

United States Senate  
WASHINGTON, DC 20510

July 22, 2020

Joseph J. Simons  
Chairman  
Federal Trade Commission  
600 Pennsylvania Avenue, NW  
Washington, DC 20580

Dear Chairman Simons:

We write to urge the Federal Trade Commission (FTC) to take immediate action to protect workers from suffering undue harm from the imposition and enforcement of non-compete agreements during the coronavirus disease 2019 (COVID-19) pandemic. The FTC opened discussion earlier this year of a rule restricting these agreements, and should move quickly to protect workers and foster competition by finalizing this rule.

Non-compete agreements are restrictive contracts that impose limitations on workers' ability to find employment in certain industries and geographic areas. Such agreements limit competition in the labor market and reduce the ability of workers to seek quality employment. According to one estimate, at least 36 million private-sector workers in the United States, and up to 60 million, are bound by non-compete agreements.<sup>1</sup> A recent study also suggests that approximately one out of every five employees are subject to non-competes.<sup>2</sup> Non-compete agreements impact workers in all fields, including engineers,<sup>3</sup> physicians,<sup>4</sup> and low-income workers.<sup>5</sup>

Non-competes are rarely the result of meaningful negotiation between employer and employee. According to one study, 70 percent of employees subject to non-competes were asked to sign an agreement after receiving their offer.<sup>6</sup> For example, our offices received information about a

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<sup>1</sup> Law360, "36 Million Workers Bound By Noncompetes, Survey Says," Braden Campbell, December 10, 2019, <https://www.law360.com/articles/1226030/36-million-workers-bound-by-noncompetes-survey-says>; Economic Policy Institute, "Noncompete Agreements," December 10, 2019, <https://www.epi.org/publication/noncompete-agreements/>.

<sup>2</sup> Starr, Evan and Prescott, J.J., and Bishara, Norman D. (2020). Noncompetes in the U.S. Labor Force. *U of Michigan Law & Econ Research Paper No. 18-013*. <http://dx.doi.org/10.2139/ssrn.2625714>.

<sup>3</sup> Marx, Matt. (2011). The Firm Strikes Back: Non-compete Agreements and the Mobility of Technical Professionals. *American Sociological Review*. <https://doi.org/10.1177%2F0003122411414822>; EconoFact, "The Chilling Effect of Non-Compete Agreements," May 20, 2018, <https://econofact.org/the-chilling-effect-of-non-compete-agreements>.

<sup>4</sup> EconoFact, "The Chilling Effect of Non-Compete Agreements," May 20, 2018, <https://econofact.org/the-chilling-effect-of-non-compete-agreements>.

<sup>5</sup> Starr, Evan and Prescott, J.J. and Bishara, Norman D. (2020). Noncompetes in the U.S. Labor Force. *U of Michigan Law & Econ Research Paper No. 18-013*. <http://dx.doi.org/10.2139/ssrn.2625714>; EconoFact, "The Chilling Effect of Non-Compete Agreements," May 20, 2018, <https://econofact.org/the-chilling-effect-of-non-compete-agreements>.

<sup>6</sup> Marx, M. (2011). The Firm Strikes Back: Non-compete Agreements and the Mobility of Technical Professionals. *American Sociological Review*. <https://doi.org/10.1177%2F0003122411414822>; EconoFact, "The Chilling Effect of Non-Compete Agreements," May 20, 2018, <https://econofact.org/the-chilling-effect-of-non-compete-agreements>.

constituent working in the biopharmaceutical industry who, after accepting a job offer, was presented with a non-compete agreement. The constituent objected to the agreement, explaining that it was unenforceable under Massachusetts law, but was told no change would be made.<sup>7</sup> Because the constituent had already accepted the new job and left a previous position, they felt compelled to sign the agreement.<sup>8</sup>

Employers have other tools to force workers to sign non-compete agreements, particularly as the nation suffers from the highest unemployment rates since the Great Depression.<sup>9</sup> For example, in March 2018, Courtney Van Cott, a real estate agent in Arizona, was forced to sign a non-compete after being told “that if [she] didn’t sign the agreement that [she] would be terminated and [she] wouldn’t be getting paid on...pending transactions.”<sup>10</sup> Indeed, springing non-competes on existing employees is a common, coercive tactic: according to one study, nearly half of the workers subject to non-competes were asked on their first day of work or after to sign the agreement.<sup>11</sup>

Non-compete agreements have severe negative impacts on workers. These restrictive agreements significantly reduce job mobility, especially for those in certain technical fields, including engineers.<sup>12</sup> Non-competes also make it harder to start, grow, and recruit for start-ups, lowering entrepreneurship rates by imposing restrictions on potential entrepreneurs and employees.<sup>13</sup> Indeed, evidence suggests that the pervasive use of non-competes in the labor market can harm even employees who are not subject to these agreements.<sup>14</sup>

Further, when employees know that they cannot find similar employment in the same geographic region if they leave their job, it gives the employer undue power in the employer-employee relationship, allowing them to lower wages, decrease benefits, or subject workers to inhospitable environments without fear of their employees leaving for a competitor. Our offices also received report of a caregiver working for a national franchise, who was told that she could not work for

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<sup>7</sup> Confidential interview conducted and shared with Sen. Warren’s staff.

<sup>8</sup> *Id.*

<sup>9</sup> CNBC, “Unemployment is nearing Great Depression levels. Here’s how the eras are similar – and different,” Greg Iacurci, May 19, 2020, <https://www.cnbc.com/2020/05/19/unemployment-today-vs-the-great-depression-how-do-the-eras-compare.html>.

<sup>10</sup> Interview conducted with Courtney Van Cott and shared with Sen. Warren’s staff.

<sup>11</sup> Marx, M. (2011). The Firm Strikes Back: Non-compete Agreements and the Mobility of Technical Professionals. *American Sociological Review*. <https://doi.org/10.1177%2F0003122411414822>; EconoFact, “The Chilling Effect of Non-Compete Agreements,” May 20, 2018, <https://econofact.org/the-chilling-effect-of-non-compete-agreements>.

<sup>12</sup> Marx, M., Strumsky, D., and Fleming, L. (2009). Mobility, Skills, and the Michigan Non-Compete Experiment. *Management Science*, 55(6), 875-889. <https://doi.org/10.1287/mnsc.1080.0985>; Marx, Matt. (2011). The Firm Strikes Back: Non-compete Agreements and the Mobility of Technical Professionals. *American Sociological Review*. <https://doi.org/10.1177%2F0003122411414822>; EconoFact, “The Chilling Effect of Non-Compete Agreements,” May 20, 2018, <https://econofact.org/the-chilling-effect-of-non-compete-agreements>.

<sup>13</sup> Starr, E., Balasubramanian, N., and Sakakibara, M. (2017). Screening Spinouts? How Noncompete Enforceability Affects the Creation, Growth, and Survival of New Firms. *Management Science*, 64(2), 495-981. <https://doi.org/10.1287/mnsc.2016.2614>; EconoFact, “The Chilling Effect of Non-Compete Agreements,” May 20, 2018, <https://econofact.org/the-chilling-effect-of-non-compete-agreements>.

<sup>14</sup> Starr, E., Frake, J., and Agarwal, R. (2017). Mobility Constraint Externalities. *Organization Science*. <https://dx.doi.org/10.2139/ssrn.3027715>; EconoFact, “The Chilling Effect of Non-Compete Agreements,” May 20, 2018, <https://econofact.org/the-chilling-effect-of-non-compete-agreements>.

any other agency for a year after leaving.<sup>15</sup> Leseney said that after this, she and her coworkers were “too terrified” to leave.<sup>16</sup>

The COVID-19 pandemic has exacerbated the problems created by non-compete agreements. For example, such restrictive provisions are particularly common among emergency medicine physicians. As the American Academy of Emergency Medicine (AAEM) notes, corporate medical groups and some hospital administrators “control emergency physicians through exploitative contractual provisions.”<sup>17</sup> The University of Pittsburgh Medical Center, for example, has been the subject of numerous complaints from doctors who have been subject to non-competes, as well as patients who have had care interrupted due to thoughtless enforcement of such agreements.<sup>18</sup>

Physician and other health worker non-competes during a global pandemic pose a risk to public health. The American Medical Association (AMA) has noted that “covenants-not-to-compete restrict competition, can disrupt continuity of care, and may limit access to care.”<sup>19</sup> And the AMA notes that non-competes “can undermine physicians’ specific ethical commitment to public health to provide urgent medical care.”

The specter of a disrupted career due to non-compete agreements also poses risks to hospital health and safety during COVID-19. Reports have emerged of doctors being fired<sup>20</sup> or threatened with termination<sup>21</sup> for speaking out about a lack of personal protective equipment (PPE) or poor health and safety conditions at hospitals. If doctors are subject to non-compete agreements, the threat of having to uproot their lives and their families’ lives creates a dangerous incentive to avoid speaking up about serious health issues.

And despite the ongoing crisis, other companies continue to enforce non-compete agreements. For example, on May 18, 2020, Amazon filed a lawsuit against Brian Hall, a former employee who had obtained a job with Google after being passed over for a promotion at his former

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<sup>15</sup> Interview shared with Sen. Warren’s staff.

<sup>16</sup> Interview shared with Sen. Warren’s staff.

<sup>17</sup> American Academy of Emergency Medicine, “Restrictive Covenants,” Larry D. Weiss, <https://www.aaem.org/resources/key-issues/em-contracts/restrictive-covenants#:~:text=The%20American%20Academy%20of%20Emergency,clauses%2C%E2%80%9D%20in%20physician%20contracts.&text=Some%20contract%20holders%20and%20hospital,physicians%20through%20exploitative%20contractual%20provisions.>

<sup>18</sup> The Non-Compete Blog, “Expecting Mothers Are Latest Victims of Physician Non-Compete Agreements,” Jonathan Pollard, January 11, 2013, <https://thenoncompeteblog.com/2013/01/11/expecting-mothers-are-latest-victims-of-physician-non-compete-agreements/>; Washington Post, “Giant hospital system’s charity status challenged,” Carolyn Y. Johnson, February 7, 2019, <https://www.washingtonpost.com/health/2019/02/07/giant-hospital-systems-charity-status-challenged/>.

<sup>19</sup> American Medical Association, “Restrictive covenants and patient care in a pandemic,” April 8, 2020, <https://www.ama-assn.org/delivering-care/ethics/restrictive-covenants-and-patient-care-pandemic>.

<sup>20</sup> Mississippi Today, “Two Mississippi doctors fired after speaking out about coronavirus safety,” Kayleigh Skinner and Erica Hensley, April 5, 2020, <https://mississippitoday.org/2020/04/05/two-mississippi-doctors-fired-after-speaking-out-about-coronavirus-safety/>.

<sup>21</sup> Bloomberg, “Hospitals Tell Doctors They’ll Be Fired If They Speak Out About Lack of Gear,” Olivia Carville, Emma Court, and Kristen V. Brown, March 31, 2020, <https://www.bloomberg.com/news/articles/2020-03-31/hospitals-tell-doctors-they-ll-be-fired-if-they-talk-to-press>.

company.<sup>22</sup> Because of the nature of his job, the suit would effectively prevent Hall from taking his new position until October 2021, potentially leaving him jobless in the midst of COVID-19.<sup>23</sup>

Many states have acknowledged that non-compete agreements are harmful. Some, for example, have limited such agreements to particular fields, to employees only at businesses that fall above certain revenue thresholds, or to certain geographical ranges.<sup>24</sup> Unfortunately, such laws are inconsistent and often ineffective. Massachusetts imposes restrictions on non-compete agreements, but that did not stop a biopharmaceutical company from forcing new employees to sign such agreements.<sup>25</sup> And although non-competes are unenforceable in California, for example, they are “common...in” the state and employers still “use them to pressure employees into not going to work for competitors.”<sup>26</sup>

The FTC has also acknowledged the insidious nature of non-compete agreements in the labor market. On January 9, 2020, the agency held a workshop “to examine whether there is a sufficient legal basis and empirical economic support to” justify a Commission Rule to “restrict the use of non-compete clauses in employer-employee” contracts.<sup>27</sup> In late January, the FTC solicited public comments on the same question, setting a deadline of March 11, 2020.<sup>28</sup> In early March, nineteen state attorneys general submitted “extensive comments” describing how non-compete clauses suppress wages, decrease benefits, and reduce innovation and labor market mobility.<sup>29</sup>

Unfortunately, since the passage of that March 11 deadline more than four months ago, the FTC has taken no public action on a rule to limit non-compete agreements. This is especially concerning as the country faces an unprecedented labor crisis in the midst of a global pandemic. Over 51 million workers have filed for unemployment since the FTC deadline for public

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<sup>22</sup> CNBC, “Amazon is suing a cloud employee who left for Google, rekindling the debate over non-compete agreements,” Jordan Novet, June 11, 2020, <https://www.cnbc.com/2020/06/11/aws-case-against-worker-who-joined-google-reignites-non-compete-debate.html>.

<sup>23</sup> See Amazon.com, Inc. v. Brian Hall, Complaint for Declaratory, Injunctive, and Other Relief, Case # 20-2-08977-0 SEA, May 18, 2020,

<https://fm.cnbc.com/applications/cnbc.com/resources/editorialfiles/2020/06/10/ComplaintforInjunction.pdf>.

<sup>24</sup> Fair Competition Law, “Employee Noncompetes: A State by State Survey,” Russell Beck, June 27, 2020, <https://www.faircompetitionlaw.com/wp-content/uploads/2020/06/Noncompetes-50-State-Survey-Chart-20200627.pdf>.

<sup>25</sup> Confidential interview conducted and shared with Sen. Warren’s staff.

<sup>26</sup> Economic Policy Institute, “Noncompete Agreements,” December 10, 2019, <https://www.epi.org/publication/noncompete-agreements/>.

<sup>27</sup> Federal Trade Commission, “Non-Competes in the Workplace: Examining Antitrust and Consumer Protection Issues,” January 9, 2020, <https://www.ftc.gov/news-events/events-calendar/non-competes-workplace-examining-antitrust-consumer-protection-issues>.

<sup>28</sup> Federal Trade Commission, “FTC Extends Deadline for Comments on Workshop Addressing Non-Compete Clauses in Employment Contracts,” press release, January 28, 2020, <https://www.ftc.gov/news-events/press-releases/2020/01/ftc-extends-deadline-comments-workshop-addressing-non-compete#:~:text=Following%20a%20recent%20public%20workshop,for%20public%20comments%20from%20Feb.&text=Interested%20parties%20may%20submit%20public.topics%20through%20March%2011%2C%202020..>

<sup>29</sup> D.C. Attorney General, “AG Racine Leads 19 Attorneys General Urging Federal Trade Commission to Crack Down on Abusive Non-Competes in the Workplace,” Mar. 12, 2020, <https://oag.dc.gov/release/ag-racine-leads-19-attorneys-general-urging>.

comment has passed.<sup>30</sup> In this historically weak labor market, non-compete agreements become even more poisonous, leaving millions of workers who have lost jobs due to the pandemic unable to seek employment elsewhere, and potentially unable to start their own company after the crisis subsides. Fortunately, having held a workshop and completed a period for public comment, the FTC is well-positioned to issue a Commission Rule to reduce these obstacles facing millions of struggling Americans.

We appreciate that the FTC has acknowledged this heightened risk in a joint statement with the Department of Justice (DOJ), warning employers who “engage in collusion or other anticompetitive conduct in labor markets,” including “anticompetitive non-compete agreements,” and threatening “to hold accountable those who” engage in such conduct, citing the agencies’ past challenges to non-compete agreements.<sup>31</sup> We have seen no public evidence, however, of additional actions, including either a Commission Rule or enforcement efforts.

And, despite this strongly worded statement, non-compete agreements continue to pose a grave threat to the welfare of millions of workers, including essential workers risking their lives.

The threat of non-compete agreements both during and after the economic crisis precipitated by the COVID-19 pandemic has put millions of workers in an untenable position. We urge the FTC to immediately move forward with its Commission Rule to restrict non-compete agreements, and we ask that the agency pursue emergency action to limit the enforcement of non-compete agreements during and after the COVID-19 public health emergency. We also urge the agency to take immediate action to investigate any reports of non-compete enforcement, including cases referenced in this letter, and take enforcement action where appropriate.

To ensure the agency is fulfilling its statutory mandate, we ask that you answer the following questions by Tuesday, August 4, 2020.

1. What actions has the FTC taken since March 11, 2020 to pursue a potential Commission Rule restricting the use and enforcement of non-compete agreements in contracts between employers and employees?
2. Has the FTC considered any rulemaking pertaining to the use or enforcement of non-compete agreements during and after the COVID-19 public health emergency?
3. Has the FTC brought any enforcement actions against employers for using or enforcing non-compete agreements since issuing a joint statement with the DOJ in April 2020 regarding the use of these and other agreements that suppress competition in the labor market?

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<sup>30</sup> USA Today, “Layoffs: 1.3M workers file for unemployment as COVID-19 surges, pushing total in crisis above 51M,” Paul Davidson, July 16, 2020, <https://www.usatoday.com/story/money/2020/07/16/layoffs-2020-another-1-3-m-workers-file-unemployment-covid-10-spikes/5448665002/>.

<sup>31</sup> Department of Justice, “Joint Antitrust Statement Regarding COVID-19 And Competition in Labor Markets,” April 2020, <https://www.justice.gov/opa/press-release/file/1268506/download>; Department of Justice, “Justice Department and Federal Trade Commission Jointly Issue Statement on COVID-19 and Competition in U.S. Labor Markets,” press release, April 13, 2020, <https://www.justice.gov/opa/pr/justice-department-and-federal-trade-commission-jointly-issue-statement-covid-19-and>.

4. Has the FTC considered issuing a rule that would allow a defense of undue hardship during and after the COVID-19 public health emergency in response to employer lawsuits for a violation of non-compete agreements?<sup>32</sup>

Sincerely,

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Elizabeth Warren  
United States Senator

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Christopher S. Murphy  
United States Senator

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<sup>32</sup> See, e.g., Law.com, “The Enforceability of Non-Compete Provisions During the COVID-19 Pandemic,” Daniel Zinman, James Walker, and Jacob Taber, June 11, 2020, <https://www.law.com/newyorklawjournal/2020/06/11/the-enforceability-of-non-compete-provisions-during-the-covid-19-pandemic/?slreturn=20200518084204>.