



UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

Office of Policy
Planning

January 23, 2023

MEMORANDUM

FROM: Shannon Lane

TO: April Tabor

SUBJECT: Summary of Interview of Elizabeth Wilkins by Slate's What Next podcast

EXECUTIVE SUMMARY:

On January 13, 2023, Slate's What Next podcast published an interview with Elizabeth Wilkins, the Federal Trade Commission's ("FTC") Director of the Office of Policy Planning. The interview was conducted by Lizzie O'Leary. The podcast¹ and transcript² are publicly available on Slate's website, and the transcript is included in this memorandum below this summary. The interview concerned the FTC's proposed Non-Complete Clause Rule, 88 Fed. Reg. 3482 (Jan. 19, 2023) ("Proposed Rule"). This memorandum is to be placed on the public record pursuant to 16 C.F.R. § 1.26(b)(5) and the Notice of Proposed Rulemaking, under which summaries or transcripts of oral communications respecting the merits of the proposed rulemaking from any outside party to any Commissioner or Commissioner advisor are to be placed in the public record. This executive summary does not summarize the entire transcript, but rather focuses on information that is not already included in the rulemaking record.

Ms. Wilkins described a recent FTC action against a security company concerning its enforcement of non-competes and explained the Proposed Rule. Ms. O'Leary stated that non-competes are applied to hourly workers and interns as well as other workers. Ms. Wilkins gave an example of a non-compete for volunteers for a girls' sports league to illustrate how broadly non-competes are applied. Ms. O'Leary asked why non-competes have proliferated. Ms. Wilkins responded that one theory is that some form contracts include boilerplate non-compete clauses. She argued that many of those form contract non-compete clauses should not be difficult for employers to drop, because there is little reason to have them at all. However, she also said that some employers do enforce them and use them to gain leverage over employees.

Ms. O'Leary asked how employers can track down past employees to rescind the non-competes. Ms. Wilkins explained the various ways that the Proposed Rule tries to ease the burden on employers, and invited the public to share ways to make this requirement effective and less burdensome.

¹ What Next: TBD, *Why the Feds Want to Kill Noncompetes* (Jan. 13, 2023), available at <https://slate.com/podcasts/what-next-tbd/2023/01/the-feds-are-coming-for-noncompete-clauses>.

² What Next: TBD, *Why the Feds Want to Kill Noncompetes* (Jan. 19, 2023), available at <https://slate.com/transcripts/a0NCWjh3VEJ2eDZpeGJkaFBFT2tIRFg5QktuMFFZZVkxUnpRSUdMb2hBYz0=>.

Ms. O’Leary asked why the FTC decided to propose this rule now. Ms. Wilkins responded that the FTC has been looking into this issue for a long time, but now there was better evidence because states have been experimenting with non-compete restrictions, leading to a natural experiment that allowed economists to study both the individual and economy-wide impacts of non-competes.

Ms. O’Leary noted that at the moment, workers have a lot of leverage and have been switching jobs, and asked whether wages were really being suppressed right now. Ms. Wilkins agreed that there is currently a lot of job switching in the aftermath of the pandemic. However, she explained, the pandemic is a one-time shock and the Proposed Rule would change the relationship between employers and workers in the long term. She also stated that there is evidence that increasing job mobility helps both parties and the overall economy by allowing worker to match to the optimum job. Ms. O’Leary asked if this Proposed Rule would benefit employers if they had to pay higher wages in a slower economy. Ms. Wilkins responded that employers would compete against each other on wages, benefits, workplace benefits, etc., and it would be beneficial to employers to figure out how to attract and retain the workers they need. In the long term, employers will have a better suited and more productive workforce. While there are arguments that constraining workers can lead to more investment and thus innovation, there is also evidence that allowing mobility promotes appropriate knowledge-sharing that spurs innovation. Some of the best and healthiest new companies are spin-offs, where workers start a new company in their same industry. There is strong evidence cited in the proposal that a lack of non-competes spurs innovation, such as in California where they are banned.

Ms. O’Leary asked why a federal ban was needed if states have been legislating in this area. Ms. Wilkins gave three reasons. First, labor markets do not necessarily respect state lines and one state’s laws can impact another’s. Second, employers can use choice of law provisions in contracts to get around non-compete bans. Third, the FTC found that there are as many non-competes in states where they are unenforceable as states where they are enforceable. It is hard for workers to know their rights. A national rule with notice provisions would help clarify workers’ rights and eliminate the chilling effect of non-competes.

TRANSCRIPT:

Speaker 1: Greetings. I hope everyone is staying safe and well. As you know, these are some difficult times that we’re going through right now. Times that were actually quite unimaginable just a couple of weeks ago. But together, we will get through this.

Lizzie O’Leary: Prudential Security has an active Facebook page. It’s filled with everything from videos like this one about COVID in the spring of 2020 to posts celebrating the holidays, Thanksgiving, Christmas, Veteran’s Day, even pictures of its security guards being recognized for their work. But what Facebook doesn’t show is that those guards who worked in a handful of different states were forced to sign non-compete agreements that restricted who they could work for once they left the company.

Elizabeth Wilkins: Minimum wage security guards who had non-compete that prevented them from working for a competing company within 100 miles and with threatened damages of \$100,000.

Lizzie O’Leary: That’s Elizabeth Wilkins, who runs the Office of Policy Planning at the Federal Trade Commission, which sued Prudential Security last week, saying the company imposed illegal noncompete restrictions on its workers.

Elizabeth Wilkins: This was a company that enforced those provisions against the security guards and against the companies that tried to hire them. So, you know, when we’re talking about these things can

be potentially coercive or exploitative of like an unequal relationship of power between a worker and an employer. This is real life stuff we're talking about.

Lizzie O'Leary: Real life stuff that affects an estimated 30 million workers. That's how many people the FTC thinks are likely covered by non-compete agreements. Now, the commission wants to go further than just filing suit against companies like Prudential. They want to ban these kinds of agreements nationwide. Today on the show, why the FTC is on a mission to get rid of non-compete. I'm Lizzie O'Leary and you're listening to what next TBD a show about technology, power and how the future will be determined. Stick around.

Lizzie O'Leary: The FTC's proposal to ban non-compete is both pretty simple and also wide reaching. I asked Elizabeth Wilkins to walk me through it.

Elizabeth Wilkins: So first of all, what is a non-compete? It is exactly what it sounds like. It's a contractual term between an employer and a worker that says the worker. Once they finish employment, they can't go work for a competitor or start a competing business. The rule is, as you say, pretty simple. It says employers can't put these kinds of terms and employment agreements. They can't enforce existing terms and agreements and they have to affirmatively notify their workers and former employees that they can no longer enforce those agreements.

Elizabeth Wilkins: That's because we see all types of situations where not only are workers bound by these contracts, but, you know, they have limited understanding of their rights. I want to emphasize this is a proposal, but if we go forward with finalizing a rule that says you can't have those things, we also want to make sure it's effective and that workers know that that these things are impermissible and that they can move between jobs so we can actually remedy the harm that we see.

Lizzie O'Leary: One of the things that I find interesting is that this isn't just, you know, salaried employees. This applies to hourly workers, to interns like that seems extremely broad.

Elizabeth Wilkins: It is extremely broad. I saw an article recently where a prominent researcher in this field talked about his wife who volunteers for like a girl's sports league and there were non competes for the volunteers. So it does seem like in certain circumstances these terms have just kind of proliferated in ways that make no sense or at least no sense that we can figure out for all kinds of work arrangements.

Lizzie O'Leary: Well, you might think of non-compete agreements, something modern. They actually date back to 16th century England and the apprenticeship system in the modern era. We associate them with fields like technology or banking. But recent research found that almost a third of non competes cover workers who make less than \$13 an hour. Probably the best known example of perplexing non competes was when the sandwich chain Jimmy John's was sued by two states for trying to stop employees from working for other sandwich shops in a three mile radius. For two years after leaving the company. Why do you think they have proliferated? Because, you know, like you I went back and I read a lot of different coverage and they do seem to have popped up in a lot of places. I wonder what your best hypothesis is as to why.

Elizabeth Wilkins: A couple of things. You know, there are certain some circumstances where employers have reasons for having these. But another theory that I've seen, which is really interesting, is, you know, kind of the rise of the form contract, right, that there's now sort of boilerplate language in a lot of of places. And so these things are sort of popping up boilerplate across a wide range of employment arrangements. So on the one hand, that sort of seems to suggest honestly there ought to be a wide swath of these contracts that shouldn't be hard at all for employers to drop because there really isn't very much reason for them to have it at all. That said, you know, we also see circumstances like the security guard company where clearly they were also enforcing them. You

know, it is a tool for employers to gain leverage over their employees. And so I don't want to suggest that these are kind of I don't know what sort of nothing burgers in the contract. They have real consequences for workers.

Lizzie O'Leary: One of the things that is in this proposed rule is the idea that, you know, not only will this be banned, but that let's say they exist already and employers got to go track down maybe a past employee and say, okay, you are no longer bound by this. Like, how do you guys expect that part to happen? That seems tricky.

Elizabeth Wilkins: There's a couple of things in the proposal that try and make this burden easier. We have a sample notice that we're clear. Kind of would suffice so you don't have to work from scratch. We make clear that there's a number of ways, including email, which is pretty low lift to contact workers. And then, of course, you know, employers keep payroll records. They ought to have ways of contacting folks. That said, we're inviting comment on every part of the rule. So if there are better and worse ways to do this, we really invite people to explain to us the way that we can make this, you know, both effective and least burdensome.

Lizzie O'Leary: One of the reasons that this move by the FTC has gotten a lot of news coverage and frankly, a reason that I wanted to talk to Elizabeth Wilkins is that it's part of a push by the agency to get a little bit more aggressive. Why did the agency decide to take on this fight now?

Elizabeth Wilkins: A couple of things. First, this is an issue that the agency has been looking into for a long time. We've held workshops. We've had open common dockets over a number of years to think through the competitive implications of contracts like these. So for us, while we decided, you know, to put this together now this is not new. But the other thing is there really is a burgeoning literature and now kind of, we think has reached the point where we can potentially make some conclusions.

Elizabeth Wilkins: One of the reasons that the that the evidence has evolved so much over the last ten or 20 years is because of experimentation on the state level that there have been a wave of state legislatures that have banned non competes either outright or for certain subsets of the labor force. And that has created a real neat kind of natural experiment for economists to study, not just kind of the individual effects of non competes, which is a little bit what we've been talking about, but the economy wide effects.

Elizabeth Wilkins: What are the effects on wages in the economy more broadly when non competes are unenforceable? And it's from studies like these that we have made these preliminary findings that banning non competes across the economy might increase workers wages to the tune of 250 to \$300 billion. So, you know, this economic literature that's taken advantage of these state experiments has really led us to some preliminary conclusions that the economy wide harms here could be pretty substantial and that the benefits of a rule like this could be equally so.

Lizzie O'Leary: When we come back. Could a ban on non competes really help people make more money? I want to dig into that specifically. I've looked at these sort of natural experiments, as you as you mentioned, in Oregon and in Hawaii. Hawaii was for tech workers. And, you know, that is what the economic literature says. But when you use that number, right, 250 to \$300 billion. I guess one question I have is we have been in this macroeconomic moment where there hasn't exactly been like a dearth of people switching jobs or quitting. And workers have had a lot of leverage lately. And so I wonder whether it's really necessary or where your evidence is that wages are being suppressed in this kind of macroeconomic environment where workers have a lot of power.

Elizabeth Wilkins: Well, first of all, you're right. We are seeing a lot of job switching right now as the economy kind of goes through this shift after the shock of the pandemic. The pandemic is a one time

shock. We are proposing a long term rule that would change the relationship between workers and employers in in the labor market. We are regulating not for this moment only, but for into the future.

Elizabeth Wilkins: And while this has been a kind of disruptive moment for employers to understand how to manage through this labor market, just as you say, this has been really good for workers and workers ability to raise their wages and their working conditions and most importantly, to match better with employment that they're better suited for.

Elizabeth Wilkins: And in the long term, there's evidence that increasing job mobility and the ability of workers and employers to match to kind of the optimum situation for both parties is both good for employers in terms of the workplace that they are able to to run and good overall for the productivity of the economy.

Lizzie O'Leary: Is it good for employers, though, if we see, you know, some I don't know, macro softening and economic slowdown and they are still in a position where they're paying higher wages that maybe they're not able to support in a less gangbusters economy.

Elizabeth Wilkins: This is employers competing against each other. It's employers competing on a range of things, right. Wages, benefits, workplace environment, etc.. So, you know, yes, I think it is beneficial to employers to figure out within the constraints that they have how to attract and retain the workers that they need and that in the long term they're going to have a workforce that is better suited to their situation and better suited to productivity in the long term.

Lizzie O'Leary: One argument for non competes is that they help safeguard trade secrets, that there's some research also that they spur innovation. And I guess I, I wonder how you all make sure that that that doesn't happen that there aren't these unintended consequences.

Elizabeth Wilkins: Those are the commonly cited reasons for why employers use some compete. I'll repeat again, some of them seem fairly unjustifiable by those standards, but some some are. Couple of things. One. Employers do have other options. There are nondisclosure agreements and trade secret law which help employers protect confidential information. And, of course, if what a employer really wants to do is retain their workers and protect their training investments, they can do so by offering better wages and better working conditions rather than curtailing the liberty of their of their workers.

Elizabeth Wilkins: The other thing is, yes, there are some arguments that constraining workers to stay in one place and therefore investing more and in confidential information in them could spur innovation. But there's also evidence the other way that allowing workers to switch between firms promotes the appropriate sharing of knowledge in a way that spurs innovation. It also spurs entrepreneurship and business dynamism. So some of the best and healthiest new companies in an industry are what we call spinoffs. Workers that leave one company in an industry and then start a new business in that same industry. And that's the kind of thing and the kind of competition that we think spurs, like I said, business dynamism and most importantly, innovation and better quality products for consumers.

Elizabeth Wilkins: We cite, I kind of think, a range of of evidence in the proposal. And we think that the the evidence that innovation has actually spurred is is pretty strong. The last thing I'd say is, obviously, you know, California is an economy that hasn't had non competes for over a hundred years. And I don't think anybody would say that that's an economy that is starved for for innovation.

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Lizzie O'Leary: You mentioned California and some other states. And I think one question people have is why if you do have states with with various state provisions, why there's a need for a federal ban.

Elizabeth Wilkins: We think there's a pretty strong need for a federal ban. So one issue is, you know, labor markets don't necessarily respect state lines, right? So even if California bans them, if their neighbor next door doesn't and you have a labor market that straddles, you can have one state's rules affecting another state's ability to regulate. The second is, you know, there's choice of law provision. So an employer who has control over the contracts that they write with employees can write a choice of law provision that says if you want to bring a dispute, you have to do so under the laws of X state. That's a good way to get around being located in a place that that may ban a non-compete.

Elizabeth Wilkins: And then the third is, you know, something that I said before that, you know, we find, you know, really disturbingly that there are as many non-compete and contracts in states where they are unenforceable as where they are, you know, with a patchwork of laws that do a patchwork of things. It is harder for a worker to know what their rights really are and a non-compete that is unenforceable, but that is enforceable in the mind of the worker is just as effective as one that isn't. So a clear nationwide rule would help and particularly with with notice provisions would help clarify workers rights and eliminate this chilling or interim effect that we see. That, again, is depressing workers wages and curtailing their ability to to move to the job that's best suited for them.

Lizzie O'Leary: There's no question that this proposal is going to face legal challenges. And traditionally, federal courts have taken a relatively conservative view when it comes to questions of competition and antitrust. The U.S. Chamber of Commerce has already said they think it's outside the scope of the FTC's authority. I wonder how you all are prepared to defend this potential rule, especially on the major questions doctrine and for the lay version of that is basically the idea that Congress didn't specifically authorize a policy with such big ramifications.

Elizabeth Wilkins: We think our statutory authority is clear. Our statute allows us to make rules and regulations based on our authority to prevent unfair methods of competition. And we feel confident about that. And, you know, I'd go further and say not only do we feel confident about the statutory language, but also we have a mandate from Congress to prevent unfair methods of competition. We have a situation here where preliminarily in a proposal, we found pretty significant evidence of harm for a practice that we think is an unfair method of competition and where we think rulemaking may be an effective remedy. And so that's a circumstance in which really perhaps we have an obligation to go forward with using all of the tools that Congress gave us to carry out the mandate that they provided.

Lizzie O'Leary: Some of the language that you were quoting. That was from Section five of the FTC Act. And I think it's fair to say that this is a historically a bold use of of Section five. And that is something that it seems like the chair, Lina Khan And you have also been pushing on that the FTC rescinded some previous guidance that limited Section five. And I wonder, like thinking about this FTC and what feels like a declaration of some muscle from the FTC, like is is this a sign that the agency is is feeling its oats a little bit.

Elizabeth Wilkins: Feeling it, though? This is a colorful way to put it. You know, what I'd say is we believe that government should work for people. The FTC has an incredible mandate. Right? It is to protect the public from unfair methods of competition and unfair and deceptive acts and practices in the marketplace. Every one of us as a consumer, every one of us is a worker. Many of us are small business owners, and we need protection from unfair market practices that curtail our life opportunities and our ability to exercise the liberty that is kind of part of the American dream in our economic lives. We take that mandate really seriously. Congress gave us a whole set of tools to be able to carry out that mandate, and we think that we ought to use them. And that is, you know, the kind of history and tradition of this agency. And as I said, one that we take very seriously, and this proposal is part of that.

Lizzie O'Leary: Elizabeth Wilkins, thank you so much for your time.

Elizabeth Wilkins: It was a pleasure. Thanks for having me.

Lizzie O'Leary: Elizabeth Wilkins is the director of the Office of Policy Planning at the Federal Trade Commission. And that is it for our show today. What next?

Lizzie O'Leary: TBD is produced by Evan Campbell. Our show is edited by Torrey Bosch. Alicia Montgomery is vice president of Audio for Slate. TBD is part of a larger what Next family and were also part of Future Tense, a partnership of Slate, Arizona State University and New America. And if you are a fan of the show, I have a request for you. Join Slate Plus, become a member. Just head on over to [Slate.com Slash](https://www.slate.com/plus), what next?

Lizzie O'Leary: Plus, to sign up. We'll be back on Sunday with another episode when we try to figure out what is up with Tesla. All right. I'm Lizzie O'Leary. Thanks for listening.