorously for workers, bringing to them the benefits of a more competitive labor market.



Harms to Competition

- Non-compete clauses reduce the movement of workers between firms, which decreases knowledge flow, limits available talent pool, and hampers innovation. They also prevent workers from starting businesses in which they can pursue innovative new ideas.
- There is also strong evidence that non-competes hurt prices for consumers.
 - Researchers have found a strong correlation between non-competes in doctors' employment contracts and high patient costs. We estimate proposed rule could reduce US healthcare spending by \$148B annually.



The Draft Rule

- FTC proposed a general rule that would significantly reduce the ability of employers to impose non-compete restrictions on workers.
 - The rule would make it illegal to enter into or attempt to enter into a non-compete, maintain a non-compete with a worker, and represent to a worker that they are subject to a noncompete. De facto non-competes would fall within the rule's ambit.
 - Rulemaking asks for comment on several issues:
 1. Should there be a categorical prohibition, or just a presumption of illegality? If the latter, what types of facts should be needed to rebut presumption?
 2. Should the rule apply to all, or have different standards for higher-paid workers or executives/senior executives? Notes that bargaining relationship with senior executives may be different than for lower paid workers.
 - <https://www.ftc.gov/legal-library/browse/federal-register-notice/non-compete-clause-rulemaking>



Sampling of Comments Received

- Support for rule from a number of commenters.
 - Identify the types of harms proposed rule noted: limits on changing jobs and locations, limiting competition among employers.
- Some businesses note that non-competes are more efficient than more limited restraints, like NDAs and enforcing trade secret laws, because those cases are harder/more expensive to litigate.
- *Note: Summary just for illustration for purposes of webinar, and does not purport to be comprehensive or suggest direction of Commission action.*



Next Steps

- FTC staff are working through comments received. We are obliged to consider comments, and explain why we did or didn't accept them in final rule.
- Staff will present proposed revisions to Commission, which will ultimately vote whether to issue the rule, with any changes they deem appropriate, as final.
- Timing TBD.

