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November 15, 2019

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

Dear Chairman Simons:

We, the Attorneys General of Minnesota, California, Delaware, District of Columbia, Illinois, Iowa, Maine, Massachusetts, Maryland, Michigan, New Mexico, North Carolina, Oregon, Pennsylvania, Rhode Island, Vermont, Virginia, Washington and Wisconsin write to the Federal Trade Commission (FTC) to urge it to use its rulemaking authority to bring an end to the abusive use of non-compete clauses in employment contracts.

We write to follow up on the July 15, 2019 Comment submitted to the FTC by eighteen State Attorneys General, and consistent with that Comment, to endorse the arguments presented in the March 20 petition, submitted by the AFL-CIO, Institute for Local Self-Reliance, Open Markets Institute, SEIU, and 16 other labor unions and public interest groups and 46 legal advocates and scholars, requesting that the FTC initiate a rulemaking to classify abusive worker non-compete clauses as an “unfair method of competition” and per se illegal under the FTC Act for low wage workers or where the clause is not explicitly negotiated.

Non-compete clauses in employment contracts prevent employees of one business from leaving and working for or starting another. Using non-competes, employers have bound a wide range of workers—including baristas, engineers, journalists, home health aides, physicians, and sandwich makers—and deprived them of their freedom to use their labor as they choose. Non-competes deprive workers of the right to pursue their ambitions and can lock them into hostile or unsafe working environments. In total, nearly 30 million American workers, or one in every five, currently work under a non-compete while approximately 60 million workers, or two in five, have been bound by a non-compete at some point during their careers.<sup>1</sup>

As the Comment and the Petition before the FTC make clear, the arguments in support of non-compete clauses are unpersuasive. Employers and their advocates argue that non-compete clauses allow employers to recoup their investment in job training, methods of business, and other intangibles. Employers, however, have much less draconian ways to recoup these investments. Instead of non-competes, employers can use negotiated non-disclosure agreements

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<sup>1</sup> Evan Starr, J.J. Prescott & Norman Bishara, *Noncompetes in the U.S. Labor Force*, U. Mich. Law & Econ. Research Paper No. 13, 14 (2018).

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(NDAs) or trade secret and intellectual property law to protect their investment. Additionally, employers can provide term employment contracts with workers—offering workers job security in exchange for workers committing to a job for a fixed period. They can also offer regular raises and promotions to retain workers. All these options are effective at protecting employers’ investment in intangibles and much less onerous than a broad, one-sided restriction on where workers can use their experience, knowledge, and skills.

Non-compete clauses also burden businesses seeking to hire workers or enter a market. Restricting worker movement benefits only the employer seeking to prevent employees from leaving without that employer offering incentives to stay besides potential legal action to enforce a non-compete. In this way, non-compete clauses inhibit innovation and may actually drive consumer costs up by suppressing competition from rival businesses.

The FTC has the clear authority to identify and prohibit “unfair methods of competition” through the rulemaking process. The Supreme Court has stated that an “unfair method of competition” includes “not only practices that violate the Sherman Act and the other antitrust laws, but also practices that the FTC determines are against public policy for other reasons[.]”<sup>2</sup> Since the FTC has the authority and duty to protect workers as well as consumers, it should act now to prevent another employer from robbing even one more worker of the right to leave for better opportunities.

While we will continue to support state and federal legislative reforms on non-competes, we believe an FTC rule offers the quickest, most comprehensive regulatory path to protecting all workers from these exploitative contracts.<sup>3</sup> We ask that the FTC initiate a rulemaking as discussed above. We also ask that the Federal Trade Commission provide an estimate for how long the rulemaking process will take, including when we can reasonably expect proposed and final rules.

We believe an expeditious FTC rulemaking on non-competes is critical. We understand that the FTC has been evaluating these issues and is planning an upcoming workshop on non-competes. The undersigned States Attorneys General look forward to that workshop and submitting additional comments regarding non-compete agreements in the employment context following that workshop and thank you and the FTC for your attention to this matter and look forward to a prompt response.

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<sup>2</sup> *FTC v. Ind. Fed. Of Dentists*, 476 U.S. 447, 454 (1986) (internal citations omitted).

<sup>3</sup> *See, e.g.*, September 18, 2019 Letter of Fed. Trade Comm’r Rohit Chopra (“A rulemaking proceeding that defines when a non-compete clause is unlawful is far superior than case-by-case adjudication. The proceeding would allow a broad array of stakeholders, not just a plaintiff and a defendant, to contribute to the development of the law.”).

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Respectfully Submitted,




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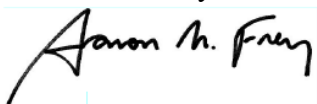
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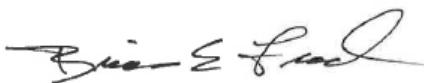
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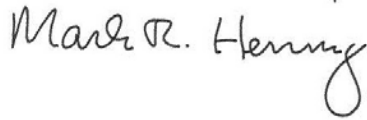


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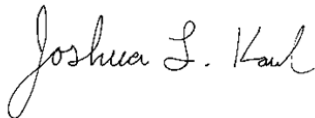
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cc: Commissioner Rohit Chopra  
Commissioner Noah Joshua Phillips  
Commissioner Rebecca Kelly Slaughter  
Commissioner Christine S. Wilson