COMMENTS OF THE
AMERICAN BAR ASSOCIATION ANTITRUST LAW SECTION
ON PETITION FOR FEDERAL TRADE COMMISSION RULEMAKING
TO PROHIBIT WORKER NON-COMPETE CLAUSES

September 15, 2021

The views expressed herein are presented on behalf of the Antitrust Law Section. They have not been reviewed or approved by the House of Delegates or the Board of Governors of the American Bar Association and, accordingly, should not be construed as representing the position of the Association.

The Antitrust Law Section of the American Bar Association (the Section) respectfully submits these comments concerning the petition of the Open Markets Institute and others (Petition) requesting that the Federal Trade Commission (Commission) initiate a rulemaking on non-compete clauses applicable to workers. The Petition asks that the Commission promulgate a rule declaring that non-compete clauses are an unfair method of competition in violation of Section 5 of the Federal Trade Commission Act (FTC Act).1 Under the rule, such clauses would be per se violations.

Without expressing a view on whether the Commission should undertake this rulemaking,2 these comments identify important considerations in deciding whether to undertake the rulemaking and in conducting the rulemaking if the Commission does so. Issues touched on in these comments were treated in depth by the Section’s comments in connection with the Commission’s workshop on “Non-Competes in the Workplace: Examining Antitrust and Consumer Protection Issues.”3


2 Although Section 6(g) of the FTC Act gave the Commission the power “to make rules and regulations,” the Section has questioned the Commission’s authority under Section 6(g) to promulgate rules implementing Section 5’s prohibition of unfair methods of competition. Comments of the Antitrust Law Section of the American Bar Association in Connection with the Federal Trade Commission Workshop on “Non-Competes in the Workplace: Examining Antitrust and Consumer Protection Issues” 53-60 (Apr. 23, 2020) (hereinafter Section Comments), https://www.americanbar.org/content/dam/aba/administrative/antitrust_law/comments/april-2020/comment-42420-ftc.pdf. The D.C. Circuit upheld the Commission’s authority to promulgate rules under Section 6(g) in 1973. Nat’l Petroleum Refiners Ass’n v. FTC, 482 F.2d 672 (D.C. Cir. 1973). But at the Commission’s January 9, 2020 workshop, several participants commented that the courts today are less inclined to rule that way. Comments of William E. Kovacic, Non-compete in the Workplace: Examining Antitrust and Consumer Protection Interests 35–36, https://www.ftc.gov/system/files/documents/public_events/1556256/non-compete-workshop-transcript-full.pdf; Comments of Aaron L. Nielson, id. at 234–36; Comments of Richard J. Pierce, Jr., id. at 294–96. Two current FTC commissioners nevertheless have argued that the FTC has the power to promulgate such rules. Rohit Chopra & Lina Khan, The Case for “Unfair Methods of Competition” Rulemaking, 87 U. CHICAGO L. REV. 356 (2020).

3 Section Comments, supra note 2.
The Section is available to provide additional comments or assistance in any other way that the Commission might deem helpful and appropriate. The Antitrust Law Section is the world’s largest professional organization for antitrust and competition law, trade regulation, consumer protection, and data privacy as well as related aspects of economics. Section members, numbering over 9,000, come from all over the world and include attorneys and non-lawyers from private law firms, in-house counsel, non-profit organizations, consulting firms, federal and state government agencies, as well as judges, professors, and law students. The Section provides a broad variety of programs and publications concerning all facets of antitrust and the fields listed above. For nearly thirty years, the Section has provided input to enforcement agencies conducting consultations on topics within the Section’s scope of expertise.4

Non-compete clauses in employment contracts have been primarily a subject of contract law, and thus a matter mainly for the states.5 The states differ in their treatment of non-compete clauses in employment contracts.6 Four states have opted to ban the clauses outright.7 In recent years, nine states have banned them for low-wage workers.8 Some states have adopted narrow prohibitions. And 31 states apply a common law reasonableness test.9 The Commission should consider the admonition of Justice Louis Brandeis: “To stay experimentation in things social and economic is a grave responsibility. Denial of the right to experiment may be fraught with serious consequences to the Nation.”10

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4 Prior comments submitted by the Section can be accessed on its website at: https://www.americanbar.org/groups/antitrust_law/resources/comments_reports_amicus_briefs.


6 See id. at 1 (“[Covenants not to compete (CNCs)] have a long history in the United States. They have been regulated to varying degrees by the states, who take different approaches to legislating and enforcing CNCs. California, for example, has long banned the enforcement of CNCs, while most other states have not. This is the type of experimentation and variation that our system of government is designed to promote.” (footnotes omitted)).

7 With some exceptions, the clauses are banned in California, the District of Columbia, North Dakota, and Oklahoma. CAL. BUS. & PROF. CODE § 16600; D.C. CODE § 32-581; N.D. CENT. CODE § 9-08-06; OKLA. STAT. tit. 15, § 15-219A.

8 Five states prohibited the clauses for low-wage workers in 2019: Maine prohibited them for workers earning less than four times the federal poverty level. ME. STAT. tit. 26 § 599A. Maryland prohibited them for workers earning less than $15 per hour. MD. CODE ANN., LAB. & EMPL. § 3-716. New Hampshire prohibited them for workers paid less than $14.50 per hour. N.H. REV. STAT. ANN. § 275:70-a. Rhode Island prohibited them for workers earning less than 2.5 times the federal poverty level without overtime. R.I. GEN. LAWS §§ 28-59-1–3. Washington prohibited them unless the employee is paid more than $100,000 per year. WASH. REV. CODE § 49.62. In 2020 Virginia prohibited them for employees earning less than the average wage in the Commonwealth. VA. CODE ANN. § 40.1-28.7:8. Comparable provisions have been enacted but not yet gone into effect in Illinois, Nevada, and Oregon.


10 New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (dissenting opinion). While quoting Brandeis’s dissent in *New State Ice* and noting the variation in state treatment of non-compete clauses in employment contracts, a group of states has supported an FTC rulemaking in this area. Public Comments of 20 State Attorneys General, *supra* note 5.
Before the Commission undertakes a rulemaking on non-compete clauses in employment contracts, it also should consider implementation. The wide use of the clauses provides impetus for a rulemaking, but it also could present a compliance challenge. Simply prohibiting the clauses might do little to reduce their use. And because penalties for the use of non-compete clauses could be imposed only on an employer continuing to employ the clauses after being adjudicated to be in violation of the rule, a sanctions-based approach could consume enormous resources. The Commission should consider what else is possible to address non-compete clauses in employment contracts.

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Antitrust law treats non-compete clauses differently depending on context. Non-compete clauses in agreements between actual or potential competitors can be per se illegal market allocations. Non-compete clauses in agreements between actual or potential competitors, however, can be reasonable ancillary restraints incident to a joint venture or the sale of a business. When the Sherman Act was enacted, non-compete clauses were upheld at common law only in comparable scenarios, and most states now apply the common law to non-compete clauses in employment contracts. Few reported antitrust decisions consider non-compete clauses in vertical agreements.


12 California prohibited most non-compete clauses in employment contracts in 1941. CAL. BUS. & PROF. CODE § 16600. But the clauses remain common in California. See Colvin & Shierholz, supra note 11.

13 In the most recent year for which data was available, the United States had 5,285,307 employers. See 2018 Business Dynamics Statistics Data Tables, https://www.census.gov/data/tables/time-series/econ/bds/bds-tables.html.

14 See Palmer v. BRG of Ga., Inc., 498 U.S. 46 (1990); Blackburn v. Sweeney, 53 F.3d 825 (7th Cir. 1995). The Department of Justice has obtained indictments charging criminal violations of Section 1 of the Sherman Act involving no-poach agreements between competing employers. Indictment, United States v. Davita Inc., Cr. No. 21-cr-00229 (D. Colo. filed July 14, 2021); Superseding Indictment, United States v. Surgical Care Affiliates, LLC., Cr. No. 3:21-cr-011-L (D. Tex. filed July 8, 2021). These cases alleged horizontal agreements restraining employers, while the Petition concerns vertical agreements restraining employees.

15 See Polk Bros., Inc. v. Forest City Enters., Inc., 776 F.2d 185 (7th Cir. 1985); Lektro-Vend Corp. v. Vendo Co., 660 F.2d 255 (7th Cir. 1981). In what follows, these comments are addressed to non-compete clauses that are vertical agreements.

16 Judge Taft’s landmark opinion in Addyston Pipe identified five scenarios in which non-compete contractual clauses were upheld at common law. They were: covenants “by the seller of property or business not to compete with the buyer,” covenants “by a retiring partner not to compete with the firm,” covenants in partnership agreements “not to do anything to interfere . . . with the business of the firm,” covenants “by the buyer of property not to use the same in competition with the business retained by the seller,” and covenants “by an assistant, servant, or agent not to compete with his master or employer after the expiration of his time of service.” United States v. Addyston Pipe & Steel Co., 85 F. 271, 281 (6th Cir. 1898).

17 In 31 states, the law applicable to non-compete clauses in employment contracts is the common law. See Dau-Schmidt & Jones, supra note 9, at 7–10 in SSRN draft.
agreements between an employer and an employee, and none appears to find a per se violation, or even an unreasonable restraint. 18

Current controversy over non-compete clauses in employment contracts has focused on their impact in labor markets: The clauses limit the ability of the workers to switch jobs and thus limit the extent to which employers must compete to retain employees, in particular by increasing wages. 19 With perfect information and foresight, non-compete clauses might not affect lifetime earnings because employers could not impose limits on wage increases without also increasing starting wages, but frictions in labor markets are significant, especially for the least-skilled and least-experienced workers. Several empirical studies in the academic literature have found that non-compete clauses depress the wages of technology and low-wage workers. 20 If the Commission undertakes a rulemaking on non-compete clauses in employment contracts, it should seek to further develop evidence that they have anticompetitive effects.

Even if non-compete clauses in employment contracts typically are anticompetitive, they can serve legitimate purposes in some instances. 21 Non-compete clauses can be used to protect trade secrets, customer relationships, and employer investments in employee human capital. Moreover, empirical academic research on the use of non-compete clauses for executives and physicians has found that they serve procompetitive purposes. 22 If the Commission undertakes a

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18 See Consultants & Designers, Inc. v. Butler Serv. Grp., Inc., 720 F.2d 1553 (11th Cir. 1983); Aydin Corp. v. Loral Corp., 718 F.2d 897 (9th Cir. 1983); Newburger, Loeb & Co., Inc. v. Gross, 563 F.2d 1057, 1081–83 (2d Cir. 1977); Bradford v. New York Times Co., 501 F.2d 51, 59–60 (2d Cir. 1974). A recent law review article reports that: “A search in the Westlaw database yielded a grand total of zero cases in which an employee noncompete was successfully challenged under antitrust law.” Eric A. Posner, The Antitrust Challenge to Covenants not to Compete in Employment Contracts, 83 ANTITRUST L.J. 165, 173 (2020). Nevertheless, the Section has indicated that non-compete clauses can violate federal antitrust law. See Section Comments, supra note 2, at 37. Several state attorneys general have settled cases in which they charged that the clauses violated their states’ antitrust laws.


20 See Natarajan Balasubramanian et al., Locked In? Noncompete Enforceability and the Mobility and Earnings of High-Tech Workers, J. HUM. RESOURCES (forthcoming); Michael Lipsitz & Evan Starr, Low-Wage Workers and the Enforceability of Non-Compete Agreements, MGMT. SCI. (forthcoming); Starr et al, supra note 11; Matthew Johnson, Kurt Lavetti & Michael Lipsitz, The Labor Market Effects of Legal Restrictions on Worker Mobility (Feb. 17, 2021), https://ssrn.com/abstract=3455381; Comments of Kurt Lavetti, Non-competes in the Workplace, supra note 2, at 138 (“the empirical evidence has quite convincingly shown that strengthening the enforceability of non-compete laws reduces average earnings and worker mobility”); Comments of Evan Starr, id. at 174 (“I think there’s agreement that banning non-competes raises wages and mobility for even technical workers . . . .”). Other literature finds that non-compete clauses reduce worker mobility. Matt Marx, Deborah Strumsky & Lee Fleming, Mobility, Skills, and the Michigan Non-Compete Experiment, 55 MGMT. SCI. 875 (2009).

21 See Comments of Kurt Lavetti, Non-competes in the Workplace, supra note 2, at 151 (“It does seem like there is very convincing evidence that workers are harmed on average, but there are some important exemptions . . . .”).

rulemaking on non-compete clauses in employment contracts, it should consider the extent to which they serve legitimate procompetitive purposes, the efficacy of alternate ways to achieve the same purposes, and whether a rule could be tailored to avoid situations in which non-compete clauses serve procompetitive purposes.\textsuperscript{23}

In a leading Sherman Act case, the Supreme Court stated that the “\textit{per se} rule is a valid and useful tool of antitrust policy and enforcement.”\textsuperscript{24} But the Court later cautioned that: “Resort to \textit{per se} rules is confined to restraints, like [price fixing], that would always or almost always tend to restrict competition and decrease output. To justify a \textit{per se} prohibition a restraint must have manifestly anticompetitive effects and lack any redeeming virtue.”\textsuperscript{25} The Court went on to add that “the \textit{per se} rule is appropriate only after courts have had considerable experience with the type of restraint at issue and only if courts can predict with confidence that it would be invalidated in all or almost all instances under the rule of reason.”\textsuperscript{26}

If the Commission adopts a rule banning (some) non-compete clauses in employment contracts, it must articulate a rationale that the Commission will use to defend the rule against court challenges.\textsuperscript{27} The Section urges the Commission to justify any \textit{per se}–type rule only in a manner consonant with the Supreme Court’s teaching on \textit{per se} rules in Sherman Act cases. The Section recognizes that the Commission has long taken the position that the limits of Section 5 of the FTC Act are not defined by Sherman Act jurisprudence, but the Section urges the Commission to recognize the wisdom in the Supreme Court’s teaching on \textit{per se} rules.

Without prejudging what the Commission might find in the rulemaking process, the Section suggests that a ban on all non-competes in employment contracts would be exceptionally difficult to justify consistent with the Supreme Court’s teaching in Sherman Act cases. If the Commission undertakes a rulemaking on non-compete clauses in employment contracts, it should consider whether it is feasible to define a class of employment contracts in which non-compete clauses almost always restrict competition and lack any redeeming value.\textsuperscript{28} This class might be defined by criteria such as the absence of bargaining over the inclusion or content of the non-compete clause, the absence of significant investment in human capital, and compensation below

\begin{footnotesize}
23 See supra note 8.


26 Id. at 886–87 (citations and internal quotation marks omitted).

27 See Dep’t of Homeland Security v. Regents of Univ. of Cal., 140 S. Ct. 1891, 1909 (2020) (“An agency must defend its actions based on the reasons it gave when it acted.”).

28 See Comments of Kurt Lavetti, Non-competes in the Workplace, supra note 2, at 153 (“Non-competes have been used for a long time, and the literature is, in a relative sense, nascent compared to the history of the use of non-compete agreements. I think there are policies that can be used to protect vulnerable workers while still permitting non-competes in other contexts, that a lot of other people today have discussed examples of such policies, like setting minimum earnings and wage floors for workers who are bound by non-compete agreements. Another way of structuring this would be to say that if you sign a non-compete agreement, there has to be an explicit compensating wage differential that’s tied to that non-compete agreement.”).
\end{footnotesize}
some specified level. These criteria appear to characterize the vast majority of low-wage, low-skill jobs.

29 A per se rule applicable under limited circumstances would be akin to the treatment of tying under federal antitrust law. “The four elements of a per se tying violation are: (1) two separate products are involved; (2) the sale or agreement to sell one product is conditioned on the purchase of the other; (3) the seller has sufficient economic power in the tying product market to enable it to restrain trade in the tied product market; and (4) a ‘not insubstantial’ amount of interstate commerce in the tied product is affected.” Suture Express, Inc. v. Owens & Minor Distribution, Inc., 851 F.3d 1029, 1037 (10th Cir. 2017).