U.S. Chamber of Commerce

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Federal Trade Commission
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RE: Request for Information Regarding Employer Noncompete Agreements

Dear Commissioners,

On behalf of the U.S. Chamber of Commerce ("the Chamber"), we are pleased to submit these comments to the Federal Trade Commission ("FTC") in response to the FTC's Request for Information regarding employer noncompete agreements.

At the outset, we appreciate the FTC's current approach to noncompete clauses, which embraces empirical study and the prospect of case-by-case enforcement rather than expansive and unconstitutional competition rulemaking. The Chamber has long endorsed the FTC's current approach and encourages the FTC to continue to gather data regarding the costs and benefits of noncompete clauses.

At a federal level, anticompetitive noncompete clauses can be enforced under the appropriate rule of reason analysis applied to the given facts of a specific case. In fact, in the handful of FTC enforcement actions only taken recently, the Chamber has not expressed concern with how those cases have been handled. However, where noncompete clauses raise concerns beyond the scope of an antitrust analysis, those concerns should be decided as a matter of contract law by the courts or left to state legislatures to design an approach that reflects their local communities and economies.

Noncompete Provisions Serve a Legitimate Role in Employment Contracts

The Chamber agrees with the FTC's statement in its RFI that "noncompete agreements can serve valid purposes in some circumstances." Reasonable and tailored noncompetes serve pro-competitive interests. Courts, scholars, and economists all have found that noncompetes encourage investment in employees and help to protect intellectual property. In every sector of the economy, employers rely on noncompetes to protect investments in their workforce, to protect trade secrets and other confidential information, and to structure their compensation programs. As the FTC's own economist John McAdams recently explained, noncompetes "allow firms to reduce recruitment and training costs by lowering turnover," encourage firms to offer

higher wages to compensate new employees, and "increase the returns to research and development," thereby promoting innovation.[1]

In a traditional "noncompete" contract, an employee[2] agrees to accept something of value (such as money, a promotion, an employment opportunity, stock or equity, among many other possible things of value) in exchange for a promise, once the employment ends, not to engage in activity that will harm the business interests of that employer, for a limited period of time. Usually, the employee's promise in a traditional noncompete is to refrain from providing similar services to a competitor of the original employer, in a particular geographic location, for set duration of time. Through such an agreement, an employer ensures that its special investment in, training of and disclosure of sensitive business information to the employee will not be unfairly leveraged to benefit a competitor who subsequently engages that employee.

State legislatures and courts nationwide recognize that an employer has a legitimate interest in protecting against a competitor's acquisition of its sensitive business information through engaging a former employee. Courts further recognize that tailored noncompete agreements are a reasonable tool for achieving such protection. The kinds of protectable information include trade secrets known by the employee, special business relationships (customer, vendors, etc.) managed or known by the employee, confidential business plans designed or known by the employee, and pricing or bidding strategies learned by the employee.[3]

Noncompetes are enforced only when legitimate business interests are present. In virtually every case, courts conduct a balancing analysis, weighing the value of employer's protectable interest against the important interests of the employee in mobility and freedom to earn a living in a chosen line of work.[4] Having researched the matter extensively, including surveys of companies that use noncompetes and that hire external employees who are subject to noncompetes, the Chamber is unaware of any recent data suggesting that noncompete clauses are broadly overused or over-enforced.

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[1] McAdams, *Non-Compete Agreements: A Review of the Literature*, Bureau of Economics Research Paper, 6 (2019), https://papers.ssrn.com/sol3/ papers.cfm?abstract_id=3513639.

[2] The term "employee" is used in these Comments for the sake of simplicity. But non-compete agreements also are frequently entered by non-employee independent contractors, business owners, vendors and other relationship partners. The comments and arguments made here apply equally to such non-employee arrangements as they do to employee contracts.

[3] See, e.g., Sensus USA, Inc. v. Franklin, 2016 WL 1466488, *7 (D. Del. Apr. 14, 2016) (applying Delaware law) (restrictive covenants are appropriate to protect companies' legitimate business interests such as "preserving employer good will and protecting an employer's confidential information, including customer lists, pricing, trade secrets and proprietary information.").

[4] See, e.g., Hess, 570 Pa. 148, 163 ("In determining whether to enforce a non-competition covenant, this Court requires the application of a balancing test whereby the court balances the employer's protectable business interests against the interest of the employee in earning a living in his or her chosen profession, trade or occupation, and then balances the result against the interest of the public.").

Antitrust Enforcement Can Reach Anticompetitive Noncompetes Under a Rule of Reason Analysis

The legitimate uses of noncompete agreements promote competition. Where a noncompete is used for illegitimate business purposes and the result is anticompetitive harm to the competitive process, the FTC should step in as a matter of antitrust enforcement. Such power is clearly consistent with the FTC's existing statutory authority and the rule of reason standard continues to serve antitrust enforcement well.

Finally, the Chamber cautions, that the FTC should cabin its enforcement efforts to instances where it has a strong empirical basis for concern. Specifically, the prior administration sought to encompass "de facto" noncompete agreements, including forfeiture clauses, within the scope of its noncompete ban.

Concerns Beyond the Scope of the Antitrust Laws Should Be Governed by the Courts as a matter of Contract Law or Left to State Legislatures

In general, "fairness" is not a recognizable antitrust legal standard. To the degree there are concerns that noncompete agreements are "unfair" to the employee, that is not a recognizable antitrust concern. It is important to note that noncompete contracts are not unilaterally imposed on employees. They are contracts freely bargained for before or during a period of employment in exchange for consideration.

Indeed, noncompete agreements benefit both companies and workers. For example, these agreements benefit employees by promoting employers' investments in their workers. As the Commission's own economist John McAdams recently explained, noncompete agreements can "solve a 'holdup' problem for certain types of investment (e. g., training, information sharing) into employees," which emerges when employers "forgo making certain investments in their workforce knowing that employees would be able to subsequently quit and appropriate the value of the investment." In other words, employers are more likely to spend resources on employee training and development when they do not fear that the employees will immediately take that knowledge to a competitor. "[B]y discouraging worker attrition before the firm has had the time to recoup the cost of it upfront investment," noncompetes encourage "mutually beneficial" investments. McAdams also notes that noncompete agreements "allow firms to reduce recruitment and training costs by lowering turnover." Noncompetes can also help firms prevent a free-riding problem wherein competitor firms rely on poaching workers to reduce their own training costs. Thus, firms benefit by retaining well-trained employees, and employees benefit from more training opportunities, increased wages, and the stability of lower workplace turnover, which can improve team efficiency and morale.

Employees are protected from unfair outcomes by common law requirements of contract enforcement that require awareness, a conscious meeting of the minds, and adequacy of consideration, among other things. Like any other contract, a noncompete contract will not be enforced unless it is proven that both parties entered it with full awareness and a mutual accurate understanding of its terms. Likewise, common law in every state requires that noncompete commitments are given in exchange for something of real value to the employee. States have individually determined the level of "value" an employer must deliver to obtain an enforceable noncompete commitment. For example, some states declare that mere employment, or continued employment, alone is not sufficient to trade for a noncompete commitment.

Further, employees are protected from unfair enforcement of noncompetes through the balancing of several important factors by the courts, an analysis that has become nearly universal among the states. To be deemed "fair" in any jurisdiction, a noncompete must (a) be designed to protect a legitimately protectable interest of the employer, (b) be drafted narrowly with regard to prohibited activity for a future employer, and (c) be reasonably limited in geographic scope and temporal duration. Through this universal balancing test, employees are assured that noncompete commitments are not frivolous, not unilateral, and not unduly restrictive to the employee in the circumstances of each case. Concerns about an imbalance of bargaining power in occasional cases are legitimate. But that potential for such an imbalance has been recognized and addressed by state law. Simply stated, a lack of understanding by an employee or an imbalance in bargaining power is a factor that will invalidate a noncompete agreement in that instance.

In closing, the Chamber agrees that the FTC has a responsibility to enforce the antitrust laws against anticompetitive noncompete arrangements where there is clear harm to the competitive process. Beyond this important, but limited role, the FTC should leave the courts and state legislatures to address any additional concerns.

The Chamber thanks the FTC for the opportunity to share our views through this comment letter.

Sincerely,

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U.S. Chamber of Commerce