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UNITED STATES OF AMERICA
Federal Trade Commission
WASHINGTON, D.C. 20580

**New Decade, New Resolve to
Protect and Promote Competitive Markets for Workers**

Remarks of Commissioner Rebecca Kelly Slaughter¹

As Prepared for Delivery at FTC Workshop on Non-Compete Clauses in the Workplace

Washington, DC
January 9, 2020

Introduction

Thank you to the Chairman, OPP, and the rest of our FTC staff who worked so hard to put together this workshop. I also want to thank the advocates and academics—including those participating today—who have raised awareness about and contributed both research and new ideas to the discussion concerning non-compete provisions in employment contracts. State attorneys general and their staff have also been at the forefront of this issue by investigating and initiating legal action to end unjustified and anticompetitive non-compete clauses in employment contracts.

Finally, I want to thank those in the labor community who advocate day in and day out to improve the plight of workers in our country. You play a critical role in the antitrust law and policy community and we appreciate your expertise on this issue and others that lie at the intersection of labor and antitrust.

The principal message I hope to convey with my remarks is that while antitrust enforcement and competition policy initiatives will not be a panacea for the struggles facing American workers, ensuring competitive labor markets is a key ingredient of the recipe for improving economic justice for workers.

Importance of Antitrust Law to Workers

We are gathered here today, a little more than a week after ringing in a new decade. It is a time when we celebrate renewed hope and reflect upon what we can individually or collectively do to better the lives of others.

Competitive markets are a cornerstone of our economy, entrepreneurship, and the American dream. Antitrust and competition law has long been focused on the effect anticompetitive

¹ The views expressed in these remarks are my own and do not necessarily reflect the views of the Federal Trade Commission or any other commissioner.

mergers and conduct have on products and consumers. This is important work that must continue. It ensures that all of us are protected from harms such as paying higher prices for lower quality and less innovative goods and services.²

But the market of goods and services for consumers is not the only one to which antitrust law is attuned; a competitive market for labor benefits workers through higher wages and better benefits and other terms of employment.³ Workers suffer when competition for their labor is chilled and employers are insulated from competition. Job opportunities become more limited, and workers are less able to negotiate better pay, benefits, or working conditions. It is fitting that we are here today, at the dawn of a new decade, to discuss non-compete provisions in employment contracts and whether the FTC should initiate a rulemaking to address unfair or anticompetitive use and enforcement.

Real World Impact of Non-Competes

Today's first panel provided useful insight regarding the legal issues surrounding non-compete provisions. I would like to follow this by taking a step back to talk about why we are here in the first place—American workers and their ability to reap the benefits from fair and open competition for their labor.

And before I dive in, I want to make a brief note about word choice. Non-compete clauses are often referred to by folks across the ideological spectrum as “non-compete *agreements*.” But you may notice that throughout my remarks I refrain from using the term “agreements” to refer to these provisions, since agreements refer to a willing meeting-of-the-minds between parties. One of the concerns that I have about these provisions is that they rarely represent real agreements and are instead restrictions unilaterally imposed upon workers by their employers.

So to return to the substance, non-compete provisions have been around for many years; recently, thanks to the work of journalists, labor and antitrust advocates, and others, many examples have come to light of non-compete provisions that restrict workers who lack any bargaining power in employment negotiations and who tend to have no other choice than to accept a non-compete in order to secure employment. Even if a worker had the wherewithal to

² Many of the FTC's cases involve products and services that are not sold directly to consumers but that are inputs into products or services consumers ultimately purchase or pay for. *See, e.g.*, Press Release, Fed. Trade Comm'n, FTC Challenges Illumina's Proposed Acquisition of PacBio (Dec. 17, 2019), <https://www.ftc.gov/news-events/press-releases/2019/12/ftc-challenges-illumina-proposed-acquisition-pacbio>; Press Release, Fed. Trade Comm'n, FTC Challenges Proposed Merger of Two Hydrogen Peroxide Producers (Aug. 2, 2019), <https://www.ftc.gov/news-events/press-releases/2019/08/ftc-challenges-proposed-merger-two-hydrogen-peroxide-producers>; Press Release, Fed. Trade Comm'n, Statement of the FTC's Bureau of Competition Regarding Announcement that Republic National Distributing Company and Breakthru Beverage Group Have Terminated Their Acquisition Agreement (Apr. 8, 2019), <https://www.ftc.gov/news-events/press-releases/2019/04/statement-ftcs-bureau-competition-regarding-announcement-republic>.

³ U.S. DEP'T JUSTICE & FED. TRADE COMM'N, ANTITRUST GUIDANCE FOR HUMAN RESOURCE PROFESSIONALS 2 (2016), https://www.ftc.gov/system/files/documents/public_statements/992623/ftcdoj_hr_guidance_final_10-20-16.pdf.

try to negotiate over such a provision in her employment contract, 30 to 40 percent of employees are asked to sign after accepting employment, often on the first day of work.⁴

Surveys have estimated that 16 to 18 percent of all U.S. workers are currently covered by a non-compete provision, meaning that they have restrictions on where they can work after they leave, lose, or are let go from their current job. This includes 12 percent of workers who earn less than \$20,000 per year and 15 percent of those who make \$20,000 to \$40,000 per year.⁵

Sandwich makers at Jimmy John's sandwich shops were prevented for a period of two years from working at competing businesses that earn 10 percent of their revenue from selling sandwiches. One Jimmy John's assistant manager left her job and transitioned to a completely different industry, where she did not make as much money as she could have in the restaurant business, out of fear that Jimmy John's would sue her over the non-compete.⁶ Illinois Attorney General Madigan sued and obtained a settlement where Jimmy John's agreed to eliminate this indefensible non-compete provision in its employment contracts, which notably applied not only to the three mile radius around the Jimmy John's where the worker was employed but also to any sandwich business located within three miles of any Jimmy John's shop anywhere in the country.⁷

While it would be impossible to know how many workers have been prevented in practice from leaving or seeking to leave a job due to a non-compete, we know that all it takes to chill workers from seeking a better opportunity is a manager waiving a non-compete provision or threatening to sue them if they get a new job. Illinois Attorney General Madigan and Jane Flanagan, one of our panelists today, wrote about how several employees of a spa and hair salon said that their employer "bragged" about threatening lawsuits against anyone who left for a rival salon. The employer even went so far as to threaten a former employee by brandishing court papers. They also cite instances of employers mentioning non-compete provisions during reference checks for their former employees.⁸

Non-competes can strike fear into workers. A public comment in this proceeding was filed by an accountant who has a one-year non-compete clause in his employment contract with his former

⁴ Evan Starr, J.J. Prescott, & Norman D. Bishara, *Noncompetes in the U.S. Labor Force*, (U. Mich. L. & Econ. Research Paper No. 18-013, 2019), <https://ssrn.com/abstract=2625714>; Matt Marx, *The Firm Strikes Back: Non-compete Agreements and the Mobility of Technical Professionals*, 76 AM. SOC. REV. 695 (2011), https://pdfs.semanticscholar.org/f0cc/a352c57244794405de5f4015ed1ec55bf93b.pdf?_ga=2.189624107.1684170475.1578502723-753797417.1578502723_

⁵ Starr, Prescott, & Bishara, *supra* note 3.

⁶ *Scrutiny on Worker Non-Compete Deals*, CHATTANOOGA TIMES FREE PRESS (Jan. 3, 2015), <https://www.timesfreepress.com/news/national/georgia/story/2015/jan/03/scrutiny-worker-non-compete-deals/280886/>.

⁷ See Press Release, Illinois Attorney General, Madigan Announces Settlement With Jimmy John's For Imposing Unlawful Non-Compete Agreements (Dec. 6, 2016), http://www.illinoisattorneygeneral.gov/pressroom/2016_12/20161207.html.

⁸ LISA MADIGAN & JANE FLANAGAN, OVERUSE OF NON-COMPETE AGREEMENTS: UNDERSTANDING HOW THEY ARE USED, WHO THEY HARM, AND WHAT STATE ATTORNEYS GENERAL CAN DO TO PROTECT THE PUBLIC INTEREST (2018) (report prepared for Unrigging the Market: Convening to Restore Competitive Labor Markets, a conference at Harvard Law School), https://lwp.law.harvard.edu/files/lwp/files/webpage_materials_papers_madigan_flanagan_june_13_2018.pdf.

employer. After being fired from that job and finding a new job, he is frightened that his old firm will sue him and his family for regaining employment in the accounting field for which he was trained.⁹

These non-compete provisions are sometimes boiler plate provisions in contracts with all of a firm's employees without any regard to whether there may be a legitimate justification or a less-restrictive means of protecting trade secrets or proprietary business information. New York and Illinois brought suit against WeWork, which prevented workers at all levels—from executives to baristas to cleaners—from working for competitors.¹⁰ The settlement exempted all but 100 executive-level leaders at WeWork from the non-compete restrictions. Similarly, Illinois investigated a childcare provider that required the same non-compete for all of its employees, including kitchen staff, bus drivers, housekeepers, teachers, and landscapers.¹¹

And we know that non-compete clauses can limit employee mobility and competition even in states where non-compete clauses are legally unenforceable. One study found that 40 percent of workers reported turning down a job offer from a competitor because of a non-compete, even though they worked in states where such provisions were entirely unenforceable.¹² Overly broad non-competes can make it difficult for entrepreneurs to start new businesses and can make it a challenge for those start-ups to find qualified employees.¹³

The examples of how non-competes affect people's livelihoods and ability to earn a living go on and on—a Florida security guard was blocked from working as a security guard in all of Florida,¹⁴ summer camp counselors couldn't work for competing camps,¹⁵ an hourly laborer shoveling dirt for an environmental drilling company was prevented from seeking a higher paying job at competing firm,¹⁶ low-level customer service employees at a check-cashing business were bound by non-competes,¹⁷ and coffee shop baristas couldn't work for another coffee shop within a 10 mile radius for 18 months.¹⁸ Non-competes have even been applied to

⁹ Public Comment on FTC's Workshop on Non-Compete Clauses Used in Employment Contracts (Dec. 23, 2019), <https://www.regulations.gov/document?D=FTC-2019-0093-0004>.

¹⁰ Press Release, New York Attorney General, AG Underwood Announces Settlement with WeWork to End the Use of Overly Broad Non-Competes that Restricted Workers' Ability To Take New Jobs (September 18, 2018), <https://ag.ny.gov/press-release/2018/ag-underwood-announces-settlement-wework-end-use-overly-broad-non-competes>.

¹¹ MADIGAN & FLANAGAN, *supra* note 7.

¹² Starr, Prescott, & Bishara, *supra* note 3; Marx, *supra* note 3.

¹³ MATT MARX, REFORMING NON-COMPETES TO SUPPORT WORKERS (2018), https://www.brookings.edu/wp-content/uploads/2018/02/es_2272018_reforming_noncompetes_support_workers_marx_policy_proposal.pdf.

¹⁴ Jared Bennet, "Money and Greed": How Non-compete Clauses Force Workers to Fight for Rights, *GUARDIAN* (October 24, 2018), <https://www.theguardian.com/us-news/2018/oct/24/non-compete-clause-low-wage-workers-lawsuits-rights>.

¹⁵ Steven Greenhouse, *Non-Compete Clauses Increasingly Pop Up in Array of Jobs*, *N.Y. TIMES* (June 9, 2014), <https://www.nytimes.com/2014/06/09/business/noncompete-clauses-increasingly-pop-up-in-array-of-jobs.html>.

¹⁶ Conor Dougherty, *How Noncompete Clauses Keep Workers Locked In*, *N.Y. TIMES* (May 13, 2017), <https://www.nytimes.com/2017/05/13/business/noncompete-clauses.html>.

¹⁷ Press Release, Illinois Attorney General, Attorney General Madigan Reaches Settlement with National Payday Lender for Imposing Unlawful Non-Compete Agreements (Jan. 7, 2019), http://www.illinoisattorneygeneral.gov/pressroom/2019_01/20190107b.html.

¹⁸ Press Release, Washington Attorney General, Attorney General Bob Ferguson Stops King County Coffee Shop Practice Requiring Baristas to Sign Unfair Non-Compete Agreements (October 29, 2019),

interns.¹⁹ As Professor Lobel mentioned earlier, disturbing statistics show that non-compete restrictions may disproportionately harm women, who tend to have less geographic mobility and are often less likely to negotiate employment terms.²⁰

Non-competes have been found to impact wages as well as job mobility. A study of an Oregon ban on non-competes for low-wage workers found that relative to control states, the non-compete ban increased average hourly workers' wages by 2–3%, rising to 6% five years after the ban was implemented. The study also confirmed the relationship to job mobility, finding that the Oregon ban raised job-to-job mobility and increased the proportion of salaried workers without affecting hours worked.²¹ Finally, it found that female workers in occupations where non-compete provisions are more common benefited more from the ban.²²

In addition to harming workers, non-competes can also harm consumers. Take the example of home healthcare aides, where non-competes have become common in contracts between aids and healthcare staffing agencies. A long-time healthcare aide wanted to switch agencies to follow a client, but the employer threatened to sue the aide for \$4,000 for violating the non-compete provision. The company relented only when the client wrote a letter in support of the home health aide's transition to the new company.²³

Physicians are also increasingly being subject to non-competes, which means patients can lose their long-time and preferred doctors. According to one survey, approximately 45 percent of primary care physicians are subject to a restrictive covenant that prohibits them from taking patients to a new competing practice.²⁴ With hospital consolidation continuing and more physicians becoming employees of large health care systems, this may result in greater bargaining leverage for the hospital systems and less bargaining leverage for physicians and other healthcare providers to fairly bargain over the non-compete clause.²⁵ One of the public comments filed for this proceeding emphasizes this concern on behalf of both patients and

<https://www.atg.wa.gov/news/news-releases/attorney-general-bob-ferguson-stops-king-county-coffee-shop-s-practice-requiring>.

¹⁹ Harriet Torry, *Interns' Job Prospects Constrained by Noncompete Agreements*, WALL ST. J. (June 29, 2019), <https://www.wsj.com/articles/interns-job-prospects-constrained-by-noncompete-agreements-11561800600>; John V. Berry, *Legal Insider: States Start Non-Compete Agreement Reform*, ARLNOW (Aug. 12, 2019), <https://www.arlnow.com/2019/08/12/legal-insider-states-start-non-compete-agreement-reform/>.

²⁰ Orly Lobel, *Non-Competes*, *Human Capital Policy & Regional Competition*, J. CORP. L. (forthcoming 2020), <https://ssrn.com/abstract=3473186>.

²¹ Michael Lipsitz & Evan Starr, *Low-Wage Workers and the Enforceability of Non-Compete Agreements* (December 9, 2019), <https://ssrn.com/abstract=3452240>.

²² Lobel, *supra* note 19.

²³ Bennet, *supra* note 13.

²⁴ Kurt Lavetti, Carol Simon, & William D. White, *The Impacts of Restricting Mobility of Skilled Service Workers: Evidence from Physicians*, J. HUM. RESOURCES (February 7, 2019) (published online before print), http://kurtlavetti.com/UIPNC_vf.pdf.

²⁵ Remarks of Commissioner Rebecca Kelly Slaughter, *Antitrust and Health Care Providers: Policies to Promote Competition and Protect Patients*, Antitrust and Health Care Providers Policies to Promote Competition and Protect Patients Center for American Progress (May 14, 2019), https://www.ftc.gov/system/files/documents/public_statements/1520570/slaughter_-_hospital_speech_5-14-19.pdf; see also Elena Praeger & Matthew Schmidt, *Employer Consolidation and Wages: Evidence from Hospitals*. (May 7, 2019), <https://ssrn.com/abstract=3391889>.

doctors.²⁶ While some argue that they serve a legitimate business interest, this raises the question of whether such a business interest is being promoted at the expense of patients.

Addressing Non-Competes and Other Labor Competition Issues

A handful of states have exhibited great leadership in enforcing against unjust non-compete restrictions and legislating to limit their usage and enforcement. This is significant and important work, but it is still only a patchwork solution to a problem that is rampant throughout much of the country.

Proposed federal legislation, particularly the bill introduced by Senators Murphy and Young, is a positive development, but we need not wait for legislation to tackle this issue head-on.

The workshop we are having today is a valuable mechanism for the FTC to gather information and learn more about the impact non-compete provisions have on firms, workers, and the economy. But information gathering should not be the end of this exercise; we should also take action.

Without prejudging the outcome of a rulemaking proceeding on non-competes, I strongly support the FTC's undertaking such an endeavor. And I want to acknowledge and express gratitude to Commissioner Chopra for his white-paper calling for the FTC to take advantage of our statutory authority to engage in rulemaking on unfair methods of competition.²⁷ I also want to credit the many advocacy groups who came together to petition the Commission to undertake a non-compete rulemaking specifically.

I want to conclude my remarks by mentioning a few other ways I believe the Commission should increase its focus on workers beyond a rulemaking process on non-competes. We should also give consideration to a rulemaking on no-poach agreements between franchises and their franchisees that unduly hamper the competitive marketplace for workers' labor. And it is worth considering whether other contracting terms applied to workers (such as mandatory arbitration requirements) may be appropriate subjects for rulemaking.

In addition, labor market concentration ought to be a greater focus in merger review. I am pleased that the Chairman and the leadership of the Bureau of Competition have acknowledged the potential for labor monopsony concerns in mergers and I am hopeful that such theories of harm will increasingly be considered as part of our merger review.²⁸ Similarly, the Commission should make it a priority to examine and investigate other conduct and potential restraints that may be inhibiting competition for labor.

²⁶ Francisco Almeida, Public Comment on FTC's Workshop on Non-Compete Clauses Used in Employment Contracts (Dec. 11, 2019), <https://www.regulations.gov/document?D=FTC-2019-0093-0002>.

²⁷ Rohit Chopra, Comm'r, Fed. Trade Comm'n, Comment on Hearing #1 on Competition and Consumer Protection in the 21st Century (September 6, 2018), https://www.ftc.gov/system/files/documents/public_statements/1408196/chopra_-_comment_to_hearing_1_9-6-18.pdf. See also Section 6(g) of the FTC Act, 15 U.S.C. 46(g) (2018) (authorizing the Commission to issue regulations to carry out its authority to define unfair methods of competition that are prohibited by Section 5).

²⁸ Pallavi Guniganti, *FTC Will Look at Labour Monopsony, Hoffman Says*, GLOBAL COMPETITION REV. (June 8, 2018), <https://globalcompetitionreview.com/article/usa/1170360/ftc-will-look-at-labour-monopsony-hoffman-says>

Finally, I share the concern that has been expressed by many labor law experts about the misclassification of gig economy and other workers as independent contractors.²⁹ Classifying workers as independent contractors allows firms to avoid the obligations and requirements associated with treating these workers as employees while insulating the firms from the labor protections and rights afforded to employees to collectively bargain. I think that workers who fall into those categories should at a minimum have the benefit of the antitrust exemption for labor organizing. While I think this would be most effectively achieved through legislation, I believe as an intermediate step that the FTC should not use its limited resources to bring enforcement actions against such collective action by workers.

I look forward to the rest of the day's presentations and panels, and now have the pleasure of introducing our next speaker, Ryan Nunn.

²⁹ Paul Sanjukta, *The Enduring Ambiguities of Antitrust Liability for Worker Collective Action*, LOY. U. CHICAGO L.J. 969 (2016), <https://docs.house.gov/meetings/JU/JU05/20191029/110152/HHRG-116-JU05-Wstate-PaulS-20191029-SD002.pdf>.