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**By Electronic Filing (<http://www.regulations.gov>)**

The Honorable Lina M. Khan  
Chair  
Federal Trade Commission  
600 Pennsylvania Avenue NW  
Washington, D.C. 20580

*Re: Notice of Proposed Rulemaking, Non-Compete Clause Rule, 88 Fed. Reg. 3482  
(Jan. 19, 2023)*

Dear Chair Khan:

We, the undersigned Attorneys General of the District of Columbia, New Jersey, California, Colorado, Delaware, Illinois, Maine, Maryland, Massachusetts, Michigan, Minnesota, Nevada, New Mexico, New York, Oregon, Pennsylvania, Rhode Island, and Washington (the “State AGs”), submit this Comment in support of the proposed rulemaking by the United States Federal Trade Commission (the “Commission” or “FTC”) entitled *Non-Compete Clause Rule* (the “proposed rule”). This comment offers the perspective of state Attorneys General across the country with enforcement experience in practice areas related to the proposed rule, including labor, antitrust, and consumer protection. Many of the undersigned State AGs have previously engaged with the FTC on the subject of non-compete clauses, submitting a joint comment to the Commission relating to its hearing on “Competition and Consumer Protection in the 21st Century” in July 2019,<sup>1</sup> and again in January 2020 related to the Commission’s “Workshop on Non-Compete Clauses in the Workplace.”<sup>2</sup> Both comments supported curtailing the use of anti-competitive contracts like non-compete provisions.

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<sup>1</sup> See Public Comments of 18 State Attorneys General on Labor Issues in Antitrust in Response to the Federal Trade Commission’s Public Hearings on Competition and Consumer Protection in the 21st Century (July 15, 2019), <https://attorneysgeneral.org/wp-content/uploads/2019/07/2019.07.15-Comments-re-Non-Compete-Clauses-in-Labor-Contracts.pdf>.

<sup>2</sup> See Public Comments of 19 State Attorneys General in Response to the Federal Trade Commission’s Workshop on Non-Compete Clauses in the Workplace (Jan. 9, 2020), <https://oag.dc.gov/sites/default/files/2020-03/FTC-Comment-Letter-Non-Compete-Clauses-Workplace.pdf>.

The undersigned State AGs support the Commission’s proposed rule because it will benefit workers and businesses in our states. We represent states that do and do not have state legislation regarding non-competes, and we offer examples from our diverse experiences, which underscore the need for a uniform, national rule. In addition, we offer several comments and recommendations regarding the proposed rule in response to the Commission’s request for comment. Specifically, the State AGs support the Commission’s functional definition of “non-compete clause,” support the Commission’s broad definition of “worker,” support the Commission’s proposal not to impose an income threshold on covered workers, and urge the Commission to clarify that the proposed rule does not preempt state laws that provide substantially similar or greater protections, nor does it preclude the concurrent enforcement of such laws by state agencies and residents.

**I. A federal rule limiting non-competes will significantly benefit workers and promote fair competition among businesses.**

The Commission’s proposed rule provides an important protection for American workers and furthers the State AGs’ strong interest in protecting workers in our states. The American worker faces numerous challenges in today’s labor market. Workers’ relative income has steadily declined over the past seventy years due to numerous factors, including globalization and technological change.<sup>3</sup> Most American workers are at-will, meaning they lack job security and can be fired at any time for almost any reason.<sup>4</sup> More recently, the COVID-19 pandemic made matters worse for many workers, as some employers and even industries have shut down, and many workers have been left to balance personal safety against their financial needs.<sup>5</sup>

The proliferation of non-competes in employment contracts—which many workers lack any meaningful ability to negotiate—has presented an additional constraint upon workers’ earning power and job mobility. Non-competes cover workers across all industries, professions, and income levels.<sup>6</sup> One recent analysis of U.S. national survey data from 2014 found that 18 percent of labor force participants were bound by non-competes and 38 percent had agreed to one in the past.<sup>7</sup> This prevalence has also coincided with an increase in non-compete litigation brought by employers against their employees.<sup>8</sup>

The State AGs support the Commission’s proposed rule because it will significantly benefit workers, especially low- and middle-wage workers. The State AGs additionally support the

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<sup>3</sup> *Labor Share of Output Has Declined Since 1947*, BUREAU OF LAB. STAT. (Mar. 7, 2017), <https://www.bls.gov/opub/ted/2017/labor-share-of-output-has-declined-since-1947.htm>; Yasser Abdih & Stephan Danninger, *What Explains the Decline of the U.S. Labor Share of Income?* (Int’l Monetary Fund, Working Paper No. 17-167, 2017), <https://www.imf.org/-/media/Files/Publications/WP/2017/wp17167.ashx>.

<sup>4</sup> *At-Will Employment – Overview*, NAT’L CONFERENCE OF ST. LEGISLATURES (Apr. 15, 2008), <https://www.ncsl.org/labor-and-employment/at-will-employment-overview>.

<sup>5</sup> Julia Raifman et al., *The Unequal Toll of COVID-19 on Workers*, ECON. POL’Y INST. (Feb. 7, 2022), <https://www.epi.org/blog/the-unequal-toll-of-covid-19-on-workers>.

<sup>6</sup> See, e.g., Alexander J.S. Colvin & Heidi Shierholz, *Noncompete Agreements*, ECON. POL’Y INST. (Dec. 10, 2019), <https://www.epi.org/publication/noncompete-agreements>.

<sup>7</sup> Evan Starr et al., *Noncompetes in the U.S. Labor Force*, J.L. & ECON. (2021).

<sup>8</sup> Ruth Simon & Angus Loten, *Litigation Over Noncompete Clauses Is Rising*, WALL ST. J. (Aug. 14, 2013), <https://www.wsj.com/articles/litigation-over-noncompete-clauses-is-rising-does-entrepreneurship-suffer-1376520622>.

proposed rule because it will advance competition and innovation and have positive impacts for consumers in critical industries like the healthcare industry.

**A. The proposed rule will significantly benefit workers, especially low- and middle-wage workers.**

The proposed rule's positive impact on workers is supported by a substantial body of academic research that has studied the effects of state-specific legislation banning non-competes. Researchers have found that where states have passed such laws, workers across all income strata experience gains in wages and job mobility.<sup>9</sup> For example, researchers found that after Oregon passed a law in 2008 banning non-competes for low-wage workers, the legislation was associated with increased wages and job mobility for such workers.<sup>10</sup> In addition, research has also compared outcomes for workers between states with varying degrees of non-compete enforceability (i.e., the likelihood the non-compete will be found valid under state law). These studies have shown that in states where non-competes are more enforceable, all workers, including those who have not signed non-competes, experience relatively reduced job mobility and lower wages compared to states where non-competes are less enforceable.<sup>11</sup> This indicates that the use of non-competes in a labor market creates significant negative externalities, placing downward pressure on job mobility and wages that extends to all workers in the same labor market—even if they have not signed a non-compete.<sup>12</sup>

The proposed rule would also promote gender and racial equity. Researchers have found that the depressive effects of non-competes on worker earnings is magnified for women and non-white workers, who see earnings reductions two times greater than that experienced by white male workers.<sup>13</sup> Due to these disproportionate effects, researchers have concluded that restricting the use of non-competes would significantly reduce gender and racial wage gaps.<sup>14</sup> Banning non-competes could also increase entrepreneurship among women, as research has shown that women in states with higher non-compete enforceability are less likely than men to leave their jobs and start rival ventures.<sup>15</sup>

Finally, the State AGs have seen firsthand how non-competes and restrictive employment arrangements can substantially harm low- and middle-wage workers, and we have used our enforcement authority to protect such workers. For example, from 2019-2020, the Massachusetts Attorney General led a fourteen-state coalition that stopped major fast food franchises, including Dunkin' Donuts, Burger King, and Little Caesars, from using provisions that, similar to non-

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<sup>9</sup> E.g., Michael Lipsitz & Evan Starr, *Low-Wage Workers and the Enforceability of Noncompete Agreements*, 68 MGMT. SCI. 143 (2021) (studying effect of Oregon non-compete ban for low-wage workers); Natarajan Balasubramanian et al., *Locked In? The Enforceability of Covenants Not to Compete and the Careers of High-Tech Workers*, J. HUM. RES. (2020) (studying effect of Hawaii non-compete ban for technology workers).

<sup>10</sup> Lipsitz & Starr, *supra* note 9.

<sup>11</sup> Evan Starr et al., *Mobility Constraint Externalities*, 30 ORG. SCI. 961 (2019).

<sup>12</sup> *Id.*

<sup>13</sup> Matthew S. Johnson et al., *The Labor Market Effects of Legal Restrictions on Worker Mobility* 4 (June 6, 2020) (unpublished manuscript), <https://ssrn.com/abstract=3455381>.

<sup>14</sup> *Id.*, at 38.

<sup>15</sup> Matt Marx, *Employee Non-Compete Agreements, Gender, and Entrepreneurship*, 33 ORG. SCI. 1756 (2022).

competes, restricted the right of fast food service workers to move between franchises.<sup>16</sup> The imposition of non-competes and other restrictive arrangements upon low- and middle-wage workers is particularly troubling because such workers often lack bargaining power to negotiate the terms of their employment and access to legal resources to challenge the non-compete.<sup>17</sup> Moreover, the typical business justification for non-competes—that they protect an employer’s proprietary information—often does not withstand scrutiny when applied to low- and middle-wage workers.<sup>18</sup>

In sum, states have led the way on restricting the use of non-competes and our experiences inform our support of the proposed rule. State action has both revealed the harm caused by non-competes and allowed researchers to quantify the benefits of banning non-competes on worker earnings and job mobility. The state landscape has also allowed researchers to compare the experiences of workers in states that have restricted non-competes to those that have not, and measure the negative externalities that arise from a patchwork regime. This body of experience and research supports the proposed rule’s implementation of a uniform federal rule restricting the use of non-competes.

## **B. The proposed rule benefits businesses and the economy.**

The distinctions in non-compete enforceability between states have also allowed researchers to study their harms on state economies. Researchers have found that high non-compete enforceability in states is associated with reduced levels of entrepreneurship and startup activity compared to states where non-compete enforceability is lower.<sup>19</sup> High non-compete enforceability is also associated with reductions in research and development spending and capital expenditures per employee.<sup>20</sup> As non-competes preclude companies from competing for available and qualified workers, their prevalence further entrenches the power of dominant corporations by restricting entrepreneurship and constraining workers’ ability to move from big businesses to small firms.<sup>21</sup> While proponents of non-competes often argue they are necessary to protect businesses’ trade secrets, these justifications overlook the fact that employers can turn to more targeted protections to address such concerns, including trade secret law and non-disclosure agreements—and the proposed rule expressly recognizes that employers can continue to avail themselves of such protections to protect their legitimate business interests.<sup>22</sup>

As the proposed rule also notes, the experience of states that have already acted to restrict the use of non-competes also casts doubt on the notion that non-competes are necessary to protect business interests and develop a vibrant economy. California provides a prime example, as

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<sup>16</sup> Press Release, Office of the Mass. Att’y Gen., Three Fast Food Chains Agree to End Use of No-Poach Agreements (Mar. 2, 2020), <https://www.mass.gov/news/three-fast-food-chains-agree-to-end-use-of-no-poach-agreements>.

<sup>17</sup> Tyler Boesch et al., *Non-Compete Contracts Sideline Low-Wage Workers*, FED. RESERVE BANK OF MINN. (Oct. 15, 2021), <https://www.minneapolisfed.org/article/2021/non-compete-contracts-sideline-low-wage-workers>.

<sup>18</sup> *Id.*

<sup>19</sup> Sampsa Samila & Olav Sorenson, *Noncompete Covenants: Incentives to Innovate or Impediments to Growth*, 57 MGMT. SCI. 452 (2011).

<sup>20</sup> Mark J. Garmaise, *Ties That Truly Bind: Noncompetition Agreements, Executive Compensation, and Firm Investment*, 27 J.L. ECON. & ORG. 376, 403 (2011).

<sup>21</sup> Sandeep Vaheesan, *The Fight Over Non-Competes Is Heating Up. The FTC Must Stand Strong*, TIME (Jan. 23, 2023), <https://time.com/6249347/fight-over-non-compete-clauses>.

<sup>22</sup> 88 Fed. Reg. at 3506-3508.

California law has largely banned the use of non-competes since 1872.<sup>23</sup> Over 150 years of prohibition, however, has not stopped California from cultivating a thriving and innovative business sector that powers the largest state economy in the nation.<sup>24</sup> California's experience is further corroborated by results in other undersigned states—such as Colorado, Illinois, and Washington—that have also passed laws restricting non-competes that have likewise not precluded the development of healthy state economies.<sup>25</sup>

### C. The proposed rule uniquely benefits the healthcare industry.

As noted by the Commission, the proposed rule will uniquely benefit the healthcare industry, which has become increasingly concentrated in the United States, leading to fewer insurers, hospitals, and physician groups.<sup>26</sup> Increased consolidation in healthcare has led to higher prices,<sup>27</sup> without improvements in quality for patients,<sup>28</sup> and lower wages for workers.<sup>29</sup>

Non-competes, which are widely used across all professions in the healthcare industry,<sup>30</sup> further compound concentration by restricting market entry,<sup>31</sup> which inflates prices and decreases wages. For example, a dominant healthcare system may use non-competes to lock in employees, preventing them from starting their own practice or working for would-be competitors.<sup>32</sup> By prohibiting healthcare workers from participating in a competitive labor market, non-competes risk entrenching dominant healthcare systems and increasing labor costs for would-be competitors

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<sup>23</sup> See Cal. Civ. Code § 16600; see also *Edwards v. Arthur Andersen LLP*, 189 P.3d 285 (Cal. 2008).

<sup>24</sup> Press Release, Office of Gov. Gavin Newsom, *California Poised to Become World's 4th Biggest Economy* (Oct. 24, 2022), <https://www.gov.ca.gov/2022/10/24/icymi-california-poised-to-become-worlds-4th-biggest-economy>.

<sup>25</sup> See Section II(B), *infra*.

<sup>26</sup> Martin Gaynor et al., *The Industrial Organization of Health-Care Markets*, 53 J. ECON. LIT. 235 (2015); Brent D. Fulton, *Health Care Market Concentration Trends in the U.S.: Evidence and Policy Responses*, 36 HEALTH AFF. 1530 (2017).

<sup>27</sup> See, e.g., Fulton, *supra* note 26, at 1531; DAVID DRANOVE & LAWTON R. BURNS, *BID MED: MEGAPROVIDERS AND THE HIGH COST OF HEALTH CARE IN AMERICA* (2021); Hannah Neprash & J. Michael McWilliams, *Provider Consolidation and Potential Efficiency Gains: A Review of Theory and Evidence*, 82 ANTITRUST L.J. 551 (2019).

<sup>28</sup> Nancy D. Beaulieu et al., *Changes in Quality of Care After Hospital Mergers and Acquisitions*, 382 NEW ENG. J. MED. 51 (2020); Neprash & McWilliams, *supra* note 27.

<sup>29</sup> Gaynor et al., *supra* note 26, at 236.

<sup>30</sup> Naomi Hausman & Kurt Lavetti, *Physician Practice Organization and Negotiated Prices: Evidence from State Law Changes*, 13 AM. ECON. J.: APPLIED ECON. 258, 259 (2021); see also Timothy B. Lee, *The Ridiculous Practice That Stopped Some Nurses From Working in a Pandemic*, SLATE (Oct. 25, 2021), <https://slate.com/business/2021/10/noncompete-agreements-nurses-wyoming-ban-them.html>; Bailey Bryant, *Home Care Companies Increase Use of Noncompetes, Other Contract Restrictions*, HOME HEALTHCARE NEWS (Dec. 2, 2018), <https://homehealthcarenews.com/2018/12/home-care-companies-increase-use-of-noncompetes-other-contract-restrictions>.

<sup>31</sup> Evan Starr et al., *Screening Spinouts? How Noncompete Enforceability Affects the Creation, Growth, and Survival of New Firms*, 64 MGMT. SCI. 552 (2018); Jessica Jeffers, *The Impact of Restricting Labor Mobility on Corporate Investment and Entrepreneurship* (2019) (unpublished manuscript), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3040393](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3040393); Michael Lipsitz & Mark Tremblay, *Noncompete Agreements and the Welfare of Consumers* (2021) (unpublished manuscript), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3975864](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3975864).

<sup>32</sup> See David J. Balan, *Labor Practices Can Be an Antitrust Problem Even When Labor Markets Are Competitive*, CPI ANTITRUST CHRONICLE 9 (2020), <https://www.competitionpolicyinternational.com/wp-content/uploads/2020/06/CPI-Balan.pdf>.

without any resulting benefit to payers or patients. This is supported by a recent study finding that increased enforceability of non-competes increases market concentration.<sup>33</sup>

Non-competes are especially harmful to patients and payers in the healthcare system. Research has found that non-compete enforceability increases physician prices for payers.<sup>34</sup> Non-competes in the healthcare industry are especially concerning because of the ongoing crisis of provider shortages, which is projected to continue. Physicians, nurses, pharmacists, and other healthcare workers like home health aides are in shrinking supply, with many retiring faster than anticipated. New York and California, for example, each are projected to lose half a million workers from their healthcare workforce by 2026.<sup>35</sup> By preventing healthcare workers from changing jobs within their communities, non-competes reduce patients' access to care and risk exacerbating provider shortages.<sup>36</sup> Non-competes also pose the risk of disrupting a patient's continuity of care where physicians, especially specialists, are prevented from contacting their former patients after leaving their employer.<sup>37</sup> Finally, policymakers have observed other patient risks associated with healthcare worker non-competes, such as the possibility that healthcare workers may be deterred from advocating for better clinical standards and patient safety due to fear of retaliation and limited exit options imposed by non-competes.<sup>38</sup>

In sum, non-competes have outsized harms on the healthcare industry, harming healthcare workers, payers, and patients. The proposed ban would improve healthcare workers' mobility, increase healthcare worker compensation, and improve the quality and cost of healthcare.

## **II. The State AGs' support for the proposed rule is based on their unique interest in and experience with enforcement regarding non-competes.**

The State AGs represent a diverse group of jurisdictions with varying approaches to non-compete enforcement. The undersigned State AGs represent states that have and have not passed legislation regarding non-competes and the sum of our diverse experiences weigh in favor of the proposed rule.

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<sup>33</sup> Lipsitz & Tremblay, *supra* note 31, at 4-6.

<sup>34</sup> See Hausman & Lavetti, *supra* note 30, at 259.

<sup>35</sup> Anastassia Gliadkovskaya, *Labor Shortages in Healthcare Expected to Rise as Demand Grows, Report Finds*, FIERCE HEALTHCARE (Sept. 30, 2021), <https://www.fiercehealthcare.com/practices/labor-shortages-healthcare-expected-to-rise-as-demand-grows-report-finds>.

<sup>36</sup> For example, a family practice physician bound by a non-compete was prevented from caring for underserved patients at a Federally Qualified Health Center, 70% of which report vacancies for family physicians. Erik B. Smith, *Ending Physician Noncompete Agreements—Time for a National Solution*, JAMA HEALTH FORUM (2021), <https://jamanetwork.com/journals/jama-health-forum/fullarticle/2786894>; also see Caitlin Crowley et al., *High Demand, Low Supply: Health Centers and the Recruitment of Family Physicians*, 98 AM. FAM. PHYSICIAN 146 (2018), <https://www.aafp.org/pubs/afp/issues/2018/0801/p146.html> (noting provider shortages are common).

<sup>37</sup> See, e.g., Michelle Andrews, *Did Your Doctor Disappear Without a Word? A Noncompete Clause Could Be the Reason*, N.Y. TIMES (Mar. 15, 2019), <https://www.nytimes.com/2019/03/15/business/physician-non-compete-clause.html>.

<sup>38</sup> Letter from Elizabeth Warren & Christopher Murphy, United States Senators, to Joseph Simons, Chairman, Federal Trade Commission (July 22, 2020), <https://www.warren.senate.gov/newsroom/press-releases/warren-and-murphy-urge-ftc-to-protect-workers-by-restricting-non-compete-agreements-during-the-covid-19-pandemic>.

**A. The undersigned states that do not have statutes regarding non-competes support the proposed rule because it will clarify the law and yield predictable outcomes for workers and employers.**

Many of the undersigned states do not have statutes that ban non-compete clauses, leaving them governed by common law. Common law assessments of non-competes typically apply a reasonableness inquiry, evaluating a number of state-specific factors like the employer’s legitimate business interest, hardship on the employee, and the geographic scope and duration of the restriction.<sup>39</sup> These common law assessments vary between states, as courts have articulated distinct formulations of reasonableness tests.<sup>40</sup> These multi-factor common law approaches necessarily result in piecemeal decisions that do not address the non-compete problem in a uniform manner. Further complicating the difficulties with common law enforcement is the fact that some state enforcement agencies lack straightforward authority to enforce common law protections. Altogether, the challenges presented by common law enforcement underscore the need for a uniform federal rule.

The proposed rule would alleviate several challenges that the common law approach imposes on workers seeking to challenge non-competes. Namely, the proposed rule would promote predictability and reduce costs by eliminating the need for workers to litigate a fact-intensive reasonableness inquiry under common law. This would even the playing field between workers and their employers, where workers often possess less access to legal resources and advice.<sup>41</sup> Rectifying this power imbalance is particularly important for low-income workers who may be discouraged by litigation costs even if they have cases where they are likely to prevail—and indeed, low-income workers are likely to have meritorious cases under common law reasonableness tests.<sup>42</sup>

Workers in states without non-compete statutes may also seek relief under antitrust law—but antitrust cases, too, present issues regarding cost and predictability that the proposed rule would likewise address. Antitrust lawsuits are time-consuming and frequently require economic expert analyses to define a relevant market, the business’s share of that market, and the effects of the challenged restraint (i.e., the non-compete) on that market. While plaintiffs can prevail in such cases, the fact-intensive inquiry can lead to unpredictable outcomes that take years to resolve. For example, in 2015, the New Mexico Court of Appeals considered whether a non-compete that restricted a dentist from working for one year and within one hundred miles of his previous

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<sup>39</sup> See e.g., *Bennett v. Storz Broad. Co.*, 270 Minn. 525, 533 (Minn. 1965); *Lovelace Clinic v. Murphy*, 76 N.M. 645, 650–51, 417 P.2d 450, 454 (N.M. 1966); *BDO Seidman v. Hirshberg*, 93 N.Y. 2d 382, 389 (N.Y. 1999); *Kennedy v. Kennedy*, 584 S.E.2d 328, 334 (N.C. Ct. App. 2003).

<sup>40</sup> See e.g., *Hirshberg*, 93 N.Y. 2d at 389 (New York common law inquiry evaluates whether a restriction is “reasonable in time and area, necessary to protect the employer’s legitimate interests, not harmful to the general public and not unreasonably burdensome to the employee”); *Kennedy*, 584 S.E.2d at 333 (North Carolina common law evaluates whether the restriction is “(1) in writing, (2) based upon valuable consideration, (3) reasonably necessary for the protection of legitimate business interests, (4) reasonable as to time and territory, and (5) not otherwise against public policy.”).

<sup>41</sup> Boesch et al., *supra* note 17.

<sup>42</sup> See Jane Flanagan, *No Exit: Understanding Employee Non-Competes and Identifying Best Practices to Limit Their Overuse*, AM. CONST. SOC’Y (Nov. 2019), [https://www.acslaw.org/issue\\_brief/briefs-landing/no-exit-understanding-employee-non-competes-and-identifying-best-practices-to-limit-their-overuse](https://www.acslaw.org/issue_brief/briefs-landing/no-exit-understanding-employee-non-competes-and-identifying-best-practices-to-limit-their-overuse).

employer was a “reasonable restraint.”<sup>43</sup> After five years of litigation, the district court found that the hundred-mile restriction was unreasonable and reformed the non-compete to a thirty-mile restriction, which the Court of Appeals affirmed.<sup>44</sup> Neither party could have foreseen this decision, much less the exact nature of the mileage adjustment, when the dentist left his employment. The context-specific nature of this decision to a specific labor market also limits its predictive utility to future litigants.

The proposed rule would also address the problem where state-specific litigation fails to address the cumulative market impact of non-competes—a problem that is illustrated in the case where a labor market spans multiple states. To provide an example, the cities of Philadelphia, Pennsylvania<sup>45</sup> and Camden, New Jersey are five miles apart. This metropolitan area is home to millions of workers who work in numerous industries, and is especially populated with healthcare workers, many of whom are subject to non-competes.<sup>46</sup> A labor market that spans two jurisdictions poses unique challenges for workers, employers, and state enforcers alike. First, while Pennsylvania and New Jersey have adopted similar common law tests to evaluate reasonableness, there are distinctions between the tests that could lead to inconsistent decisions affecting workers in the common labor market.<sup>47</sup> These distinctions may sow confusion between workers, especially those who live in one state and work in another, regarding which law governs their non-compete. More broadly, if states that share labor markets do not have consistent non-compete regimes, this can create negative externalities throughout the entire market. A judicial decision enforcing a non-compete in one jurisdiction can create negative externalities on wages and job mobility throughout the labor market that extend to workers in the neighboring state who were not considered in the judicial decision.<sup>48</sup> A uniform national rule would resolve this coordination and spillover problem.

Lastly, non-competes can influence worker behavior through *in terrorem* effects because even where non-competes are legally invalid, their mere presence in an employment contract can restrict worker mobility.<sup>49</sup> Indeed, research has shown that workers frequently identify non-competes as an important reason for declining job offers, and do so even in states where they are legally invalid.<sup>50</sup> The employees’ beliefs about the likelihood of facing a lawsuit are key factors in these decisions.<sup>51</sup> Employees are often wary of the consequences of breaching non-competes, and many lack the legal knowledge to properly weigh the validity of a non-compete, the consequences of breach, and the risk of employer legal action. The proposed rule would provide clarity to workers that would mitigate these chilling effects.

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<sup>43</sup> *KidsKare, PC v. Mann*, 350 P.3d 1228, 1231-33 (N.M. Ct. App. 2015).

<sup>44</sup> *Id.*

<sup>45</sup> Notably, over 40 percent of Pennsylvania workplaces utilize non-competes. Colvin & Shierholz, *supra* note 6.

<sup>46</sup> Shannon Pettypiece, *Biden’s Push to Ban Noncompete Agreements Could Have Big Implications for Health Care*, NBC NEWS (Feb. 13, 2023), <https://www.nbcnews.com/politics/economics/biden-ban-non-compete-agreements-health-care-industry-rcna70099>.

<sup>47</sup> *Compare Solari Indus., Inc. v. Malady*, 55 N.J. 571, 585 (N.J. 1970), with *Rullex Co., LLC v. Tel-Stream, Inc.*, 659 Pa. 446, 624-25 (Pa. 2020).

<sup>48</sup> See Johnson et al., *supra* note 13.

<sup>49</sup> Evan Starr et al., *The Behavioral Effects of (Unenforceable) Contracts*, 36 J.L. ECON. & ORG. 633 (2020).

<sup>50</sup> *Id.*

<sup>51</sup> *Id.*



**B. The undersigned states with statutes regarding non-competes are also in favor of the proposed rule because a federal rule will resolve the problems of disparate state approaches.**

Many of the undersigned states have legislated about non-competes, but distinctions in state approaches also demonstrate the need for a baseline federal rule. Some states have instituted more categorical bans, while others have banned non-competes for specific categories of workers. Listed below are examples of different legislative approaches to curtailing non-competes. These examples highlight the variance in state approaches, which illustrate the clarity that would be brought to bear with the floor established by the proposed rule.

- **California.** Since 1872,<sup>52</sup> California has banned “every contract by which *anyone* is restrained from engaging in a lawful profession, trade, or business of any kind,”<sup>53</sup> meaning both *de jure* and *de facto* non-competes are void.<sup>54</sup> California’s longstanding public policy favoring free labor markets has fostered knowledge spillovers, promoting economic growth and innovation.<sup>55</sup> However, despite California’s functional ban of non-competes, these unenforceable clauses continue to proliferate in contracts throughout the state at rates similar to the rest of the nation<sup>56</sup> and the lack of uniformity in state laws creates confusion ripe for exploitation by employers.<sup>57</sup> For example, employers have attempted to evade the ban by inserting choice-of-law provisions designating the law of another state, which California courts have struck down.<sup>58</sup> In support of ongoing enforcement efforts and in hopes of creating more uniformity, the California Attorney General submitted a letter in 2021 to the California State Bar in support of a proposed opinion that made clear that California attorneys have a duty not to counsel or assist a client in conduct that is a violation of law, including the use of illegal non-competes.

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<sup>52</sup> See Cal. Civ. Code § 16600; see also *Edwards v. Arthur Andersen LLP*, 189 P.3d 285 (Cal. 2008).

<sup>53</sup> Cal. Bus. & Professions Code § 16600 (emphasis added).

<sup>54</sup> *AMN Healthcare, Inc. v. Aya Healthcare Servs., Inc.*, 239 Cal. Rptr.3d 577, 588 (Ct. App. 2018) (holding that California Civil Code § 16600 prohibits all contracts which have the effect of “restrain[ing] individual [employees] from practicing . . . their chosen profession.”); see also *Edwards v. Arthur Andersen LLP*, 189 P.3d 285, 290 (Cal. 2008) (same).

<sup>55</sup> Ronald J. Gilson, *The Legal Infrastructure of High Technology Industrial Districts: Silicon Valley, Route 128, and Covenants Not to Compete*, 74 N.Y.U. L. REV. 575, 613-620 (1999).

<sup>56</sup> See, e.g., Najah A. Farley, *Non-compete Provisions in Context: Why NELP Supports Calls for Reform*, NAT’L EMP. L. PROJECT (Sept. 27, 2018), <https://www.nelp.org/blog/non-compete-provisions-context-nelp-supports-calls-reform> (noting that 19 percent of California’s workers report signing a non-compete); *Non-compete Contracts: Econ. Effects and Policy Implications*, U.S. DEPT. TREASURY, OFF. ECON. POL’Y 4 (Mar. 2016), [https://home.treasury.gov/system/files/226/Non\\_Compete\\_Contracts\\_Economic\\_Effects\\_and\\_Policy\\_Implications\\_MAR2016.pdf](https://home.treasury.gov/system/files/226/Non_Compete_Contracts_Economic_Effects_and_Policy_Implications_MAR2016.pdf); Colvin & Shierholz, *supra* note 6.

<sup>57</sup> Flanagan, *supra* note 42 (“This very real effect on behavior makes employers more likely to ‘overreach under the radar’ based on the logical assumption that doing so ‘might have the benefit of keeping employees from leaving and moving to competitors [even] when they are [legally] entitled to do so.’”) (alterations in original).

<sup>58</sup> See *Application Grp., Inc. v. Hunter Grp., Inc.*, 72 Cal. Rptr. 2d 73, 82, 90 (Cal. Ct. App. 1998) (holding that nonresident businesses can be “held to account for ‘wrongful business conduct’ affecting California employers and employees” based on the assertion that “[t]he law applied will be that of the state whose policies would suffer the most were a different state’s law applied.”)

- **Colorado.** In 2022, Colorado passed a law limiting most non-competes to “highly compensated workers” earning more than \$101,250 per year.<sup>59</sup> The law also limits non-solicitation covenants to workers earning more than \$60,750 and imposes notice, choice of law, and venue requirements for non-competes. This law imposes statutory penalties in addition to actual damages, and violators are liable for attorneys’ fees and costs. Enforcement actions may be brought by the Colorado Attorney General, the Colorado Division of Labor Standards and Statistics, or through a private right of action.
- **District of Columbia.** The District of Columbia recently passed a law banning non-competes for most employees who earn under \$150,000 per year, which became effective in October 2022.<sup>60</sup> The D.C. Attorney General is authorized to enforce the law, which also includes a private right of action. The D.C. Office of the Attorney General has since received numerous complaints from District workers regarding non-competes and has begun securing compliance through enforcement efforts against businesses operating in the District of Columbia.<sup>61</sup> In addition to these enforcement efforts, the D.C. Attorney General recently submitted a letter to the Legal Ethics Committee of the District of Columbia Bar, urging the committee to issue an opinion as to whether an attorney’s drafting or implementation of an illegal non-compete violates local ethics rules.<sup>62</sup>
- **Illinois.** Illinois passed the Freedom to Work Act in 2017, which renders non-competes unenforceable for low-wage workers, specifically those earning the minimum wage.<sup>63</sup> The Act was recently amended on January 1, 2022, to prohibit non-competes for workers earning \$75,000 or less annually.<sup>64</sup> For workers who earn more than \$75,000 annually, the Act provides requirements that employers must meet in order to enforce non-competes against them.<sup>65</sup> Since the amendments went into effect, the Illinois Attorney General has received complaints from workers about non-competes and has begun using its enforcement authority to ensure compliance with the Act.
- **Washington.** Since 2020, Washington has deemed non-competes void and unenforceable for employees making less than \$100,000 per year, and independent contractors making less than \$250,000 per year.<sup>66</sup> Washington’s 2020 law also has a rebuttable presumption that all non-competes exceeding eighteen months are unenforceable, and that presumption cannot be overcome absent clear and convincing evidence that the duration is necessary to protect the employer’s

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<sup>59</sup> See Colo. Rev. Stat. § 8-2-113, *et seq.* (also providing that threshold compensation amounts are subject to annual adjustments).

<sup>60</sup> District of Columbia Non-Compete Clarification Amendment Act of 2022, D.C. Code § 32-581.01, *et seq.*

<sup>61</sup> See Press Release, D.C. Office of the Att’y Gen., Worker Alert: Noncompete Provisions Are Now Illegal for Many D.C. Workers (Feb. 21, 2023) <https://oag.dc.gov/blog/worker-alert-noncompete-provisions-are-now-illegal> (announcing settlement requiring D.C. gym to cease using non-competes for covered employees).

<sup>62</sup> *Id.*

<sup>63</sup> Illinois Freedom to Work Act, 820 ILCS 90/1.

<sup>64</sup> 820 ILCS 90/10(a).

<sup>65</sup> 820 ILCS 90/15; 820 ILCS 90/20.

<sup>66</sup> RCW 49.62.020 - .040.

business or goodwill.<sup>67</sup> In Washington, it is also illegal for a franchisor to restrict, restrain, or prohibit a franchisee from soliciting or hiring an employee of the franchisor or an employee of a franchisee of the same franchisor.<sup>68</sup> Washington’s Office of the Attorney General and private persons may enforce these laws.<sup>69</sup>

There are fundamental limitations to these state-by-state approaches that would be addressed by a uniform federal rule. Primarily, the differences in state legislation create inter-state variance problems similar to those created by the common law approach discussed in Section II(A), *supra*. The Washington, D.C. metropolitan region provides an illustrative example, as it comprises a large labor market that includes millions of workers in the District, as well as numerous counties in neighboring states, including the State of Maryland. While the District and Maryland have both passed laws prohibiting the use of non-competes for certain workers, the District law applies to most workers making under \$150,000 per year, whereas the Maryland law only applies to workers making up to \$31,200 per year.<sup>70</sup> In addition, the District law includes a fact-specific location requirement where it only applies to a worker who spends “more than 50% of his or her work time for the employer working in the District.”<sup>71</sup>

Thus, while state legislation has brought clarity that improves upon common law regimes, challenges persist due to inter-state variance. The risk of worker confusion remains, as workers in labor markets spanning multiple states continue to face challenges determining which state’s law applies. The D.C. Attorney General has experienced this in connection with enforcement of its non-compete law, which took effect in October 2022. Due to the nature of work in the region, the office has often received worker complaints that involve a degree of fact-specific jurisdictional inquiry—for example, in the case of healthcare workers who have been subjected to non-competes by an employer that operates worksites in both the District and Maryland. These choice-of-law inquiries present threshold challenges to educating residents of their rights that would be mitigated by the proposed rule’s provision of a baseline federal protection.

In addition, as discussed above, the coordination problem remains where increased use of non-competes in one state can create downward wage pressures throughout a labor market that extend to neighboring states.<sup>72</sup> The coordination issue is further exacerbated by the increase in remote or hybrid working arrangements post-pandemic that allow workers to work in a different state than the state in which their employer is located. The proposed rule, in establishing a federal floor, would address many of these challenges that have resulted from jurisdictional differences.

Finally, a federal rule would also respond to the persistence of non-competes even in states that have banned them through legislation. One study compared states where non-competes are valid with states where they are not, and found almost no difference in the incidence of non-competes between states across employers.<sup>73</sup> Non-competes likely remain pervasive because employers know many workers are poorly informed about the existence or validity of these terms,

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<sup>67</sup> RCW 49.62.020(2).

<sup>68</sup> RCW 49.62.060.

<sup>69</sup> RCW 49.62.080.

<sup>70</sup> Compare D.C. Code § 32-581.01(13), with Md. Code Ann., Lab. & Empl. § 3-716 (West).

<sup>71</sup> D.C. Code § 32-581.01(6)(A)(i).

<sup>72</sup> Johnson et al., *supra* note 13, at 3.

<sup>73</sup> Starr et al., *supra* note 7, at 61.

and many workers lack the ability to meaningfully bargain with their employer.<sup>74</sup> In addition, employers that operate in multiple states may also struggle with confusion determining which state’s law applies. Regardless of the reason, however, individual employers can benefit from non-competes—even in states where they are not valid—through their chilling effect on worker behavior.<sup>75</sup> These incidences of non-compliance further illustrate the limitations of state-specific approaches and the need for a federal rule.

### **III. The State AGs’ comments and recommendations.**

The State AGs offer the following input and recommendations for the proposed rule responsive to the Commission’s request for comment, informed by our experience regarding non-competes in our states.

#### **A. The State AGs support the Commission’s “functional test” to define “non-compete clause.”**

The State AGs support how the proposed rule defines “non-compete clause” with a “functional test” that prohibits express non-compete provisions, as well as *de facto* provisions that have the “effect of prohibiting the worker from seeking or accepting work with a person or operating a business after the conclusion of the worker’s employment with the employer.”<sup>76</sup> This definition accords with the approaches taken by many of our states that have legislated on non-competes, which have also adopted functional approaches to defining non-competes.<sup>77</sup> In addition, many of the undersigned State AGs that enforce state law regarding non-competes have received complaints from workers in our states that resemble the examples of *de facto* non-competes provided by the Commission in the proposed rule.<sup>78</sup> The D.C. Attorney General has received complaints from workers who were subjected to unusually broad “non-solicitation” clauses that, by extending a solicitation ban to both *existing and potential* clients, functionally prohibited workers from working with any other employer in the region. The New York Attorney General has received complaints from workers who were subjected to employment contracts that included provisions that, similar to the caselaw cited by the proposed rule, imposed “prohibitive magnitudes of liquidated damages” upon the affected workers.<sup>79</sup> A functional test will thus maximize the protective effect of the proposed rule and make it adaptable to varied employment circumstances.

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<sup>74</sup> Charles A. Sullivan, *The Puzzling Persistence of Unenforceable Contract Terms*, 70 OHIO ST. L.J. 1127 (2009).

<sup>75</sup> *Id.*; also see Starr et al., *supra* note 49.

<sup>76</sup> 88 Fed. Reg. 3482 at 3509-3510.

<sup>77</sup> *E.g.*, 820 ILCS 90/5(a) (defining “covenant not to compete” to also include an agreement that “imposes adverse financial consequences on the former employee if the employee engages in competitive activities after the termination of the employee’s employment with the employer”); *Brown v. TGS Mgmt. Co., LLC*, 57 Cal. App. 5th 303 (Cal. Ct. App. 2020) (finding restrictive confidentiality provision “operate[d] as a *de facto* noncompete provision”).

<sup>78</sup> 88 Fed. Reg. 2482 at 3483-84.

<sup>79</sup> 88 Fed. Reg. 3482 at 3509 (quoting *Wegmann v. London*, 646 F.2d 1072, 1073 (5th Cir. 1981)).

**B. The proposed rule’s definition of “worker” should account for the reality that in some instances, employers have used “franchisee” status to misclassify employment relationships.**

The State AGs recommend that the Commission clarify its exemption of franchisees<sup>80</sup> from the definition of “worker” to reflect the reality that in some instances, franchisee-franchisor relationships bear all the hallmarks of an employment relationship and can be abused to misclassify employees. Such a clarification would be consistent with the Commission’s current recognition in the proposed rule that a broad definition of “worker” that includes workers classified as “independent contractors” is necessary to prevent employers from “misclassif[ying] employees as independent contractors to evade the Rule’s requirements.”<sup>81</sup> The risk that employees can be similarly misclassified as “franchisees” to evade legal requirements is demonstrated by court decisions that have concluded that workers operating under a “franchisee” model were, in reality, employees entitled to the protection of state employment laws. For example, in *Roman v. Jan-Pro Franchising International, Inc.*, a federal district court held that janitorial workers who signed “franchise agreements” with an upstream franchisor were nevertheless employees entitled to the protection of California wage-and-hour laws.<sup>82</sup> Likewise, in *Awuah v. Coverall North America, Inc.*, another federal district court concluded that janitorial workers operating under a “franchising” structure similar to that in *Jan-Pro* were misclassified employees who were entitled to the protection of Massachusetts wage-and-hour laws.<sup>83</sup> Thus, the State AGs urge the Commission to clarify that any franchisee exemption should not include instances where a “franchise” label is used to misclassify employees.

**C. The State AGs support the Commission’s proposal not to impose an income threshold on covered workers.**

The State AGs support the Commission’s proposal to prohibit non-competes “without regard to the worker’s earnings or job function.”<sup>84</sup> First and foremost, this approach addresses the coordination problem between states. Research examining labor markets that span multiple states has found that a high degree of non-compete enforceability in one state can affect the earnings and mobility of workers in the bordering state—even if the bordering state has a lower degree of non-compete enforceability.<sup>85</sup> While state legislatures have reached different decisions on income thresholds (summarized in more detail in Section II(B), *supra*), this has led to a patchwork result where one state’s decision to impose a stringent income threshold can cause negative spillover effects in a bordering state that has decided on a more generous one. And as some states have already eschewed any income threshold,<sup>86</sup> any such threshold in the federal rule would fail to resolve the coordination problem.

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<sup>80</sup> 88 Fed. Reg. 3482 at 3511.

<sup>81</sup> *Id.*

<sup>82</sup> *Roman v. Jan-Pro Franchising Int’l, Inc.*, 342 F.R.D. 274 (N.D. Cal. 2022); *see also Vazquez v. Jan-Pro Franchising, Int’l, Inc.* 986 F.3d 1106, 1125-28 (9th Cir. 2021) (same).

<sup>83</sup> *Awuah v. Coverall N. Am., Inc.*, 707 F. Supp. 2d 80 (D. Mass. 2010).

<sup>84</sup> 88 Fed. Reg. 3482 at 3512.

<sup>85</sup> Johnson et al., *supra* note 13.

<sup>86</sup> 88 Fed. Reg. 3482 at 3494 (listing states that prohibit non-competes irrespective of income).

In addition, the worker protection policy rationale that justifies the proposed rule should apply to workers across income levels, as non-competes have been found to reduce wages and job mobility for both high- and low-wage earners alike.<sup>87</sup> Moreover, an income threshold could thwart the proposed rule’s stated purpose of improving job mobility for low-wage workers.<sup>88</sup> As non-compete prevalence has negative externalities on wages and job mobility throughout a labor market that extend even to workers who have not signed non-competes, permitting non-competes above a certain income threshold could have negative downstream effects on low-wage workers.<sup>89</sup> For these reasons, the State AGs support the Commission’s proposal not to include an income threshold in the proposed rule.

**D. The Commission should ensure the proposed rule will not preempt the concurrent enforcement of state laws that provide workers with substantially similar protections.**

The State AGs urge the Commission to clarify that the proposed rule’s preemption provision (“Section 910.4”) does not preempt state laws that provide substantially similar or greater protections, nor does it preclude the concurrent enforcement of state laws by state agencies and their residents. While we recognize that Section 910.4 includes a savings clause that provides for non-preemption where a state law affords workers with protections “greater than” the proposed rule,<sup>90</sup> we believe additional clarity is warranted because this “greater than” standard may not accommodate for the nature of variation in state legislation regarding non-competes and the unique enforcement remedies those laws provide to state agencies and residents.

For example, jurisdictions like Colorado, Illinois, Washington, and the District of Columbia have passed laws that ban non-competes for workers making under a specified income threshold and also include remedies provisions that authorize state agencies and residents to enforce the law. The remedies provisions in these laws are plainly “greater than” the proposed rule, as states and their residents can enforce their state laws through litigation in court—whereas they would not be able to enforce the proposed rule. However, an overly textualist reading of the income threshold provisions could contend that such thresholds present protections that are not “greater than” the proposed rule, which does not have such a threshold. This could introduce a preemption argument that could frustrate state and private enforcement in a manner contrary to the proposed rule’s stated worker protection purposes. In addition, the proposed rule should not preempt other state laws, such as antitrust, consumer protection, and other laws, that also protect workers against non-competes (or similarly restrictive employment arrangements) and confer distinct enforcement rights to state agencies and residents not afforded by the proposed rule—but which may not fit neatly within the current “greater than” standard.<sup>91</sup>

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<sup>87</sup> *E.g.*, Lipsitz & Starr, *supra* note 9 (studying effect of Oregon ban on non-competes for low-wage workers); Balasubramanian et al., *supra* note 9 (studying effect of Hawaii ban on non-competes for technology workers).

<sup>88</sup> *See* 88 Fed. Reg. 3521, 3537.

<sup>89</sup> Johnson et al., *supra* note 13.

<sup>90</sup> 88 Fed. Reg. at 3515.

<sup>91</sup> To provide just a few examples, California state law affords numerous protections to workers and competition through its antitrust law known as the Cartwright Act (Cal. Bus. & Prof. Code §§ 16700-16770), the Unfair Practices Act (Cal. Bus. & Prof. Code §§ 17000 et seq.), the Unfair Competition Law (Cal. Bus. & Prof. Code §§ 17200 et seq.), Labor Code (Cal. Labor Code § 432.5) and non-compete restrictions (Cal. Bus. & Prof. Code §§ 16600-16602), among

The Commission should clarify that the proposed rule is not intended to have such sweeping preemptive effect. The State AGs stress that it is critical for states and their residents to be able to continue to enforce state laws that regulate non-competes. In many instances, state agencies and state residents will be better-positioned than the Commission—and should not be left to depend on the Commission—to respond to non-compete issues that are specific to a particular state. Preserving this parallel enforcement structure is therefore essential to realizing the stated worker protection purposes of the proposed rule. The State AGs thus urge the Commission to make clear that the proposed rule’s preemptive effect does not intrude into such concurrent enforcement of state laws that provide workers in our states with protections that are both substantially similar to and greater than those afforded by the proposed rule.

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We thank the Commission for its work on the proposed rule, for which we offer strong support, and for the opportunity to submit this comment.

Respectfully submitted,



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others. Similarly, Illinois state law prohibits the use of non-solicitation agreements for certain workers, which provides an additional protection that may not be covered by the proposed rule. *See* 820 ILCS 90/10.



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