Wednesday, March 11, 2020

Dear Chairman Simons,

The undersigned write to affirm or endorse the March 2019 petition for a rulemaking to ban non-compete clauses for all workers.¹ We believe that an FTC rule establishing a *per se* ban is critical given the substantial harms to workers and the unsupported justifications for non-compete clauses. We attach the petition filed a year ago and explain here why the FTC should initiate a rulemaking pursuant to its unfair methods of competition authority.

Like territorial restraints or exclusive dealing contracts, a non-compete clause is a vertical restraint. Vertical restraints structure relations between two parties that are not direct rivals and limit the marketplace freedom of one party.² A non-compete is a vertical non-price restraint governing the relationship between workers and employers. It limits workers’ freedom to work in a certain occupation or industry in an area (city, county, state, or nation) for a specified time after leaving their present employer.

The antitrust laws have long governed price and non-price vertical restraints. For example, the Sherman Act applies to resale price maintenance agreements, vertical restraints between manufacturers and distributors that set a floor on the resale price.³ Similarly, exclusive dealing arrangements between manufacturers and distributors are subject to the Sherman, Clayton, and FTC Acts.⁴

Non-competes impede labor market mobility and reduce competition among employers. A non-compete clause restricts the number of employment options for a worker. For example, a broad non-compete can prevent a worker from finding another job in her field anywhere in the nation for more than a year after she leaves her present employer. By restricting outside options, non-competes encourage workers to stay with their employer, notwithstanding any dissatisfaction with their present employment. Prospective employers may be unwilling to hire workers subject to a non-compete even when it is unenforceable. Empirical research finds that an increased incidence of non-compete clauses is associated with longer job tenures, less job turnover, and reduced job offers.⁵ The effects of non-competes resemble the effects of

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² *See* Butler v. Jimmy John’s Franchise, LLC, 331 F.Supp.3d 786, 793 (S.D. Ill. 2018) (defining vertical agreements as “those made up and down the supply chain”).
³ The Court held these agreements to be *per se* illegal in a 1911 decision. *Dr. Miles Medical Co. v. John D. Park & Sons Co.,* 220 U.S. 373 (1911). Nearly a century later, it overturned the *per se* rule and held that resale price maintenance should be evaluated under the rule of reason. *Leegin Creative Leather Products, Inc. v. PSKS, Inc.,* 551 U.S. 877 (2007).
⁴ Tampa Electric Co. v. Nashville Coal Co., 365 U.S. 320 (1961). *See, e.g.*, McWane, Inc. v. FTC, 783 F.3d 814, 840 (11th Cir. 2015) (“[T]he Commission's conclusion that the Full Support Program [an exclusive dealing arrangement] harmed competition is supported by substantial evidence and sound as a matter of law.”).
no-poach or no-hire agreements between employers, both of which are per se violations of the Sherman Act.\(^6\)

Non-competes can also reduce product market competition. A monopolist or other dominant firm can use non-compete clauses to deprive rivals of workers with specialized or scarce skills. Through non-competes, rivals cannot hire workers they need to grow and succeed against the incumbent dominant firm.\(^7\) They function much similar to exclusive dealing contracts that restrict rivals’ access to critical inputs. In many industries, employees of incumbent firms are often the most promising source of new entry because they can take their experience and knowledge and start a firm to compete against their employer.\(^8\) In general, non-competes can choke off this promising source of entry and help preserve concentrated market structures.

Non-competes are a vertical restraint between worker and employer that depress labor market mobility and competition and carry the potential to exclude rivals and impair competition in product markets. Given these features and market-wide effects of non-competes, the FTC should treat these contracts as an appropriate subject for a competition rulemaking. Non-compete clauses for workers are a form of “restrictive . . . conduct that substantially lessens competition.”\(^9\) And the FTC has broad authority to define what constitutes an unfair method of competition and can prohibit practices that do not necessarily run afoul of the Sherman or Clayton Acts, as the Supreme Court has noted.\(^10\)

In accordance with the attached petition for rulemaking, we ask that the FTC identify and prohibit non-compete clauses for workers as an unfair method of competition.

Sincerely,

Open Markets Institute  
Allegheny County Medical Society  
American Academy of Emergency Medicine  
American Economic Liberties Project  
Change to Win  
Consumer Federation of America  
Demand Progress Education Fund  
Economic Policy Institute  
National Employment Law Project  
Organization United for Respect

\(^6\) Anderson v. Shipowners’ Association of Pacific Coast, 272 U.S. 359, 362, 365 (1926). Then-Judge Sotomayor wrote that “a horizontal conspiracy among buyers to stifle competition is as unlawful as one among sellers.” \textit{Todd v. Exxon Corp.}, 275 F.3d 191, 201 (2d Cir. 2001).

\(^7\) \textit{See, e.g.,} Warren Greenberg, \textit{Marshfield Clinic, Physician Networks, and the Exercise of Monopoly Power}, 33 HSR: HEALTH SERVS. RES. 1461, 1470 (1998) ("The Marshfield Clinic also enforced a non-compete clause with physicians who were formerly employed by Marshfield. Such physicians could not practice within 30 miles of Marshfield for three years after termination from the Clinic, resulting in less competition to the Marshfield Clinic.")


\(^9\) E.I. du Pont de Nemours & Co. v. FTC, 729 F.2d 128, 137 (2d Cir. 1984).

\(^10\) \textit{See FTC v. Ind. Fed. of Dentists}, 476 U.S. 447, 454 (1986) ("The standard of ‘unfairness’ under the FTC Act is, by necessity, an elusive one, encompassing not only practices that violate the Sherman Act and the other antitrust laws, but also practices that the Commission determines are against public policy for other reasons[]").
People’s Parity Project
Public Citizen
Service Employees International Union
UFCW
UNITE HERE
Workplace Fairness

And in their individual capacities:

Alan Hyde (Distinguished Professor and Sidney Reitman Scholar, Rutgers Law School)
Ariana Levinson (Professor, University of Louisville Brandeis School of Law)
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