



UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

Office of Policy Planning

November 28, 2023

VIA ELECTRONIC MAIL

The Honorable Kathy Hochul
Governor of New York State
NYS State Capitol Building
Albany, NY 12224

Re: New York's Bill on Non-Compete Clauses

Dear Governor Hochul:

I write this letter as a Deputy Director of the FTC's Office of Policy Planning, the FTC office that provides advocacies and submits filings supporting competition and consumer protection principles to state legislatures, regulatory boards, and officials.

We understand that your office is considering a bill that passed the NY State Senate and State Assembly, S3100A and A1278B, to restrict the use of non-compete clauses in employment. As referenced in the justifications for S3100A, the FTC proposed a rule in January of 2023 banning non-compete clauses in employment at all wage levels. In doing so, the FTC made several preliminary findings that you may find informative as you consider this bill. That notice of proposed rulemaking (NPRM) is attached to this letter.¹

As the NPRM notes, nationwide, approximately one in five workers—or thirty million Americans—are bound by non-compete clauses.² In total, the FTC estimates that banning non-compete clauses could increase workers' earnings by approximately \$250 to \$296 billion per year.³ The FTC preliminarily concludes that because non-compete clauses decrease mobility and competition in the labor market, these clauses lower wages for both workers who are and are not subject to them.⁴ The FTC also made preliminary findings that non-compete clauses harm innovation and prevent new businesses from forming.⁵ The FTC's proposed rule would both ban employers from entering into non-

¹ The proposal and additional information are also available on our website at <https://www.ftc.gov/legal-library/browse/federal-register-notices/non-compete-clause-rulemaking>, and in the Federal Register at *Non-Compete Clause Rule*, 88 Fed. Reg. 3482 (proposed Jan. 19, 2023).

² *Non-Compete Clause Rule*, 88 Fed. Reg. at 3485.

³ *Id.* at 3501.

⁴ *Id.*

⁵ *Id.* at 3502.

compete clauses with their workers and require employers to rescind existing non-compete clauses and notify workers that the clause is no longer in effect.⁶

There are several portions of the NPRM that you may find particularly informative.

- Evidence on the existing use of non-compete clauses in the U.S. is set forth on pages 3485-86 of the NPRM. The evidence shows that non-compete clauses are used extensively, including for low-wage workers. 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.⁷
- An extensive discussion of the literature, studies, and other evidence on the effects of non-compete clauses is set forth on pages 3484-93 of the NPRM. Many of these studies are further discussed as part of the FTC's cost-benefit analysis on pages 3522-30.
 - Evidence that non-compete clauses reduce earnings for both workers who are and who are not covered by non-compete clauses, as well as increase racial and gender wage gaps, is set forth on pages 3486-88 and 3522-25 of the NPRM.
 - Evidence that non-compete clauses reduce workforce mobility and the resulting effects is set forth on pages 3489-93, 3526-28, and 3529, including the effects on consumer prices, access to talent, new business formation, innovation, and training and other investments.
- The FTC preliminarily determines that non-compete clauses negatively affect competition, as explained on pages 3500-02. It also preliminarily determines that non-compete clauses are exploitative and coercive, both at the time of contracting and at departure, for all workers except for senior executives, as explained on pages 3502-04.
- The NPRM considers the common justifications put forward for non-compete clauses, including increasing incentives to invest in workers and protecting trade secrets, and preliminarily concludes nevertheless that non-compete clauses are unlawful. The discussion of justifications commonly raised for non-compete clauses as well as alternatives to non-compete clauses available to employers to protect their investments is on pages 3504-08.
- The FTC explains each section of its proposed rule on pages 3508-16. In particular, the FTC explains why it is proposing a categorical ban on non-compete

⁶ *Id.* at 3483.

⁷ *Id.* at 3485.

clauses, including for both low and high-wage workers, on pages 3512-13. The proposed rule's relation to state law is explained on page 3515.

- The FTC sets forth alternative proposals on pages 3516-21. It discusses the advantages and disadvantages of a uniform rule versus differentiating between categories of workers such as low and high-wage workers on pages 3518-19.

The comment period on the proposed rule closed on April 19, 2023. We received more than 21,000 comments from members of the public, which are publicly available and searchable on Regulations.gov.⁸ Some of those commenters identify themselves as New York residents, businesses, and New York-based organizations. We also received a joint comment from New York's Attorney General and the Attorneys General of several other states.⁹

We hope that the research and analysis the FTC has undertaken concerning non-compete clauses is valuable to you as you consider this bill.

Sincerely,

Sarah Mackey-Barr
Deputy Director
Office of Policy Planning

cc: New York State Senator Sean M. Ryan

⁸ Public Comments, Non-Compete Clause Rule NPRM (Jan. 9, 2023), available at <https://www.regulations.gov/document/FTC-2023-0007-0001>.

⁹ Comment, FTC-2023-0007-21043 (April 19, 2023), at <https://www.regulations.gov/comment/FTC-2023-0007-21043>.