April 14, 2023

Submitted via https://www.regulations.gov/commenton/FTC-2023-0007-0001

Federal Trade Commission
Office of the Secretary
600 Pennsylvania Avenue NW, Suite CC-5610 (Annex C)
Washington, DC 20580

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

Dear Commissioners,

On behalf of 11 local governments, agencies and elected officials from across the United States ("Local Government Commenters"), Public Rights Project submits this comment to voice strong support for the Federal Trade Commission's Non-Compete Clause Rulemaking.

The Proposed Rule affects local governments in their roles as labor enforcers, market participants, and representatives of their communities and local economies. We agree with the FTC's analysis that non-compete clauses are an unfair method of competition and that promulgating a rule pursuant to Sections 5 and 6(g) of the Federal Trade Commission Act with a prompt effective date is an appropriate agency response.

Several aspects of the Proposed Rule are especially important for the FTC to preserve and strengthen in issuing a Final Rule. Specifically, we support: the Proposed Rule's coverage of independent contractors; its prohibition on entering into, maintaining, or representing that a worker is covered by a non-compete agreement, including notice and rescission requirements; its "floor not ceiling" approach to state and local preemption; and its functional definition of "non-compete clause." We further urge the FTC to strengthen the Proposed Rule in two ways: 1) by limiting the exception for franchisees, and 2) by adopting a broader definition of "non-compete clause" that includes workplace policies and captures other coercive barriers to worker mobility.

We thank the FTC for this opportunity to comment on the Proposed Rule and welcome future opportunities to collaborate in ensuring that workers in our jurisdictions can freely seek to better their wages and working conditions.

I. Interest of Local Government Commenters in the FTC's Non-Compete Clause Rulemaking.

Local Government Commenters include some of the country's most significant local labor markets, home to many thousands of workers impacted by non-compete clauses. They also include labor markets that have seen the benefits of banning non-competes, as in California, where the state's longstanding restrictions on such restraints have fostered a climate of innovation and economic growth.[1] We support federal action to address non-compete clauses because the effects of non-competes are nationwide in scope, employers continue to require and

[1] *See* Timothy Lee, *A Little-Known California Law Is Silicon Valley's Secret Weapon*, Vox (Feb. 13, 2017), https://perma.cc/WU95-6KNM; Matt Marx et al., *Regional Disadvantage? Employee Non-Compete Agreements and Brain Drain*, 44 Res. Pol'y 394 (2015).

maintain unenforceable non-compete clauses, and choice of law provisions may be used to evade existing state law restrictions on non-competes.

Our cities and counties are committed to protecting the rights of workers and consumers and have legislated to raise the minimum wage, punish wage theft, require paid sick leave, and otherwise ensure that jobs provide for workers' basic needs. Both the proposed ban on non-compete clauses and these local labor protections are particularly important for low-wage workers, who are disproportionately Black, Latinx, immigrants, and women.[2] Local Government Commenters have a considerable interest in the outcome of the FTC's rulemaking on this issue because a strong non-compete clause rule will advance local labor enforcement efforts, expand authority in some localities to directly combat non-competes, and aid localities in carrying out their proprietary functions.

The Proposed Rule offers significant support to Local Government Commenters' efforts to advance the rights of workers within their jurisdictions. As observed by the FTC, non-compete clauses have the effect of weakening worker bargaining power and driving down wages and benefits, even for workers not covered by non-competes. 88 Fed. Reg. 3502–03. This effect is particularly harmful for low-wage workers and creates added pressure for state and local interventions to set a minimum floor.[3] Non-compete clauses also make other minimum labor standards more difficult to enforce because even when they are void or voidable, such clauses lead workers to believe that they have limited exit options.[4] Workers who face real or perceived barriers to seeking new employment are generally more vulnerable to violations of local, state and federal law and are less likely to come forward to report such violations because of the fear that they may lose their jobs and be unable to find new ones.[5] Lack of reporting—and lack of enforcement—allows violations of worker protections to go undetected and drives down standards below even the minimums set by law.[6] A federal rule banning non-compete clauses will thus aid Local Government Commenters in equitably and effectively enforcing their laws.

The Proposed Rule has additional implications for local governments in jurisdictions which have enacted "little FTC Acts" or other prohibitions on unfair methods of competition.[7] For example, in enforcing its prohibition on consumer fraud, unfair competition, or deceptive practices, the City of Chicago gives "consideration" to interpretations of the FTC and the federal

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[2] *See* Martha Ross & Nicole Batemen, *Meet the Low-Wage Workforce* 9, Brookings Inst. (2019), https://perma.cc/S3JQ-CB6G.

[3] *See* Terri Gerstein & LiJia Gong, *The Role of Local Government in Protecting Workers' Rights*, Econ. Pol'y Inst. (2022), https://perma.cc/U8TX-MFCN.

[4] *See* JJ Prescott & Evan Starr, *Subjective Beliefs about Contract Enforceability* 26 (Univ. of Mich. L. & Econ. Working Papers, Paper No. 231, 2022), https://perma.cc/YCU5-PP8W.

[5] *See* Matthew Fritz-Mauer, *The Ragged Edge of Rugged Individualism: Wage Theft and the Personalization of Social Harm*, 54 U. Mich. J.L. Reform 735, 772–77 (2021).

[6] *See* Charlotte S. Alexander & Arthi Prasad, *Bottom-Up Workplace Law Enforcement: An Empirical Analysis*, 89 Ind. L. Rev. 1069 (2014), https://perma.cc/3PTL-VHQT. Local government enforcers with the authority to do so pursue directed investigations and enforcement actions as an imperfect corrective for this dynamic, but worker participation is nonetheless crucial for building successful cases.

[7] Numerous cities and counties prohibit unfair methods of competition. *See, e.g.*, Chi. Mun. Code § 2-25-090(a); Jacksonville Mun. Code § 696.108; Cicero, Ill. Code § 26-3; Hialeah, Fla. Mun. Code § 80-30; Melrose Park, Ill. Code § 5.06.020; Broward Cty. Code § 20-161. In some jurisdictions, violations of FTC rules are grounds for suspension, revocation, or denial of licenses or permits. *See, e.g.*, Austin Mun. Code §§ 14-9-25, -11-168; Seattle Mun. Code §§ 6.202.230, 10.01.190. Even in the absence of local prohibitions on unfair methods of competition, local officials may be charged with investigating such practices and referring cases to the FTC or other enforcement bodies as appropriate. *See, e.g.*, Akron Code § 32.06; Dall. Code § 50-3; Charleston, W.V. Code §§ 34-37–38.

courts related to Section 5(a) of the FTCA.[8] The City of Jacksonville gives "due consideration and great weight" to interpretations of Section 5(a) in enforcing its unfair and deceptive trade practices ordinance, which also prohibits unfair methods of competition.[9] And city and county attorneys in Hawaii, South Carolina, and Montana are tasked with assisting in enforcement of state law bans on unfair methods of competition that similarly incorporate FTC rules.[10] In California, state law authorizes certain local jurisdictions to enforce the state's prohibition on unlawful, unfair or fraudulent business practices, encompassing conduct that is unlawful under FTC rules.[11] The FTC's adoption of a rule banning non-compete clauses nationwide will thus shape local enforcement of such prohibitions and bolster enforcement capacity across all levels of government.

Lastly, in addition to their roles as regulators and enforcers, Local Government Commenters rely on the ability of private businesses to compete for qualified workers in their proprietary capacity. Local governments own airports, stadiums and event centers, hospitals and clinics, and other facilities and contract with multiple third parties for their operation. Workers at these facilities go through resource-intensive screening and badging processes and gain valuable skills and experience over time. Local Government Commenters have an interest in making sure that workers are able to continue to work at a third-party operated facility by moving from one operator to another, rather than being forced to look elsewhere for work due to a non-compete clause. For example, the City and County of Denver recently learned of the use of non-competes by a contractor at the Denver Airport that prohibited airport concessions workers from taking new jobs with competing concessionaires. Until Denver eliminated the provision, it had the effect of preventing screened and badged airport workers from moving between jobs *within* the airport. A federal ban on non-compete clauses will consequently further advance local governments' proprietary interest in retaining a qualified workforce.

As explained in greater detail below, Local Government Commenters agree with the FTC's analysis that non-compete clauses are an unfair method of competition. Based on their experiences in enforcing local worker and consumer protections, Local Government Commenters also support several specific aspects of the Proposed Rule that will be especially valuable for advancing the rights of low-wage workers.

II. Local Government Commenters support the FTC's analysis that non-compete clauses are an unfair method of competition, its decision to promulgate a federal rule banning non-competes, and its efforts to ensure that the rule takes effect as soon as possible.

Rising economic inequality and the failure of wages to keep up with the cost of living have created myriad problems for local governments seeking to ensure that residents are able to meet their basic needs.[12] As highlighted by the FTC, non-compete clauses that prevent workers from freely changing jobs have the aggregate effect of driving down wages and benefits across labor markets. 88 Fed. Reg. 3484–85. Because workers cannot freely seek out new jobs in their

[8] Chi. Mun. Code § 2-25-090(a). Compliance with FTC rules, regulations, guidelines, and interpretations is also an absolute defense under Chicago law. *Id.* § 2-25-090(c).
[9] Jacksonville Mun. Code § 696.108.
[10] *See* Haw. Rev. Stat. § 480-20; Mont. Code § 30-14-121; S.C. Code § 39-5-130.
[11] Cal. Bus. & Prof. Code §§ 17200, 17204.
[12] *See* Natalie Holmes & Alan Berube, *City and Metropolitan Inequality on the Rise, Driven by Declining Incomes*, Brookings Inst. (2016), https://perma.cc/HNQ9-4V4Z.

chosen field and location, they may remain in jobs even when those jobs do not provide them with a wage they can live on or needed benefits such as paid time off, adequate healthcare, or a regular schedule.

Though non-compete clauses are commonly associated with high-paid executives, their use in low-wage industries has been well-documented and low-wage workers are especially vulnerable to their anti-competitive effects because such workers lack the savings necessary to relocate, change their line of work, or survive periods of unemployment.[13] Despite limited research on the topic, we appreciate the FTC's recognition that non-compete clauses may have a disparate impact on women and non-white workers. 88 Fed. Reg. 3488. Available research cited by the FTC mirrors the finding that minimum wage and other policy interventions to correct for inequalities of bargaining power have heightened benefits for women and workers of color affected by occupational segregation and persistent wage gaps.[14]

Given these impacts, we strongly support the compliance date in proposed Section 910.5, allowing the Proposed Rule to go into effect as soon as possible. 88 Fed. Reg. 3515–16, 3536. The Proposed Rule is an important step in promoting labor market competition and is especially needed for low-wage workers. The Proposed Rule complements existing efforts by local jurisdictions to ensure that all workers are able to secure living wages and basic benefits. And the Proposed Rule further strengthens these local policies—and the work of local labor enforcers—by removing one of many barriers that workers face in reporting violations of their rights at work. The FTC's action follows on the heels of actions by states to restrict the use of non-competes and should not be further delayed.

III. Local Government Commenters support the Proposed Rule's categorical ban on non-competes and its inclusion of independent contractors within the scope of the Proposed Rule.

The Proposed Rule's broad approach to banning non-compete clauses for all workers, including independent contractors, will promote competition by ensuring that employers cannot evade coverage through misclassification and that true independent contractors can move freely between hiring entities. Misclassification of employees as independent contractors is a growing practice with particularly harmful effects for low-wage workers and workers of color.[15] We therefore support the definitions in Section 910.1(c)–(d) and (f), which ensure that independent contractors and sole proprietors will be shielded from non-compete clauses alongside workers classified as employees. 88 Fed. Reg. 3510–11, 3535. However, we also urge the FTC to clarify and strengthen protections for low-wage workers in franchise arrangements.

Through our jurisdictions' efforts to legislate and enforce labor standards protections, we have observed firsthand that misclassification is ubiquitous and costly for workers as well as for

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[13] *See, e.g.*, Tyler Boesch et al., *Non-Compete Contracts Sideline Low-Wage Workers*, Fed. Res. Bank of Minneapolis (Oct. 15, 2021), https://perma.cc/P7VW-R5HT; Evan P. Starr et al*., Noncompete Agreements in the US Labor Force*, 64 J.L. Econ. 53, 59 (2021).

[14] *See, e.g.*, Lawrence Mishel & Josh Bivens, *Identifying the Policy Levers Generating Wage Suppression and Wage Inequality*, Econ. Pol'y Inst. (2021), https://perma.cc/NS5F-X9K9; Ellora Derenoncourt et al., *Why Minimum Wages Are a Critical Tool for Achieving Racial Justice in the U.S. Labor Market*, Wash. Ctr. for Equitable Growth (2020), https://perma.cc/324W-ABXA.

[15] *See* Charlotte Alexander, *Misclassification and Antidiscrimination: An Empirical Analysis*, 101 Minn. L. Rev. 907, 909 (2017) (finding that people of color and women are overrepresented in occupations at highest risk for misclassification).

local, state, and federal governments.[16] Misclassification takes advantage of existing inequalities in bargaining power to offload both the risks and many of the costs of employment onto workers themselves. Misclassification leaves workers unsure of their legal rights and status and creates additional hurdles for labor standards enforcement agencies. Because some companies that classify their workers as independent contractors have done so in a deliberate attempt to avoid employment regulations, government enforcers face an uphill battle to prove misclassification and to achieve compliance with underlying employment regulations.[17] In response to these challenges, jurisdictions like Seattle have enacted labor standards that provide some protections for independent contractors that parallel protections for employees.[18]

Because the Proposed Rule extends to independent contractors and sole proprietors, employers will not be able to evade the rule's coverage through misclassification. Workers will also be able to claim protection under the law without first establishing that they are properly classified as employees.[19] Expansive coverage of all workers is also needed because non-compete clauses impact competition in similar ways for employees and independent contractors, but may have an even more pronounced inhibiting effect on independent contractors' ability to protest inadequate and even unlawful working conditions. Independent contractors fall outside most federal, state, and local labor standards, including protections around workplace concerted activity under the National Labor Relations Act.[20] Therefore, independent contractors may have little recourse besides seeking work with other hiring entities—an option restricted by the presence of a non-compete. Their inclusion under the rule addresses this oppressive dynamic.

While we applaud the Proposed Rule's broad approach to worker coverage, we further underline that the use of franchise arrangements in low-wage industries is yet another means of stifling competition and avoiding employment regulations.[21] Because the Proposed Rule explicitly excludes franchisees from its definition of covered workers, businesses seeking to undercut their competition and take advantage of low-wage workers could classify workers as franchisees rather than employees or covered independent contractors. *See* § 9.10(f); 88 Fed. Reg. 3511, 3520, 3535. For this reason, we urge the FTC to eliminate the franchisee exception for any franchisees who are natural persons in order to ensure that contracting businesses do not use the exception as a means to evade the rule. Alternatively, if the FTC chooses to preserve the

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[16] *See Independent Contractor Misclassification Imposes Huge Costs on Workers and Federal and State Treasuries*, Nat'l Emp. L. Project (2020), https://perma.cc/7JFW-A978; *see also* Karl A. Racine, *Illegal Worker Misclassification: Payroll Fraud in the District's Construction Industry* (2019), https://perma.cc/WZ2V-79CL.

[17] *See* Chris Marr, *The Art of Settling But Not Resolving Gig Worker Status Disputes*, Bloomberg L. (Sept. 20, 2022), https://perma.cc/SJH3-KMBJ.

[18] *See* Seattle Mun. Code §§ 14.23, .33–.34, 8.37.

[19] While the requirement that a worker enter into a non-compete agreement would seem to be an indicator of control, and therefore employee status, courts have been mixed in their analysis, particularly where such clauses are in fact unenforceable under state law. *Compare Faludi v. U.S. Shale Solutions LLC*, 950 F.3d 269, 276 (5th Cir. 2020) (finding that the existence of a non-compete clause does not automatically negate independent contractor status); *Sakacsi v. Quicksilver Delivery Sys., Inc.*, No. 8:06-cv-1297-T-24-MAP, 2007 WL 4218984, at *4 (M.D. Fla. Nov. 28, 2007) (taking presence of non-compete clause as evidence of employment relationship); *Am. Zurich Ins. Co. v. Checker CAB of Augusta, Inc.*, CV 112-054, 2013 WL 12180434, at *13 (S.D. Ga. Sept. 30, 2013) (finding that presence of non-compete clause was not evidence of employment relationship because the clause was unenforceable and therefore did not represent actual control).

[20] *See* 29 U.S.C. § 152(3).

[21] *See, e.g.*, Press Release, Off. of the Att'y Gen. for D.C., AG Racine Sues Janitorial Companies for Misclassifying Workers and Denying Them Hard-Earned Wages and Sick Leave (July 13, 2022), https://perma.cc/EUZ8-M6DH; Press Release, Wash. St. Off. of the Att'y Gen., AG Ferguson Files Lawsuit against Janitorial Services Company for Exploiting Mostly Immigrant Workers (Apr. 6, 2021), https://perma.cc/EZH7-VBKF.

exception, we encourage the FTC to adopt the proposal from scholars Sanjukta Paul and Marshall Steinbaum that uses the "ABC test" to determine whether workers are employees and therefore not franchisees for purposes of the rule.[22]

IV. Local Government Commenters support the Proposed Rule's ban on entering into, maintaining, or representing that a worker is covered by a non-compete clause, including its notice and rescission requirements.

The Proposed Rule's approach to defining the scope of what constitutes an unfair method of competition would categorically ban employers from using non-compete clauses. § 910.2(a); 88 Fed. Reg. 3511, 3535. Importantly, the Proposed Rule's prohibition on entering into, maintaining, or representing that a worker is covered by a non-compete clause also includes notice and rescission requirements. § 910.2(b)(1)–(2); 88 Fed. Reg. 3513–14, 3535. These elements of the rule are necessary to ensure that employers do not continue to propose, require, or maintain unenforceable non-compete clauses as the presence of such terms may be coercive regardless of their enforceability and nonetheless negatively impact worker behavior in anti-competitive ways. As highlighted by the FTC, workers may believe that they are subject to a non-compete clause even if they did not sign one when it was presented. 88 Fed. Reg. 3512. And workers may believe a non-compete is enforceable even in states where such clauses are already restricted or banned.[23] Indeed, research shows that at all education levels, workers tend to believe that non-competes are enforceable even when they are not.[24]

Given these dynamics, non-competes for low-wage workers are particularly likely to be exploitative and coercive at the time of contracting (when workers agree to proposed terms of employment) and at the time of potential departure from the employer (when workers are considering seeking out new work). 88 Fed. Reg. 3512. Because low-wage workers often lack resources to hire a lawyer and there is generally no right to counsel in arbitration or civil cases, they cannot obtain legal advice prior to signing a non-compete clause or to later challenge the maintenance of an existing non-compete.[25] Threats or attempts by an employer to enforce a non-compete clause after a worker's departure can place the worker under untenable financial strain even when the agreement ultimately proves unenforceable. Thus, the exploitative and coercive effects of unenforceable non-competes can only be remedied through a categorical ban. Without the rule prohibiting employers from representing to workers that they are covered by a non-compete clause, or maintaining such clauses, employers may seek to exploit workers who lack awareness of the Commission's final rule as well as state law related to non-competes. 88 Fed. Reg. 3512–13.

The rule's notice and rescission provisions are essential to addressing this knowledge gap and avoiding employer abuse. Requiring employers to rescind existing non-compete clauses will

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[22] Sanjukta Paul & Marshall Steinbaum, *FTC Definition of Employment* (Feb. 11, 2023), https://perma.cc/WU25-AG3Y.

[23] Research showed that 19 percent of workers had signed unenforceable non-competes in California, where non-competes have been unenforceable for over 100 years. U.S. Dep't of Treasury Off. of Econ. Pol'y, *Non-Compete Contracts: Economic Effects and Policy Implications* 4 (Mar. 2016), https://perma.cc/V8MW-KQSP.

[24] *See* JJ Prescott & Evan Starr, *Subjective Beliefs about Contract Enforceability* (Univ. of Mich. L. & Econ. Working Papers, Paper No. 231, 2022), https://perma.cc/GBB2-AQGB.

[25] According to recent data from the Legal Services Corporation, low-income Americans do not get any or enough legal help for 92 percent of their substantial civil legal problems. Legal Servs. Corp., *The Justice Gap: The Unmet Civil Legal Needs of Low-Income Americans* (2022), https://perma.cc/4RW8-VJ88.

not result in unfairness because research shows that negotiations over non-competes rarely even take place, particularly in the context of low-wage industries.[26] Rather, workers are presented with non-competes only after they have already accepted a position.[27] Non-compete clauses may be bundled with non-disclosure and non-solicitation agreements outside the scope of the Proposed Rule that more directly address an employer's legitimate interests. As the FTC notes, employers also have significant trade secret protections under federal and state law governing the use of intellectual property. 88 Fed. Reg. 3505–06.

V. Local Government Commenters support the Proposed Rule's preemption of state and local law as a floor and not a ceiling.

The Proposed Rule's "floor not ceiling" approach to preemption means that it will override lax state laws while continuing to allow state and local governments to act in ways that are more protective of workers. 88 Fed. Reg. 3515. Local officials, including in some of our jurisdictions, have authority to address unfair methods of competition under a state or local "little FTC Act." We encourage the commission to maintain, in the final rule, an express provision that a state statute, regulation, order, or interpretation is not inconsistent with the rule's provisions if the protection afforded any worker is greater than the protection under the rule. § 910.4; 88 Fed. Reg. 3536. This will allow local interpretation and enforcement of existing unfair methods of competition laws to continue as long as they are additive.

Indeed, in addition to allowing for multiple modes of enforcement and further remedies, existing state laws addressing non-compete clauses and similar restraints provide protections for workers not currently offered by the Proposed Rule. California law applies to franchise arrangements and also limits no-poach and no-solicitation agreements.[28] Under Colorado law, the use of egregious non-compete clauses rising to the level of intimidation is classified as a misdemeanor.[29] California has also addressed the use of Training Repayment Agreement Provisions (TRAPs) in healthcare[30] and Colorado significantly limits the use of TRAPs generally.[31] As discussed below, though we urge the FTC to further strengthen the Proposed Rule to address such agreements, we appreciate that the Proposed Rule's approach to preemption does not interfere with existing state efforts that combat these practices.

We also strongly support the need for a strong federal regulatory floor. The Proposed Rule's approach to preemption ensures a base level of protection for all workers regardless of where they live and promotes greater uniformity without negatively interfering with state and local policymaking and enforcement. The creation of a federal floor will also ensure that non-compete prohibitions cannot be evaded through the use of contractual choice of law provisions. A federal floor will further provide businesses with clear and consistent standards to be followed in all jurisdictions, easing their compliance processes. This type of approach to preemption is common and well established in the realm of worker protections.

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[26] *See* Evan P. Starr et al*., Noncompete Agreements in the US Labor Force*, 64 J.L. Econ. 53 (2021).
[27] *See* Rachel Arnow-Richman, *Cubewrap Contracts and Worker Mobility: The Dilution of Employee Bargaining Power Via Standard Form Noncompetes*, 2006 Mich. St. L. Rev. 963, 977–80 (2006).
[28] Cal. Bus. & Prof. Code § 16600; *Scott v. Snelling & Snelling, Inc.*, 732 F. Supp. 1034, 1040 (N.D. Cal. 1990).
[29] Colo. Rev. Stat. § 8-2-113(1.5).
[30] Cal Lab. Code § 2802.1
[31] Colo. Rev. Stat. § 8-2-113(3)(a).

VI. Local Government Commenters support the Proposed Rule's functional test for non-compete clauses and further urge the FTC to expand the rule to encompass additional types of restraints which inhibit worker mobility and impact competition.

The Proposed Rule's functional test for defining what constitutes a non-compete clause recognizes that agreements between workers and employers which restrict worker mobility take a variety of forms. § 910.1(b); 88 Fed. Reg. 3509–10, 3535. We support the FTC's decision to focus "not what a term is called, but how the term functions" because such an approach reflects the reality that employers may assign a wide variety of names to essentially the same coercive practice. 88 Fed. Reg. 3509. However, we encourage the FTC to go further in addressing the variety of restraints that impact competition, suppress wages, and create barriers to worker mobility.

First, we urge the FTC to adopt a definition of "contractual term" which includes workplace policies appearing in employee handbooks or other statements of policy. 88 Fed. Reg. 3510. Though such policies may be legally unenforceable, as discussed above, workers may nonetheless believe that violations of such terms will carry consequences. Therefore, the presence of non-compete language in employee handbooks impacts worker behavior and their perceived ability to seek out alternative jobs, an exploitative and coercive effect the rule is designed to combat.

Second, the Proposed Rule should go further in defining a much broader set of arrangements between workers and employers—as well as between two employers—as functional non-competes. The rule focuses on clauses that serve as wholesale prohibitions on workers "seeking or accepting employment with a person, or operating a business, after the conclusion of the worker's employment with the employer." § 910.1(b); 88 Fed. Reg. 3535. But this overlooks other economically coercive contractual terms that may strongly influence a worker's decision not to leave a job, even if they do not rise to the level of what is currently defined as a "de facto non-compete" under the Proposed Rule. *See* § 910.1(b)(2); 88 Fed. Reg. 3535.

For example, TRAPs, which require workers who receive employer-sponsored training to "repay" the cost of training if they leave a job before a certain period of time has elapsed, would fall within the scope of the Proposed Rule only if "the required payment is not reasonably related to the costs the employer incurred for training the worker." § 910.1(b)(2)(ii); 88 Fed. Reg. 3535. However, this standard allows employers to inappropriately shift the costs of on-the-job training to workers and does not adequately account for benefits the employer may immediately gain after providing such training, such as enhanced productivity and worker cohesion. As non-compete clauses come under increasing legal scrutiny, employers may turn to TRAPs as a tool to restrict worker mobility and subsequently should be more directly addressed.[32] TRAPs are also just one of several forms of employer-driven debt which keep workers from leaving jobs due to onerous repayment obligations, such as debt associated with the purchase of tools or equipment required for a given job, franchise fees, and pay advances.[33] The FTC should strengthen its "de facto non-compete" definition to prohibit clauses and agreements, including

[32] *See Trapped at Work: How Big Business Uses Student Debt to Restrict Worker Mobility*, Student Borrower Protection Ctr. (2022), https://perma.cc/9TBP-R8MN; s*ee also* Press Release, Towards Justice, Groundbreaking Lawsuit against Petsmart Alleging Illegal Training Repayment Agreement (July 28, 2022), https://perma.cc/9FN3-FQN2.

[33] *See* Consumer Financial Protection Bureau Request for Information Request for Information Regarding Employer-Driven Debt, 87 Fed. Reg. 36469 (June 17, 2022).

other forms of employer-driven debt, that have the effect of limiting workers' ability to seek new jobs, even where these clauses do not expressly prohibit future employment or business operations. The FTC could also consider additional disclosure requirements that would help put workers on notice that such practices may constitute de facto non-competes.

Because the Proposed Rule focuses on contractual terms between workers and employers, it also leaves untouched no-poach agreements—agreements between two employers to not recruit workers from each other—which nonetheless limit a worker's ability to seek out a new job. While these agreements are already scrutinized under the Sherman and Clayton Acts, and therefore may already constitute violations of Section 5 of the FTCA, an interpretation of the Act that establishes that such agreements are per se unlawful would provide additional clarity and protection for workers.[34] The presence of such arrangements restrict worker mobility, and their attempted enforcement is a tool for employer abuse even if such arrangements ultimately prove unenforceable. No-poach agreements are particularly pernicious because workers may never know that these agreements are operating in the background to restrict their available employment opportunities—a worker leaving one employer may apply for a position with a second employer without ever knowing the two employers have entered into a no-poach agreement that prohibits hiring the worker outright. As with non-competes, low-wage workers are particularly harmed by such arrangements, which are common among franchises and in the temporary staffing industry, because they lack the resources to identify and challenge unenforceable terms.[35] The FTC should therefore adopt a Final Rule that prohibits no-poach agreements as an additional unfair method of competition and requires employers to disclose and rescind existing no-poach agreements.

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Local Government Commenters reiterate our overwhelming support for the FTC's rulemaking on the issue of non-competes. We urge the Commission to move forward as quickly as possible by adopting its existing findings and issuing a Final Rule that protects independent contractors and franchisees, requires notice and rescission of existing non-compete clauses, sets a floor for state and local regulation of non-competes, and more expansively combats other types of clauses which severely restrict worker mobility. A strong federal non-compete clause rule will in turn strengthen local enforcement of other worker protections and allow low-wage workers in our jurisdictions to better their wages and working conditions. We thank you for taking up this important issue and for the opportunity to provide comment.

[34] Such an approach would be in keeping with the FTC's current policy on unfair methods of competition enforcement under Section 5, which finds that its authority under the FTCA extends beyond the Sherman and Clayton Acts. *See* Fed. Trade Comm'n, File No. P221202, *Policy Statement Regarding the Scope of Unfair Methods of Competition Under Section 5 of the Federal Trade Commission Act* (2022).

[35] *See, e.g.*, Jane R. Flanagan, *Fissured Opportunity: How Staffing Agencies Stifle Labor Market Competition and Keep Workers "Temp"*, 20 J.L. Soc. 247 (2020).

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