

**Public Comments of 19 State Attorneys General
in Response to the Federal Trade Commission’s January 9, 2020 Workshop on
Non-Compete Clauses in the Workplace**

We, the undersigned Attorneys General, submit this Comment in response to the Federal Trade Commission’s (FTC) request for public comments in connection with the FTC’s January 9, 2020 workshop on Non-Competes in the Workplace.¹ In this Comment, we offer our perspective on the use of non-compete covenants under antitrust law, and the Attorneys General’s specific interest in, and ability to address, these issues. This Comment addresses some of the discussion during the workshop, particularly as it relates to low-income workers and others negatively impacted by non-compete agreements, and responds to certain of the FTC’s questions on which it invited public comments. Specifically, this Comment provides the Attorneys General’s perspective on:

- 1) the impact of non-compete clauses on labor market participants;
- 2) the traditional business justifications for non-compete clauses;
- 3) the competitive harm from non-competes that support identifying them as unfair methods of competition; and
- 4) recommendations for further FTC action regarding non-competes, including rulemaking, enforcement, economic research and study, and public education.

I. Introduction

We, as State Attorneys General, have a strong interest in the competitiveness of our markets, including labor markets. We care about our residents as workers and consumers, and we want to ensure that companies and organizations compete fairly for the labor of workers through wages and other benefits. We are interested in ensuring that our economies prosper in an environment free of anticompetitive restraints. One mechanism that is increasingly responsible for anticompetitive effects in labor markets and beyond are covenants not to compete (CNCs).

CNCs have a long history in the United States. They have been regulated to varying degrees by the states, who take different approaches to legislating and enforcing CNCs. California, for example, has long banned the enforcement of CNCs, while most other states have not.² This is the type of experimentation and variation that our system of government is designed to promote.³ As State Attorneys General, we support federal rulemaking that is consistent with our ability to pursue enforcement and legislative priorities to the benefit of workers and consumers.

¹ FED. TRADE COMM’N, NON-COMPETES IN THE WORKPLACE: EXAMINING ANTITRUST AND CONSUMER PROTECTION ISSUES, <https://www.ftc.gov/news-events/events-calendar/non-competes-workplace-examining-antitrust-consumer-protection-issues> (last visited March 1, 2020).

² Cal. Bus. & Prof. Code § 16600; *e.g.* *Muggill v. Reuben H. Donnelley Corp.*, 398 P.2d 147, 149 (CA 1965) (“This section invalidates provisions in employment contracts prohibiting an employee from working for a competitor after completion of his employment or imposing a penalty if he does so . . .”).

³ *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) (“It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.”).

Current conditions in labor markets and a deeper understanding of the competitive harms workers may be experiencing have led to new scrutiny of CNCs.⁴ Some states have recently limited the enforceability of CNCs.⁵ Nineteen State Attorneys General submitted a comment to the FTC in July 2019 advocating greater study of antitrust and labor issues and increased state-federal collaboration in the area. This area has become a priority because of new evidence that shows the impacts of CNCs, particularly how abusive CNCs harm low-wage workers through reduced wages. Harms from CNCs are not confined to low-wage workers, however, and can reach any number of industries, from technology to health care. Also, new research shows that CNCs are prevalent, even in low-wage workers' employment agreements. Moreover, the traditional justifications that underlie the general tolerance of CNCs are facing increased skepticism.

The FTC's workshop was an excellent gathering of experts in this area that highlighted what we now understand. The participants also identified the things we need to further understand and suggested new policy approaches, and how those policy changes might be effectuated. We appreciate the opportunity to respond to the FTC's workshop, and recommend ways forward to enhance protections for our workers and consumers through both enforcement work and a targeted FTC rulemaking that would provide a floor, not a ceiling or constraint, on states' ability to implement state-specific remedies.

This Comment proceeds by first describing the competitive harms caused by CNCs, including harms within labor markets and harms beyond labor markets. It then argues that traditional rationales supporting the enforceability of CNCs are not persuasive. This Comment then concludes by offering recommendations on how the FTC and the States can address the harms CNCs can cause to laborers, employers and consumers.

II. CNCs Can Harm Competition

Ample research shows CNCs present a danger to competition. Harm from CNCs is not limited to the employees bound by them. Negative externalities from CNCs harm other workers in the same labor market, regardless of state boundaries. These harms present competition issues as they not only directly impact workers but also impact competition by hindering competitive entry and dynamism in industries altogether. These harms consequently may harm consumers through higher prices and lower quality because the consumers are losing the benefits from innovation and entry in the industry that would otherwise occur. Below, we describe each harm in turn, starting

⁴ Transcript of Fed. Trade Comm'n Workshop, Non-Competes in the Workplace: Examining Antitrust and Consumer Protection (Jan. 9, 2020), Comm'n Phillips at 220:19-21 [hereinafter FTC Trans.], *available at* https://www.ftc.gov/system/files/documents/public_events/1556256/non-compete-workshop-transcript-full.pdf.

⁵ Recently, for example, Hawaii banned the enforcement of CNCs for technology workers, and Colorado now bans them for doctors. *See* Haw. Rev. Stat. Ann. § 480-4(d) (“[I]t shall be prohibited to include a noncompete clause or a nonsolicit clause in any employment contract relating to an employee of a technology business. The clause shall be void and of no force and effect.”); Colo. Rev. Stat. Ann. § 8-2-113 (3)(a) (“Any covenant not to compete provision of an employment, partnership, or corporate agreement between physicians that restricts the right of a physician to practice medicine . . . upon termination of the agreement is void.”). For a discussion on non-competes in medicine, see also Michelle Andrews, *Did Your Doctor Disappear Without a Word? A Noncompete Clause Could Be the Reason*, N.Y. TIMES (March 15, 2019) <https://www.nytimes.com/2019/03/15/business/physician-non-compete-clause.html>; Lavetti, et al., *The Impacts of Restricting Mobility of Skilled Service Workers: Evidence from Physicians*, J. OF HUMAN RESOURCES (2019).

with harm to workers and how harms can cross states lines, then tracing how that harm reaches consumers.

a. Harm within Labor Markets

i. Reduced Wages

CNCs harm a labor market by reducing or even eliminating competition for workers' labor by denying workers the ability to change firms.⁶ This reduction in competition for labor can happen even when firms independently choose to implement CNCs. If enough firms in a market include CNCs in their employment contracts, the resulting harms are similar, if not worse, than if the market suffered from a monopsonist employer: reduced wages, job mobility, and entry. To be sure, a monopsonist using CNCs risks a Section 2 violation. But our concerns with CNCs go beyond that scenario, as the economist Alan Krueger observed, “[n]ew practices have emerged to facilitate employer collusion, such as noncompete clauses and no-raid pacts, but the basic insights are the same: employers often implicitly, and sometimes explicitly, act to prevent the forces of competition from enabling workers to earn what a competitive market would dictate, and from working where they would prefer to work.”⁷

Given the prevalence of CNCs, the above scenario is not hypothetical. Studies show that the use of CNCs is common, and the states see this firsthand. As an example, one state AG office has received nearly 45 individual complaints about 45 different businesses regarding potentially abusive CNCs over the last six months. Nationally, CNCs restrict the mobility of around 25% of the country's workforce.⁸ Of the employees who are subject to CNC, 53% are paid hourly.⁹ With CNCs this prevalent, the benefits supposedly produced by these agreements should by now have been conclusively established across the spectrum of workers. On the contrary, the evidence points decidedly in the other direction for low-wage workers, and casts doubt as to other categories of workers as well.

A lack of employee leverage and employer accountability has made CNCs particularly problematic and contributes to their prevalence. Employers face little downside from including CNCs in their

⁶ See Workshop Comment to FTC from Sen. Rubio 1 (“[T]he proliferation of noncompete agreements has caused great harm to American workers and their families.”); Workshop Comment to FTC from Sen. Murphy, et al. (“At their core, non-competes inherently manipulate competitive labor market forces by narrowing the available employment options for workers.”).

⁷ Alan B. Krueger, *The Rigged Labor Market*, MILKEN INST. REV. (April 28, 2017), <http://www.milkenreview.org/articles/the-rigged-labor-market>.

⁸ Evan Starr, J.J. Prescott & Norman Bishara, *Noncompetes in the US Labor Force*, 17 (“We find that noncompetes are a regular part of the employment relationship: 38.1% of the sample report agreeing to a noncompete at some point in their lives, while 18%, or roughly 28 million individuals, report currently working under one.”); Alexander Colvin & Heidi Shierholz, *Noncompete agreements: Ubiquitous, Harmful to Wages and to Competition, and Part of a Growing Trend of Employers Requiring Workers to Sign Away Their Rights* 10 (Econ. Policy Inst. Working Paper, 2019) (“[W]e are unable to determine the precise share of workers nationwide that are subject to noncompetes. However, we can provide a range. In the next two sections, we show that somewhere between 27.8% and 46.5% of private-sector workers are subject to noncompetes.”).

⁹ Michael Lipsitz & Evan Starr, *Low Wage Workers and the Enforceability of Noncompete Agreements* 6 (Working Paper, 2019), <https://ssrn.com/abstract=3452240>.

employment agreements.¹⁰ They understand that CNCs are rarely truly negotiated,¹¹ especially in low-wage situations. They understand that there is almost never a consequence to an employer for using abusive CNCs or for defining particular terms of the CNC – the labor market, the time period, or the geographic area – in a way that exceeds any legitimate business purpose of the CNC.¹² This has caused increasing harms to competition for labor as the resulting problem of firms acting in parallel through CNCs make it difficult for a worker to change positions without relocating outside the range of the CNC or working in a different industry.¹³ That such a situation would result in suppressed wages follows from the fact that changing jobs, or the credible threat of changing jobs, is one of the most effective ways to increase compensation.¹⁴

Moreover, an overbroad CNC can cause harm without an employer seeking to enforce it. It can harm an employee without any action from an employer beyond the contract itself. And this is simply because an employee may believe she’s bound by an overbroad CNC and never bothers to seek a better position. Or, an employer may only need to remind an employee of her CNC, and that can often be enough to dissuade the employee from taking a new position. Finally, if a potential new employer finds out about a CNC binding a potential hire, it may be leery of getting entangled in a dispute or litigation.¹⁵ California’s experience demonstrates this effect: the state has a strict policy against enforceability of CNCs, yet there are still many employment contracts

¹⁰ Eric A. Posner, *The Antitrust Challenge to Covenants Not to Compete in Employment Contracts* (Working Paper, 2019), available at <https://ssrn.com/abstract=3453433>.

¹¹ Evan Starr, J.J. Prescott & Norman Bishara, *Noncompetes in the US Labor Force 2* (U. Mich. Law & Econ. Research Paper No. 18-013, 2019) (“In terms of the contracting process, we observe significant heterogeneity in the circumstances under which employees enter into noncompetes: roughly 1/3 of noncompetes are first requested after the individual has accepted an employment offer (without any changes in job responsibilities), only 10% of individuals report negotiating over noncompetes, and most individuals who are presented with a noncompete simply agree to it without consulting friends, family, or legal counsel.”).

¹² Posner, *supra* note 10; Opinion Letter, *Metis Group, Inc. v. Allison*, CL 2019-10757 (Va. Cir. 2020), available at <https://www.fairfaxcounty.gov/circuit/sites/circuit/files/assets/documents/pdf/opinions/cl-2019-10757-metis-group-inc-v-stephanie-allison-et-al.pdf> (“The restrictive covenants violate public policy because they are designed to perpetuate a monopoly although the work itself was limited to a particular government project. . . . There was no credible evidence as to why The Metis Group [the employer] needed to create an impermeable barrier preventing others from soliciting their employees or other independent contractors to perform any other work regardless of the nature of the work or location.”);

¹³ FTC Trans., Stutz at 61:18-24 (“But in a given relevant antitrust labor market, if you have most of the employers using non-competes to lock up most of the employees in the market, then collectively the non-competes really do register a very serious anticompetitive effect on the hiring process and the labor market.”).

¹⁴ See e.g., Bourree Lam, *The Special Few Who Are Getting Raises in this Economy*, THE ATLANTIC (Feb. 8, 2016), <https://www.theatlantic.com/business/archive/2016/02/job-switchers-raise/460044/> (“According to ADP’s data, full-time workers who changed jobs saw their paychecks increase an average of 4.5 percent, an improvement over the 3.9 percent average that covers all full-time workers Breaking the data down by age, ADP also found that the wage increase from full-time-job switching was most pronounced for workers aged 25 to 34.”).

¹⁵ See Complaint, *State of Washington v. Mercury Madness, Inc.*, ¶ 4.21 (CNC required an employee to produce to a prospective employer a copy of defendant’s employment agreement for 24 months after leaving employment, even though the CNC itself ended at 18 months); Aruna Viswanatha, *Legal Publisher in Settlement to Drop Noncompete Agreements for Employees*, WALL ST. J. (June 15, 2016), <https://www.wsj.com/articles/legal-publisher-in-settlement-to-drop-noncompete-agreements-for-employees-1465963260> (reporting that “Stephanie Russell-Kraft. . . lost a job with a new employer because of the noncompete agreement she signed with Law360” even though the policy of Law360’s founder was not to enforce CNCs.).

in California that include CNCs.¹⁶ This either means that the employer and/or the employee do not understand that California law bars enforcement of CNCs, or there is a widespread belief that CNCs do not need to be enforced to be useful to the employer.

ii. CNC Harm Crosses State Lines

Harms from CNCs do not stop at state lines. Many significant labor markets overlap state borders. A handful of examples are: Cincinnati with Kentucky, Ohio, and Indiana; the District of Columbia with Maryland and Virginia; Chicago with Illinois and Indiana; Kansas City with Missouri and Kansas; Omaha with Nebraska and Iowa; Portland with Washington and Oregon. Studies show that when there are two neighboring jurisdictions and one has a more restrictive non-compete regime than the other, the jurisdiction that relatively welcomes non-competes can cause harm to workers in the jurisdiction that does not.¹⁷ This reality is one of the reasons that the FTC's participation in this area in terms of setting a floor on CNC enforceability is appropriate and particularly important.

Despite harms crossing state lines, when states have taken steps to limit CNCs, workers have benefitted. When Oregon banned CNCs for low wage workers hourly wages rose up to 6% and job mobility increased by 12-18%.¹⁸ These benefits are observable in higher income industries as well, including the technology industry, which is an industry generally characterized by higher levels of innovation, trade secret concerns. In 2015, Hawaii banned CNCs for high-tech workers, and quarterly earnings for new hires increased by 4% while job mobility increased by 11%.¹⁹ The increase in mobility is noteworthy. It represents employees choosing something better for themselves, whether due to better wages or salary or because of any increased benefits in one of the numerous other ways that employers compete for employees.

iii. Policy Considerations

The harms from CNCs and the ways that they arise present an important policy question. If independent, non-collusive action taken by competing employers makes an antitrust case difficult to litigate but the behavior nonetheless lessens competition,²⁰ is there a need for new analyses and new applications of antitrust law that more closely address realities of labor markets? We appreciate the FTC's desire to evaluate this policy issue and use its rulemaking authority to remedy an anticompetitive harm. Within the antitrust context, the situation may be akin to conscious

¹⁶ FTC Trans., Stutz at 92:13-15; *Id.*, Nunn at 131:6-10; *Id.*, Lobel at 24:3-10; Colvin & Shierholz, *supra* note 8 at 5, 6.

¹⁷ FTC Trans., Lavetti at 145:25–146:15 (“[T]here are in fact spillover impacts on workers across the state border. Those workers are not themselves directly affected by the non-compete laws. These are workers that live and work in a different state, but they share an overlapping labor market with the workers who are affected. We estimated that, on average, about 90 percent of the negative wage effect spills over to the bordering counties. As you go further away from the border, the effects dampen. We can reject that the spillover is smaller than 10 percent. So there is very convincing evidence that there are spillover effects, there are negative externalities on other workers, and I think this is pretty convincing evidence that something ought to be done to protect especially vulnerable workers.”).

¹⁸ FTC Trans., Starr at 163:12-20; Lipsitz & Starr, *supra* note 9, at 3-4.

¹⁹ FTC Trans., Starr at 164:13-18; Natarajan Balasubramanian, et al., *Locked In? The Enforceability of Covenants Not to Compete and the Careers of High-Tech Workers* (US Census Bureau Center for Econ. Studies Paper No. CES-WP-17-09, 2017).

²⁰ FTC Trans., Stutz at 62:9-20.

parallelism, where firms taking similar action effect the same results as an anticompetitive agreement but without the legal liability.²¹ However, unlike in most conscious parallelism pricing cases, the harmful activity (CNCs) is clearly identifiable, and the resulting harms can be remedied simply by curtailing CNCs. Competitive concerns are therefore raised by a single firm's contracts with its employees regardless of whether the firm is actively colluding with its competitors. These reasons have motivated several states to challenge CNCs as well as welcome the FTC's involvement in this issue.²²

Several state attorneys general have made combating abusive CNCs a priority over the past few years.²³ While most of these cases have been brought using state consumer protection laws or laws prohibiting unfair competition, the impetus behind these cases is a concern that employers are using CNCs to *reduce* competition for labor.²⁴

²¹ *E.g.* In re Text Messaging Antitrust Litig., 782 F.3d 867, 879 (7th Cir. 2015).

²² Public Comments of 18 State Attorneys General on Labor in Antitrust, Hearings on Competition and Consumer Protection in the 21st Century (July 15, 2019), https://oag.dc.gov/sites/default/files/2019-07/State_AGs_Comments_to_FTC_on_Labor_Issues_in_Antitrust.pdf; Letter from 19 State Attorneys General to Fed. Trade Comm'n Chairman Simons (Nov. 15, 2019), http://www.ag.state.mn.us/Office/Communications/2019/Documents/20191115_MultistateFTCNonCompeteLetter.pdf.

²³ The publicly announced state settlements regarding CNCs:

1. Washington's Settlement with Mercury Madness Coffee. Oct. 29, 2019. <https://www.atg.wa.gov/news/news-releases/attorney-general-bob-ferguson-stops-king-county-coffee-shop-s-practice-requiring>
2. Illinois Settlement with Check Into Cash. January 7, 2019. http://www.illinoisattorneygeneral.gov/pressroom/2019_01/20190107b.html (the geographic limitation in the CNC was 15 miles from any location of the corporation, including subsidiaries, resulting in a geographic coverage of over 1,000 stores in 32 states.).
3. New York Settlement with Reliance Star Payment Services. Oct. 26, 2018. <https://ag.ny.gov/press-release/2018/ag-underwood-announces-settlement-payment-processing-firm-end-use-non-compete>
4. New York and Illinois settlement with WeWork. September 18, 2018. <https://ag.ny.gov/press-release/2018/ag-underwood-announces-settlement-wework-end-use-overly-broad-non-competes>.
5. New York settles with Examination Management Services, Inc. (EMSI). Aug. 4, 2016. <https://ag.ny.gov/press-release/2016/ag-schneiderman-agreement-ends-non-compete-agreements-employees-national-medical> ("She was offered a job by a clinical laboratory company that offered more regular hours, higher pay, and no travel requirements, but the offer was rescinded when the company discovered she was subject to a non-compete with EMSI)."
6. New York and Illinois Settlement with Jimmy John's. December 7, 2016. http://www.illinoisattorneygeneral.gov/pressroom/2016_12/20161207.html
7. New York Settlement with Law360. June 15, 2016. See Aruna Viswanatha, *Legal Publisher in Settlement to Drop Noncompete Agreements for Employees*, Wall St. J. (June 15, 2016), <https://www.wsj.com/articles/legal-publisher-in-settlement-to-drop-noncompete-agreements-for-employees-1465963260> (reporting that "Stephanie Russell-Kraft. . . lost a job with a new employer because of the noncompete agreement she signed with Law360" even though the founder of Law360's policy was to not enforce CNCs.).

²⁴ *E.g.*, Assurance of Discontinuance in the matter of the investigation by Barbara D. Underwood, Attorney General of New York of WeWork Companies Inc., Assurance of Discontinuance 4 ("Whereas, the Attorney General has concluded that WeWork's practice of requiring all employees to sign a Non-Compete – regardless of position or job duties, exposure to confidential information, or compensation – unreasonably restrained competition;"), available at https://ag.ny.gov/sites/default/files/final_aod.09.18_w_exhibits.pdf.

iv. Quality Considerations

Firms compete for workers in a variety of ways beyond wages. Employers compete for employees with benefits ranging from improved health care, flexible schedules, or on-site childcare to less substantive benefits like free snacks and employee lounges. Thus, not only do CNCs tend to reduce wages, but they also very likely impact these benefits. Of course, these qualities are difficult to study and measure, but it is likely that reduced wages are a symptom of reduced competition generally, meaning that workplace environments and other benefits – flexible work hours, increased workplace amenities, health care benefits – are impacted by the prevalence of CNCs.²⁵ The intersection of wage suppression and degradation of the quality of other employment benefits may well track the fact that worker populations tend to experience the effects of CNCs differently. Women and minorities see the largest pay increases when CNCs are relaxed,²⁶ which makes it likely that these groups would also see quality improvements in the workplace when CNCs are limited. Reduced pay should be viewed as only one symptom of a reduced competitive environment.

We encourage the FTC to study this issue seriously. Non-wage benefits can deeply affect workers. Work is where Americans spend most of their time. If CNCs are making the work experience worse than it would be without them, that harm is meaningful even if it's not currently measured.

b. Abusive CNCs Harm Consumers

CNCs not only harm laborers – both laborers bound by them and others in the market who are not bound – but consumers are also harmed through reduced entry and innovation.²⁷ Labor is an essential component of every business. Reducing access to skilled and unskilled labor can prevent an employer from expanding or even entering in the first place. Restricting access for one key category of employee can derail entry that would employ many other types of employees, depriving consumers of the benefits of competition.²⁸

Reduced entry has implications for consumers.²⁹ Namely, higher prices and less innovation. Take the beer market for example, if craft breweries used CNCs more frequently, the competition and

²⁵ FTC Trans., Lobel at 87:9-20 (“The other way is that in cases I’ve been involved with, you see this pattern where an employee is very, very unhappy and that – you know, we’ve seen now we’re at a moment where we know more about hostile work environments, we know about problems in various industries, also with, you know, higher paid employees that just feel that they have no voice . . . and they’re locked in because they have a non-compete. . .”).

²⁶ Testimony of Professor Evan Starr (Nov. 19, 2019) 5-6 (citing Lipsitz & Starr, *supra* note 9). See also Matthew Johnson, Kurt Lavetti & Michael Lipsitz, *The Labor Market Effects of Legal Restrictions on Worker Mobility*, available at <https://ssrn.com/abstract=3455381> (forthcoming 2020); FTC Trans., Comm. Slaughter at 112; *Id.* Lavetti at 143; *Id.* Starr at 163.

²⁷ See Hyo Kang & Lee Fleming, *Non-Competes, Business Dynamism, and Concentration: Evidence from a Florida Case Study* 33-34 (Searle Center Working Paper, No. 2017-046, 2019) (“[W]e observed an increase in the business concentration in Florida, following strengthened non-compete enforcement.”).

²⁸ Posner, *supra* note 10, at 17-18 ([providing the example of a hospital looking to enter a market, but is unable to because it can't hire one specific type of worker, resulting in harm to all the other workers that would have been hired](#)).

²⁹ See Naomi Hausman & Kurt Lavetti, *Physician Practice Organization and Negotiated Prices: Evidence from State Law Changes*, AM. ECON. J.: APPLIED ECON. (forthcoming 2020) (finding 45% of physicians are covered by CNCs and “show[ing] that a judicial decision decreasing NCA enforceability by 10% of the observed policy spectrum (about 0.39 standard deviations) causes physician prices to fall on average by 4.3%. This estimate suggests

collaborative atmosphere that generally exists in that industry today would likely not have yielded the many options the consumers have seen in recent years.³⁰ Because of the proliferation of breweries, competition between has increased, and now breweries may consider CNCs with their employees as a response.³¹

Given the harm to workers and consumers described above, it is worth considering the validity of traditional justification for CNCs.

III. Traditional Justifications for CNCs are Not Supported

Three traditional types of justifications exist for CNCs. The first justification is that the employee may be exposed to trade secrets and permitting the employee to leave with such knowledge could be detrimental to the employer. The second is that employers want to ensure a return on the investment they put into training their employees. The third is that the CNC is a term of the contract between employer and employee and thus reflects the employee's freely bargained-for preferences and benefits. None of these justifications are persuasive in today's labor markets in which a quarter of all workers are covered by CNCs and are particularly inapplicable to low-wage or hourly workers. Moreover, given the availability of alternative arrangements, the use of a CNC is excessive in order to address these concerns.

a. Trade Secret and Training Justifications are Not Persuasive

CNCs are a blunt instrument; trade secret and training justifications are overbroad and inapplicable to the majority of workers subject to CNCs. In reality, low-wage workers and hourly worker are rarely, if ever, exposed to bona fide trade secrets or competitively sensitive information. Even if they are, there are less restrictive ways of addressing this concern than with a CNC. If an employer is worried that a former employee may poach his/her clients, the employer could use a non-solicitation agreement.³² With respect to disclosure of trade secrets, the employer could use a non-disclosure agreement or rely on trade secret laws.³³

that such a policy change at the national level would reduce aggregate medical spending by over \$25 billion annually.”).

³⁰ Kieth Gribbins, *Let's Talk Non-compete Agreements in the Brewing Industry and Reflect on the Toppling Goliath Suit*, CRAFT BREWING BUS. (Aug. 6, 2018), <https://www.craftbrewingbusiness.com/featured/lets-talk-non-compete-agreements-in-the-brewing-industry-and-reflect-on-the-toppling-goliath-suit> (reporting that Toppling Goliath Brewing Co. in Iowa was suing its former head brewer for violating a CNC that bars employment at any brewery within 150 miles for two-years).

³¹ Katherine Carlon, *Trouble Brewing in Iowa's Beer Scene*, CORRIDOR BUS. (Aug. 27, 2018), <https://www.corridorbusiness.com/trouble-brewing-in-iowas-beer-scene/> (“But even as bloggers, fellow brewers and beer enthusiasts criticized Toppling Goliath for attempting to restrict its former employee, others admitted that with 6,600-plus active breweries operating in the U.S. – and more than 80 of them in Iowa, according to the Iowa Brewers Guild (IBG) – competitive pressure is threatening to make relations a little less collegial.

‘Toppling Goliath and Thew are both IBG members, so I’ll not be taking sides,’ said J. Wilson, the IBG’s Minister of Iowa Beer, “but as the industry continues to mature, I’d say more squabbles between breweries is a distinct possibility.”).

³² FTC Trans., Flanagan at 46:12-20.

³³ *Id.*, Lobel at 23:13-24:2.

Likewise, training justifications are overbroad as the CNC is rarely tailored to the training received.³⁴ Low-wage workers most often do not have jobs that provide extensive, specialized training which might justify the restrictions in a CNC. Typically, on-the-job training occurs at the beginning of employment and is particular to the needs of the employer. The employer benefits from its trained employees throughout the entire term of employment, and it should not be able to use CNCs to bind an employee for years only because of some initial training.³⁵

Further, even if you assume CNCs encourage employers to train employees, at the same time, CNCs discourage employees to invest in their own training. If an employee understands that she can't take her skills to another employer for a higher salary or more benefits,³⁶ she is less likely to invest in herself.³⁷

Though some employers may argue there are procompetitive benefits of CNC agreements,³⁸ these alleged benefits are not applicable to many categories of employees and legitimate competitive interests can be protected effectively by less restrictive alternatives which do not impact the labor market as drastically. Currently, employers appear to have little to no incentive to think carefully about tailoring a CNC to a particular employee's specific job functions.³⁹ Instead, boilerplate CNCs have become commonplace even when there are no trade secrets or specialized training to justify such restrictions on worker mobility.

b. Freedom of Contract is Not the Reality

In the past, CNCs may have been included as a specifically bargained-for contract term, but now they are included as a matter of course in many employment agreements.⁴⁰ This contemporary practice of including boilerplate CNCs indicates that CNCs are not bargained for by job-seekers, especially low-wage earners, and suggests that such 'agreements' are actually contracts of adhesion.

³⁴ See e.g., Opinion Letter at N. 12, *Metis Group, Inc. v. Allison*, CL 2019-10757 (Va. Cir. 2020) ("Standard form contracts often suffer from inaccuracies and misrepresentations because they seek to apply general terms to all circumstances instead of addressing the specific parties under the contract.").

³⁵ FTC Trans., Nunn at 128:12-22.

³⁶ At a fundamental level, the argument that a training investment in an employee can mean that the employee's labor is required to work off the debt of the investment, means that, post-training, an employer pays below market wages so the employee can "work off the debt." If it were otherwise, and the employer were paying market wages or above-market wages, the CNC would be of no value because defection to another firm wouldn't occur. It's only through training and then subsequent below market wages that the justification makes any sense. As the data suggests, this seems like an area that would be abused. See FTC Trans., Starr at 165:2-9; Posner *supra* note 10, at 11 (questioning why the law allows employers to have a security interest in a person's human capital when it is clear that a bank would never be given such an interest).

³⁷ Yifat Aran, Note, *Beyond Covenants Not to Compete: Equilibrium in High-Tech Startup Labor Markets*, 70 STAN. L. REV. 1235, 1250 (2018) (citing ORLY LOBEL, TALENT WANTS TO BE FREE: WHY WE SHOULD LEARN TO LOVE LEAKS, RAIDS, AND FREE RIDING 178 (2013); Mark J. Garmaise, *Ties That Truly Bind: Noncompetition Agreements, Executive Compensation, and Firm Investment*, 27 J.L. ECON. & ORG. 376, 383 (2009)).

³⁸ These benefits include protecting trade secrets, poaching clients, and/or protecting investments in training workers. See e.g., *Ellis v. James V. Hurson Assoc.'s, Inc.*, 565 A.2d 615, 619 (D.C. 1989); Matt Marx & Ryan Nunn, *The Chilling Effect of Non-Compete Agreements*, ECONOFACT (May 20, 2018), <https://econofact.org/the-chilling-effect-of-non-compete-agreements>.

³⁹ Posner, *supra* note 10, at 8..

⁴⁰ *Id.*; FTC Trans., Posner at 71:14-72:17; FTC Trans., Comm'n Slaughter at 111:15-20.

Proponents of CNCs may claim that workers could negotiate the CNC out of their agreements. This is not the reality. Recent studies have revealed that there is more market power in employer markets than has been understood. Often, an employer may be taking advantage of a certain moment in time when he/she has market power. Employees are most vulnerable when they need a job – near the beginning of the employment relationship– and that is when the CNC is frequently agreed to.⁴¹ This is especially true with low-wage workers who have very little bargaining power in the first instance. For these reasons, low-wage workers are not in a realistic position to bargain the CNC out of their contracts.

Nonetheless, courts analyzing whether CNCs may be enforced by employers tend to view CNCs as validly agreed to contract provisions. Workers generally lack the resources to seek legal advice before signing a CNC, or to litigate a CNC, either defensively or to seek a court order on the CNC’s enforceability. In terms of addressing this argument for CNCs, State Attorneys General and the FTC, therefore, must work together to protect workers from these harms, especially low-wage workers, while acknowledging the reality of the workplace.

IV. Recommendations

For the reasons articulated above, FTC action is appropriate. The FTC has a number of options available to it, ranging from rulemaking to enforcement actions to its unique ability to study and analyze the issues, to address abusive CNCs.

a. The FTC Should Engage in Rulemaking to Address the Abusive Use of CNCs in the Workplace.

Rulemaking by the FTC represents a balanced approach to addressing the harms caused by abusive CNCs that are so prevalent.⁴² Many of these provisions broadly limit employee mobility, stagnate wages, and generally place more burden on labor and competition than is necessary to protect legitimate business interests.⁴³

Rules promulgated by the FTC will provide clarity to firms and workers regarding when and how CNCs are considered an “unfair method of competition,” or unreasonable restraints of trade. While the exact contours of the FTC’s authority to conduct rulemaking in this area is the subject of some

⁴¹ Evan Starr, J.J. Prescott & Norman Bishara, *Noncompetes in the US Labor Force* 2 (U. Mich. Law & Econ. Research Paper No. 18-013 2019) (“That is, noncompetes may serve as intertemporal conduits of monopsony power, translating short-term monopsony power (i.e., the temporary lack of an outside offer and high marginal switching costs) into long-term monopsony power (i.e., a durable right to prevent the employee from joining or starting a competitor).”).

⁴² See *supra* Section II.a.i; Colvin & Shierholz, *supra* note 8, at 4 (“Roughly half, 49.4%, of responding establishments indicated that at least some employees in their establishments were required to enter into a noncompete agreement.”).

⁴³ U.S. DEP’T OF TREASURY OFFICE OF ECON. POLICY, *NON-COMPETE CONTRACTS: ECONOMIC EFFECTS AND POLICY IMPLICATIONS* 19 (2016) (“[W]e find stricter non-compete enforcement to be associated with both lower wage growth and lower initial wages”); Evan Starr, *Prepared Testimony for the Hearing on “Antitrust and Economic Opportunity: Competition in Labor Markets* 4 (Oct. 29, 2019).

debate, there is reason to feel comfortable that the authority exists.⁴⁴ Setting aside the exact contours of the authority, the general benefits of a rule to the business community and the public at large are easy to identify. Likewise, state regulators benefit from clarity in federal standards that may be adopted by state law or provide persuasive guidance in state actions. State economies benefit from certainty in understanding standards of CNC enforceability within and outside of our state borders. Like rulemaking in many areas of administrative law, rules governing CNCs in the workplace would provide valuable guidance to all stakeholders—employers and employees and regulators alike. Rules would clearly frame how the FTC would view CNCs’ validity and would set forth its role to challenge the use of CNCs in certain employment contracts.

An FTC rule could provide that CNCs are presumptively unreasonable for certain workers in certain situations. This could include, for example, hourly employees who earn below a certain threshold and who typically would not have access to trade secrets or competitively sensitive information, or physicians because of the potential access to care issue. The economic evidence discussed above and at the FTC’s workshop shows that CNCs harm low-wage workers. State legislation and the Illinois Attorney General’s case against the Jimmy John’s sandwich chain provide good examples of how such a rule could apply.⁴⁵ The Illinois Attorney General alleged that workers who did not have access to trade secrets or other confidential proprietary information were unlawfully subjected to a two year CNC prohibiting them from working in any restaurant located within two miles of *any* Jimmy John’s sandwich shop.⁴⁶ Given the number of Jimmy John’s sandwich shops across the country (over 2,800 locations in 43 states across the U.S.),⁴⁷ the CNC prevented a large number of former employees from working in a large swath of the country for a significant period, without any legitimate business justification. Jimmy John’s settled with

⁴⁴ Federal Trade Commission Act (FTC ACT) §6(g)(2006) (“The Commission shall also have power—[f]rom time to time...(except as provided in [unfair or deceptive acts or practices (UDAP) rulemaking proceedings] to make rules and regulations for the purpose of carrying out the provisions of this subchapter.

As competition enforcers, the State Attorneys General are focusing on the FTC’s ability to address abusive CNCs through its competition authority. We understand that the FTC has rulemaking options relating to a UDAP standard; this Comment does not address those options, or the issues raised at the workshop on such options. See also, Comment of Fed. Trade Comm’n Rohit Chopra 6 Hearing #1 on Competition and Consumer Protection in the 21st Century (September 6, 2018) (“The Commission has in its arsenal a tool that would provide greater notice to the marketplace and that is developed through a...transparent, participatory process: using rulemaking to define “unfair methods of competition” through processes established by the Administrative Procedures Act (APA).”).

⁴⁵ Illinois bans CNCs for workers earning less than \$13 per hour. 820 Ill. Comp. Stat 90/5(c). Maine bans CNCs for persons earning at or below 400% of the federal poverty level. Me. Stat. tit. 26, § 599-A. Maryland bans CNCs for workers earning less than \$15 per hour. MD. CODE ANN., LAB. & EMPL. §3-716(A)(1). New Hampshire bans CNCs for employees earning less than 200% of the federal hourly minimum wage. N.H. REV. STAT. ANN. § 275:70-a(II)(b). Oregon CNCs are voidable and not enforced in the state unless employee’s salary and commission exceed the median family income of a family of four. OR. REV. STAT §653.295(1)(d). Rhode Island CNCs are not enforceable against an employee whose average annual earnings is less than 250% of the federal poverty level. 28 R.I. GEN. LAWS §28-59-3(a)(4). A CNC is void and unenforceable in Washington state for an employee earning less than \$100,000 annually. WASH. REV. CODE ANN § 49.62.020(1)(B). In 2018, Massachusetts enacted a law that bans non-compete agreements against certain low wage and student workers. MASS. GEN. LAWS ch. 149, §24L(c).

⁴⁶ Illinois v. Jimmy John’s Enterprises., No. 2016-CH-07746 (Cook County Cir. Ct. filed June 8, 2016).

⁴⁷ JIMMY JOHN’S, <https://www.jimmyjohns.com/find-a-jjs/> (last visited March 1, 2020).

the Illinois Attorney General and agreed to rescind existing CNCs and to remove all CNCs from its “new hire” packets going forward.⁴⁸

As previously mentioned, the protection of trade secrets is often a proffered justification for the use of CNCs. If protection of trade secrets were really the issue, one would expect CNC to be concentrated among workers with advanced education and in occupations likely to deal with trade secrets.⁴⁹ However, there appears to be little difference in the incidence of CNCs used for more educated workers versus for workers generally.⁵⁰ Indeed, in more than a quarter of workplaces where the typical worker has a high school diploma (and presumably not likely to have access to trade secrets or competitively sensitive information) *all* workers are subject to CNCs.⁵¹

An FTC rule could also require that employers provide separately negotiated consideration for the CNC, either on the front end or on the back end, in order for the CNC to be reasonable. On the front end, consideration could be in the form of a wage or benefits premium provided in order for the worker to take the job subject to the CNC. On the back end, the consideration could be in the form of “garden leave” which, originally espoused under British law, translates to a period when an employer pays an employee’s salary or a part of it when an employee is required to remain out of the labor market due to a CNC.⁵² If, as supporters of CNCs argue, an employee’s agreement not to compete as a condition of employment is a valid contractual term, an argument can be made that the employee’s future agreement not to compete *after employment ends* is worthy of its own consideration. The published research, however, does not document that employees receive *anything* in return for their agreements not to compete.⁵³

Finally, the FTC CNC rule could state that unless the employer provides the employee with the CNC some specified amount of time *before* the employer makes the job offer, the CNC will be presumptively unreasonable.⁵⁴ Empirical data shows that workers presented with CNCs *after accepting a job* experience no wage or training benefits compared to workers presented with CNCs *before accepting a job*.⁵⁵ Significantly, compared to workers with post-employment CNCs, workers presented with CNCs before accepting a job offer have nearly 10% higher wages (in their first few years of work), receive 11% more training and are more than 65% more satisfied in their jobs.⁵⁶

⁴⁸ Press Release, Illinois Attorney General, Madigan Announces Settlement with Jimmy John’s for Imposing Unlawful Non-Compete Agreements (Dec. 7, 2016), http://www.illinoisattorneygeneral.gov/pressroom/2016_12/20161207.html.

⁴⁹ U.S. DEP’T OF TREASURY OFFICE OF ECON. POLICY, NON-COMPETE CONTRACTS: ECONOMIC EFFECTS AND POLICY IMPLICATIONS 11 (2016).

⁵⁰ *Id.*

⁵¹ Colvin & Shierholz, *supra* note 8, at 8.

⁵² Jane Flanagan, *No Exit: Understanding Employee Non-Competes and Identifying Best Practices to Limit their Overuse* (American Constitution Society Issue Brief, Nov. 2019)

⁵³ Evan Starr, J.J. Prescott & Norman Bishara, *Noncompetes in the US Labor Force 2* (U. Mich. Law & Econ. Research Paper No. 18-013 2019)

⁵⁴ This rule could be similar to the rule requiring the pre availability of written warranties under the FTC’s existing rules. 16 CFR Part 702 – Pre-sale Availability of Written Warranty Terms.

⁵⁵ See Evan Starr, *Are Noncompetes Holding Down Wages* (Working Paper, 2019).

⁵⁶ *Id.* at 4.

b. Any FTC Rule Would Not Preempt States From Providing Additional Protections Under State Law for Workers Subject to CNCs.

The FTC has expressed interest in the States' position on the preemptive effect of FTC action. There is an "assumption that the historic police powers of the State [are] not to be superseded by [a] Federal Act unless that was the clear and manifest purpose of Congress."⁵⁷ It is the States' position that any preemption analysis of an FTC rule would implicate conflict preemption and that an FTC rule on CNCs would not in any manner preempt states from more broadly regulating CNCs.

The U.S. Supreme Court has recognized three circumstances in which federal regulations preempt state law: First, where a federal agency indicates express intent to preclude state regulation.⁵⁸ Second, where federal regulation is so comprehensive that it is reasonable to infer that the federal agency intended to occupy the field of regulation.⁵⁹ Third, state law is preempted where a state law actually conflicts with federal law so that compliance with both federal and state regulations is impossible.⁶⁰

The third area of conflict preemption is implicated in preemption analysis of FTC rulemaking because contract law, antitrust, and consumer protection are fields that the FTC traditionally shares with the states.⁶¹ Because of traditional state regulation in these areas, there is an assumption that federal action does not supersede the States unless there is a clear and manifest purpose from Congress.⁶² For example, the Southern District of California ruled that a California law requiring that all components of a product be manufactured in the United States in order for the product to be legally affixed with a "Made in the U.S.A." designation was not preempted because companies that must comply with the California law would also comply with the FTC regulation requiring that a product be made "all or virtually all" within the United States.⁶³

Were the FTC to take action to regulate abusive CNCs, it is the States' position that regulation would set a floor and would not preempt state laws that set restrictions on CNCs that are more protective to workers, or regulate abusive CNCs more rigorously, than the FTC rule.⁶⁴ The FTC

⁵⁷ *Wyeth v. Levine*, 555 U.S. 555, 565 (2009) (quotation omitted); *see also Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996) ("[B]ecause the States are independent sovereigns in our federal system, we have long presumed that Congress does not cavalierly preempt state-law causes of action.").

⁵⁸ *See, e.g., Sprietsma v. Mercury Marine*, 537 U.S. 51, 58-59 (2002).

⁵⁹ *See, e.g., Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947).

⁶⁰ *See, e.g., Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 248 (1984). Because the Magnuson-Moss Act does not occupy the field, regulations adopted pursuant to the Magnuson-Moss Act only preempt state law to the extent that state law conflicts with the Act. *See Katharine Gibbs Sch. (Inc.) v. FTC*, 612 F.2d 658, 667-68 (2d Cir. 1979).

⁶¹ *See, e.g., Gen. Motors Corp. v. Abrams*, 897 F.2d 34, 40-44 (2d Cir. 1990) (state Lemon Law did not conflict with FTC enforcement); *Automobile Importers of America, Inc. v. Minnesota*, 871 F.2d 717 (8th Cir. 1989) (same); *Nat. Funeral Servs., Inc. v. Rockefeller*, 870 F.2d 136 (4th Cir. 1989) (FTC funeral services regulations did not preempt state law); *Am. Fin. Servs. Ass'n v. FTC*, 767 F.2d 957 (D.C. Cir. 1985) (state consumer protection statutes not preempted by FTC credit practices rule).

⁶² *Abrams*, 897 F.2d at 41-42.

⁶³ *Clark v. Citizens of Humanity, LLC*, 97 F. Supp.3d 1199, 1205 (S.D. Cal. 2015).

⁶⁴ This would be in line with Congressional treatment of employment issues in other circumstances. The FLSA, for example, has an explicit savings clause that makes it clear that States can go above and beyond the protections set by federal law. 29 U.S.C. § 218(a). This type of clause is similar to exemption provisions the FTC has used in the past. *See, e.g., Am. Fin. Servs. Ass'n*, 767 F.2d at 990 (D.C. Cir. 1985).

has the authority to restrict anticompetitive and unfair or deceptive practices.⁶⁵ The FTC regulation may not, however, affirmatively preempt states from their own regulations beyond the FTC rule in this area. We request that any FTC regulation include a savings clause making clear that state legislation offering further protections to workers is not preempted.

This principle aligns with the U.S. Supreme Court’s application of FTC regulation to state action and to subsequent review of FTC action by the D.C. Circuit, including in circumstances where the FTC uses its authority against violations the Sherman Act.⁶⁶ Thus, FTC rulemaking defining CNCs for certain categories of workers as “unfair” (or “unreasonable”) would not preempt a state law forbidding CNCs for additional categories of workers. Instead, any FTC rule would necessarily set a floor above which the States can provide additional protections.

c. The FTC and State Attorneys General Should Work Together to Address Anticompetitive and Abusive CNCs.

CNCs are creatures of state law. State attorneys general have been directly involved in addressing, by litigation or otherwise, abusive and anticompetitive CNCs in employment contracts.⁶⁷ We welcome collaboration with the FTC. As former FTC Chairman Kovacic stated during the January 9, 2020 workshop, “[t]here is a lot of room for state and federal cooperation on this” and “[t]hat cooperation shouldn’t be intermittent; [it] should be a regular element of ongoing work....”⁶⁸ The National Association of Attorneys General (NAAG) Antitrust Committee is comprised of eleven (11) state attorneys general committed to protecting competition for the benefit of consumers and workers.⁶⁹ This would be a natural alliance for the FTC to pursue, and the undersigned States are eager to work with the FTC on this matter.

d. The FTC Should Bring Enforcement Actions to Enjoin the Use of Abusive CNCs.

Litigation is also a key part of the multifaceted approach to addressing the use of the abusive CNCs—along with rulemaking and the studies, reports, and guidance documents discussed below. Use of all will increase the likelihood of successfully combatting these problematic agreements. Some scenarios are so egregious that adjudication on the facts will offer clear lessons on what is unreasonable or unfair and will provide enlightenment to all stakeholders. Clear parameters

⁶⁵ See 15 U.S.C. § 57a(a)(1)(B). We understand that the FTC could also engage in rulemaking under its competition authority. See *supra* n. 45. This Comment does not take a position on whether the FTC should exercise rulemaking under its competition authority or its authority to address unfair or deceptive practices, as we understand that neither option would preempt more protective state regulation in the field.

⁶⁶ See, e.g., *Parker v. Brown*, 317 U.S. 341, 351 (“There is no suggestion of a purpose to restrain state action in the [Sherman] Act’s legislative history.”); *Am. Fin. Servs. Ass’n*, 767 F.2d at 990 (D.C. Cir. 1985) (upholding an FTC regulation does not impermissibly preempt state law because it explicitly allowed for states to “offer protections equal to or greater than” the FTC rule); *Am. Optometric Ass’n v. FTC*, 626 F.2d 896, 910-11 (D.C. Cir. 1980) (remanding a challenge to an FTC rule to district court and questioning whether Congress authorized the Commission to affirmatively preempt state laws).

⁶⁷ See *supra* note 23 (listing state attorneys general public settlements and litigation concerning CNCs).

⁶⁸ FTC Trans., Kovacic at 40:14-22.

⁶⁹ NAT’L ASSOC. OF ATTORNEYS GENERAL, ANTITRUST COMM., https://www.naag.org/naag/committees/naag_standing_committees/antitrust-committee.php (last visited March 1, 2020).

regarding the types of CNCs that the FTC will consider unreasonable or unfair will provide useful guidance regarding litigation risks.⁷⁰

e. The FTC Should Study the Anticompetitive Impact of CNCs in Employment Contracts and Issue Guidance.

In carrying out its directive under Section 5 of the Federal Trade Commission Act to prohibit unfair methods of competition, the FTC is empowered to gather and compile industry information.⁷¹ Under Section 6(b) of the FTC Act, the Commission may gather information from market participants regarding certain aspects of their business.⁷² Using this power, the FTC may obtain key information from industry participants about the frequency, use, enforcement and general details relating to CNCs in employment contracts.⁷³ This information could fill in important gaps in current empirical research because the FTC would be able to analyze non-public data to which other researchers do not have access.⁷⁴ This information could also presumably inform the FTC's CNC policy and enforcement decisions going forward.

Additionally, this information could form the basis of a public FTC study report as provided for in Section 6(f) of the Act, further educating industry, policymakers, and the public about the impact of these CNCs on workers and on industries across various sectors. A recent example of this is the FTC's 2016 study and report on patent assertion entity (PAE) activity.⁷⁵ Following a joint workshop with the United States Department of Justice to explore the claimed harms and efficiencies of PAE activity, the Commission initiated a study to investigate the use of the PAE business model and based on findings from that study, made certain recommendations, which likely influenced market-wide conduct. Sometimes, the result of these studies and reports is self-imposed market change without any direct action on the part of the Commission.⁷⁶

The FTC also has the ability to offer impactful guidance, similar to the widely regarded 2010 Horizontal Merger Guidelines or the 2016 Antitrust Guidance for Human Resources Professionals

⁷⁰ FTC Trans., Pierce at 308.

⁷¹ 15 USC §46(b); Jaymar-Ruby, Inc. v. FTC, 496 F.Supp. 838, 846-847 (N.D. Ind. 1980).

⁷² Lesley Fair, *6(b) or not 6(b): That is the Question*, FED. TRADE COMM'N: BUS. BLOG (April 23, 2012), <https://www.ftc.gov/news-events/blogs/business-blog/2012/04/6b-or-not-6b-question>; 15 U.S.C. § 46. Additional powers of Commission; The Commission shall also have power—

(b) To require...persons, partnerships, and corporations, engaged in or whose business affects commerce...to file with the Commission...reports or answers in writing to specific questions...as to the organization, business, conduct, practices, management, and relation to other corporations, partnerships, and individuals of the respective persons, partnerships, and corporations filing such reports or answers in writing....

(f) To make public from time to time such portions of the information obtained by it hereunder as are in the public interest...and to provide for the publication of its reports and decisions in such form and manner as may be best adapted for public information and use....

⁷³ Comment of Fed. Trade Comm'n Rohit Chopra 5, Hearing #1 on Competition and Consumer Protection in the 21st Century (September 6, 2018).

⁷⁴ FTC Trans. at 208, (addressing key information gathering ideas by economists on panel).

⁷⁵ FED. TRADE COMM'N, PATENT ASSERTION ENTITY ACTIVITY (2016).

⁷⁶ See generally FED. TRADE COMM'N, SELF-REGULATION IN THE ALCOHOL INDUSTRY, REPORT OF THE FED. TRADE COMM'N (2008) (making recommendations for the industry to adopt).

issued in conjunction with the DOJ.⁷⁷ The Guidelines and the Guidance provide information about how the federal antitrust agencies will view certain activities, enabling actors to align their conduct to avoid litigation. CNC guidance issued by the FTC could play a similar role—the FTC could communicate its position on CNCs, giving the business community ample opportunity to align its conduct with that position.

f. The FTC Should Engage in a Comprehensive CNC Education Campaign.

The FTC has long been a leader in market and competition education. It has a platform that is easily accessible to the public and to industry—www.FTC.gov. The website provides an opportunity for the FTC to inform employers and workers about abusive CNCs. Through its website, the agency can efficiently educate the public about abusive employment CNCs. Experience has shown that the mere shining of light on the nature and existence of abusive CNCs causes companies to delete them from their employment contracts; this highlights the lack of true business justification for them in the first place.

* * *

We thank the FTC for providing the opportunity to submit this Comment and contribute to the Commission’s review of the use of CNCs in light of current and evolving workplace realities. We look forward to continuing to collaborate with the FTC on antitrust and labor issues, and to address the abusive use of CNCs to stop their harm to our workers, labor markets, consumers and economies.

Respectfully Submitted,



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⁷⁷ FED. TRADE COMM’N & DEP’T OF JUSTICE, HORIZONTAL MERGER GUIDELINES (2010); FED. TRADE COMM’N & DEP’T OF JUSTICE, ANTITRUST GUIDANCE FOR HUMAN RESOURCE PROFESSIONALS (2016).



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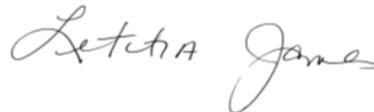
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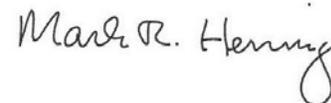
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Virginia Attorney General

A handwritten signature in blue ink that reads "Bob Ferguson". The signature is fluid and cursive, with a long horizontal stroke extending to the right from the end of the word "Ferguson".

Bob Ferguson
Washington Attorney General