Moving Forward: Protecting Workers from Anticompetitive Noncompete Agreements

January 27, 2026

Kelse Moen:

Hello and welcome to the FTC's Half-Day Workshop, Moving Forward: Protecting Workers from Anticompetitive Noncompete Agreements. My name is Kelse Moen and I'm a deputy director at the FTC's Bureau of Competition. I also have the honor to serve as co-chair of the agency's Joint Labor Task Force.

The Trump-Vance FTC is committed to protecting American workers from anti-competitive agreements that drive down wages, reduce job opportunities, and harm workers' bargaining power. Today's event will showcase our efforts and highlight our enforcement priorities in one particular area vital to American workers across the country and throughout all industries, employee non-compete agreements.

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Speaker 1:

Half-Day Workshop, Moving Forward.

Kelse Moen:

Should I ... I'll start over. Okay. Keep going. Non-compete agreements have been a perennial source of interest to the FTC. In their most basic form, they form part of an employment agreement between employer and employee, where the employer bars the employee from taking another job in the same or similar field, or in a particular geographic area for a term of months or even years after that employee leaves his job.

In practice, these agreements are often abusive, unfair, and anti-competitive, frequently foisted on employees with little or no bargaining power, even for low-skilled and low-wage jobs that lack any sort

of justification to impose this kind of restraint, and so hinder competition in the industries burdened by them.

The previous administration attempted to deal with this issue through a nationwide ban that was quickly blocked by the courts. Unfortunately, the political debates following that ban have obscured and confused many important issues. Chief among them, the current FTC's position on whether non-compete agreements are even worthy of FTC scrutiny at all.

After today, there should be no confusion. The Trump-Vance FTC is committed to stopping anti-competitive non-compete agreements with all of the lawful tools at our disposal. We will not repeat the mistakes of the Biden administration, but neither will we shrink from this fight.

If you are an employer who believes you can abuse your employees by unlawfully restricting their job mobility, you can expect that the FTC will take an interest in you. And if you are an employee who believes that you are subject to an agreement that unlawfully restricts you from taking a new job in your chosen field, then I would encourage you to reach out to us at noncompete@ftc.gov to submit an anonymous complaint. And I repeat, that is noncompete, all one word, no hyphen @ftc.gov.

But before we get started, an overview of the day's events. First, we will hear from the FTC's Chairman, Andrew Ferguson who will lay out in systematic terms, an overview of the agency's enforcement philosophy and priorities. We will receive additional insight from Commissioner Mark Meador, who will offer separate remarks of his own.

We will hear from a panel of real-life victims who have suffered the effects of unfair non-compete agreements in fields from healthcare to hairstyling. We will hear from a panel of government enforcers and public policy advocates who lay out the arguments in favor of a proactive enforcement approach. And finally, we will close the day by hearing from a panel of economists summarizing the latest research in the field.

Today's event would not have been possible if not for the efforts of many hardworking people, chief among them the FTC's own event staff and our technology partners who worked overtime during the recent snowstorm to make sure we could put on a high-quality and informative, now entirely virtual event. Like many workers across America, they may not always get the credit, but we cannot function without them.

But with that, let's get started. It is now my honor to introduce the keynote speaker of today's event, our Chairman, Andrew Ferguson.

Andrew N. Ferguson:

Thank you, Kelse for that introduction, and thank you for all of your work in putting this workshop together. This is our second attempt to get this workshop put on. The first one was obstructed by the Democrat shutdown a couple of months ago.

The second one has been limited a little bit by the snow here in D.C., but Kelse did incredible labor to transition this from an in-person event to a virtual event, and I'm really, really grateful for everything he's done on this workshop and as co-chairman of the Joint Labor Task Force here at the FTC.

As you all know, in September of last year, the FTC requested public comment on non-compete agreements. Because I believe that many non-compete agreements likely violate our antitrust laws, I asked for the public to help us identify potentially illegal non-compete agreements as a first step toward enforcing the antitrust laws against those agreements.

We've convened this workshop for a similar purpose, to improve the commission's understanding of the real-world effects of non-compete agreements and to ensure that the commission prioritizes its

enforcement resources against those non-compete agreements that cause the most damage to America's workers and to competition.

Given the controversy surrounding the Biden administration's proposed rule on non-compete agreements, I want to begin my remarks with a brief explanation of my principal objection to the proposed rule. Thereafter, I will outline the historical development of the principles our own courts use to evaluate non-compete agreements. Finally, I will conclude by explaining how those principles will inform future FTC enforcement.

On April 23rd of 2024, my predecessor joined by her two fellow Democrat commissioners promulgated the non-compete clause rule. In response, Commissioner Holyoak and I wrote vigorous and lengthy dissents. For my part, I did not object to the majority commissioner's claim that non-compete agreements can have anti-competitive effects. That much is plain.

Instead, I objected to their unconstitutional seizure of power in pursuit of preventing the potentially anti-competitive effects of non-compete agreements. Why? Well, because the Biden administration's proposed rule would've banned almost all non-compete agreements in the entire country, and validated over 30 million existing contracts, redistributed over half a trillion dollars of wealth and preempted the laws of 46 states that addressed the legality of non-compete agreements.

It was an extraordinary and unprecedented assertion of regulatory authority, and it rested on a century-old statute that no one had ever claimed, including the power to impose a nationwide ban on any sort of contract, much less a contract that all 50 states treated as lawful when Congress adopted that statute.

Defenders of the proposed rule ask us to ignore all of this as pure legal formalism. Instead, they focus on the merits of the rules as a matter of policy, but the rule of law rests on following the formalities of the law.

The commission does not have power to enact whatever policy it decides is good. We have only the powers that Congress has conferred on us. There were no good arguments that the rule was consistent with that limited conferral of power. I therefore objected to the Biden administration's assertion of extraordinary power rather than its assertion about the beneficial effects of the proposed rule.

Really, my objections were about whether we are a self-governing people. When unelected bureaucrats assert the power to prescribe general rules for the government of society, which is the essence of lawmaking in America, they appropriate a power that our constitution vests exclusively in Congress. Because we elect individuals to represent us in Congress, its members are answerable to us, the electorate.

We, therefore can expect that the laws Congress passes will reflect our interests and priorities. And if not, we just vote them out. That's government for the people and by the people. But if unelected bureaucrats who no one votes for and are answerable to no one outside of the government can appropriate to themselves the power of lawmaking, we no longer have a government for the people and by the people. Instead, we have a government for the bureaucrats ruling for their own interests.

The Biden administration's proposed rule was pure lawmaking. It was undeniably general in its application. It preempted state laws. It would've had a massive effect on the nation's economy, and it would've enacted a nationwide ban on non-compete agreements that Congress has frequently considered adopting, but has always declined to do. It is as if the Biden regulators thought to themselves, "If Congress, the courts, and state legislatures will not do what we think the right thing is on non-compete agreements, we'll do it for them." Like so many other actions of the Biden administration, it was an unlawful power grab.

In the end, the courts checked the extraordinary hubris of the Biden regulators, and for all the past administration's bluster surrounding the rule and non-compete agreements, never went into effect. It

never protected a single worker. Years of time and energy were wasted on what effectively amounted to a political stunt.

My disagreement with my colleagues has always been simple. As I explained in my dissent, I agree that non-compete agreements can have anti-competitive effects, and when they do, they violate the antitrust laws. I disagree that we should abuse our power to prevent those effects.

As Kelse explained, today's event is titled Moving Forward. We are here today because I believe we can chart a course toward protecting American workers from unlawful non-compete agreements by using the tools Congress actually gave us rather than irrigating to ourselves new powers that Congress has denied us. Indeed, we do have the power to prosecute anti-competitive non-compete agreements.

Consequent to our request for public comment on non-compete agreements, the FTC has filed two complaints against firms whose restrictive employment agreements are anti-competitive and harmed American workers. In each case, we found that these agreements not only harmed employees by denying them the ability to seek better job opportunities, but also harmed competing companies and consumers who would benefit from the greater mobility of workers.

This is an important point. Unlawful non-compete agreements are anti-competitive, not just for workers trying to sell their labor, but for rival companies and for consumers as well. That's why our complaints did not simply allege the existence of a non-compete agreement that limited competition in the labor market, but also alleged that these agreements did not serve any pro-competitive purpose, or could have accomplished such a purpose with a less restrictive non-compete agreement.

In taking this approach, we did nothing more than apply traditional common sense rules governing non-compete agreements that have been enshrined in our common law for centuries and that are applied by courts across the country every day.

To implement an effective strategy for prosecuting non-compete agreements on a case-by-case basis, we need to build on the historical development of those principles derived from centuries of practical experience that have long ensured that non-compete agreements were fair, equitable, and promoted the common interests we all have in a vibrant and competitive economy. In this case, moving forward requires some looking backward, recovering the wisdom of the past and applying it to new cases and circumstances. With that in mind, I'd like to give a brief history of non-compete agreements and the development of some of the general principles devised to ensure that they were fair, equitable, and promoted the common good of all.

A non-compete agreement is just what it sounds like, an agreement between an employer and a worker, where the worker promises not to work for a competitor or operate his own competing business. Typically, the agreement is limited to some discreet period of time in a geographic area. Such agreements have been around for centuries.

In the earliest recorded case, Dyer's case from 1414, the judge refused to enforce what amounted to a six-month non-compete agreement as infringing on the right of a worker to practice his trade, a right that the common law has developed from its earliest inception.

As time went on, however, and the economy changed and grew more complex, courts and lawmakers began to look more closely at the circumstances of these agreements and began to consider their justifications. If someone wished to buy a business from someone else, for example, the purchaser wanted assurances that the former owner of the business would not immediately establish a competing business. Without those assurances, the owner would find it very hard to sell his business. After all, who would buy a business if the seller immediately could open a competitor, potentially swiping back all the customers that had made the business valuable to sell in the first place?

Courts began to understand that some non-compete agreements, like this one can be reasonably necessary for certain productive activity to occur in the first place. Accordingly, non-compete agreements in some situations can actually promote individuals' ability to practice a trade and to keep for themselves the fruits of their own labor.

What emerged in the common law was a reasonableness test that considered whether the non-compete agreement was limited to the fair protection of the interests of one party to the contract, and not so large as to interfere with the interests of the public, like I was talking about with the common good earlier.

Notably, one of the early opinions applying the Sherman Act summarized this history. Then Judge William Howard Taft, future President and Chief Justice of the United States, when he was on the Sixth Circuit in Addyston Pipe against the United States related non-compete agreements treatment and common law to Sherman Act principles, describing an approach that looked to the facts of each situation to determine whether the agreements were reasonably necessary to achieve some pro-competitive purpose.

In practice, this resulted in courts enforcing non-compete agreements where they accompanied the sale of a business, partnership, or were otherwise shown to be reasonably necessary to protect an employer's confidential information. Subsequently, and in parallel to the development of the rule of reason in antitrust laws, American state courts adapted the common law approach to non-compete agreements with their own reasonableness test.

The precise formulation of this reasonableness test varies from state to state, but they generally balance the harms to the parties to the contract and the interests of the public at large. To do so, they do so by assessing, first, whether the non-compete is broader than needed to protect an employer's legitimate interests. And second, whether an employer's legitimate interests are outweighed by hardship to the worker, and may occasionally consider injury to the broader public as well.

Although non-compete agreements have always been considered a contract in restraint of trade subject to the Sherman Act's prohibitions, most have been evaluated under these state-level balancing tests.

Now, these tests all focus on justifications for their strength because on the face of it, there does seem to be something wrong with a non-compete agreement. One does not speak about a provision being narrowly tailored to achieve its purpose, or an action proportioned to its end unless there's some concern that the provision or action itself has the potential to cause some harmful effects. Let's not forget, they're called non-compete agreements. In other words, because the provision or action is a potential cause of some harmful effects, the provision or action should be limited to what is reasonably necessary to achieve its purpose or end. So what are the potentially harmful effects of non-compete agreements?

Let me mention just two. First, non-compete agreements reduce an employee's bargaining power vis-a-vis his or her employer. Because the non-compete agreement reduces the risk that an employer might leave for better compensation or working conditions elsewhere, an employer has less incentive to provide, and an employee has less leverage to demand better compensation or working conditions.

Thus, we can reasonably assume that non-compete agreements will tend to decrease employee wages, benefits, and working conditions. And indeed, empirical evidence bears out this assumption in at least some circumstances.

Second, because non-compete agreements prohibit an employee from working for a rival business and from forming a new competing business from scratch, they reduce competition by raising barriers to entry or expansion for potential rivals. Put differently, non-compete agreements tend to suppress competition by limiting the supply of skilled labor needed to make a rival business competitive. And

because the non-compete agreement restricts the supply of skilled labor by lawfare rather than by providing better pay or working conditions than a competitor, it works to the disadvantage of employees for reasons already mentioned.

But it also works to the disadvantages of consumers because it impedes the formation or expansion of rival businesses, which could potentially reduce prices, increase innovation and choice, and improve quality. Thus, it is reasonable to assume that non-compete agreements will tend to suppress competition to the detriment of workers and consumers alike. And again, empirical evidence bears this out in at least some circumstances.

Thus, in view of the likely adverse effects of non-compete agreements for workers and for consumers at large, courts often demand quite reasonably that these agreements not only advance a legitimate interest of the employer, but also that the agreements be necessary to protect that interest. And here we should be clear, suppression of competition with actual or potential rivals is never a legitimate interest of an employer.

Let me give an example from a recent complaint filed by our agency against non-compete agreements used by the country's largest pet cremation firm. According to our complaint, the employer acknowledged that his company would get comfortable with the risk of not having non-compete agreements in a particular market because competitors in that market are at such a smaller scale and less of a threat.

That language makes it clear that the alleged purpose of the non-compete agreement was to mitigate the risk of competition from actual or potential rivals in a particular market rather than to protect the firm's socially beneficial interests.

Similarly, that same employer allegedly stated that they should execute a non-compete agreement with an employee because of the risk that the employee would leave for a competitor, and the increased financial costs of dealing with such competitive concerns. Again, the alleged purpose of the non-compete agreement was to shield the employer from having to compete for workers with rival businesses rather than by providing them higher salaries with benefits.

Both of the employer statements made clear that the non-compete agreements were not protecting legitimate interests of the employer, but instead were suppressing competition to the detriment of workers, rival businesses, and consumers. So what can the FTC do about non-compete agreements? In keeping with the authority conferred on us by Congress and with centuries of tradition and experience accrued in addressing non-compete agreements, we must proceed on a case-by-case basis, acting against specific non-compete agreements that clearly lack justification and likely have adverse effects.

That's why we've asked the public to submit specific examples and information on non-compete agreements that they believe cause harm to workers, rival businesses, and consumers. With that information in hand, we can make informed decisions about enforcement, as we did recently against anti-competitive non-compete agreements in the pet cremation industry and no-hire agreements in the building services industry.

Now, some will object that this is to piecemeal an approach to be an effective solution to the problem of non-compete agreements. To such critics, only a blanket ban on non-compete agreements can prevent their harmful effects. Maybe they're right in one sense, but the objection is beside the point for a couple of reasons. For one thing, the commission lacks the power to issue such a rule. Congress has given us relatively extensive rulemaking authority over unfair or deceptive acts and practices, but withheld that authority for unfair methods of competition. The commission attempted to read that authority into an ancillary procedural provision of our organic act, but that effort was obviously and patently unlawful.

The power Congress has given us over unfair methods of competition is the case-by-case enforcement approach. That is how we have police anti-competitive conduct from our inception. Those who want alphabet soup bureaucrats to impose a nationwide ban on non-compete agreements when Congress has refused to do so should take their arguments to Congress, not to me.

Second, in setting aside the obvious problem that we lack the power to ban non-compete agreements categorically, I am convinced that the traditional case-by-case enforcement approach will be effective in limiting unjustified, overbroad, unfair, or anti-competitive non-compete agreements.

For one thing, the law has almost always considered the lawfulness of non-compete agreements in light of their unique circumstances. That is how the common law developed, and that remains the approach of the overwhelming majority of states.

For another thing, the U.S. antitrust laws adopted against the background of centuries of the common law, generally do not condemn as unlawful, any agreement unless its anti-competitive effects outweigh its pro-competitive justifications. Taking a case-by-case enforcement approach then is consistent with the power Congress has given us with centuries of legal tradition and with the antitrust laws we enforce.

The case-by-case approach will have effects beyond each individual case. Once firms see that unjustified or overbroad non-compete agreements increase the risk of FTC enforcement, they will not enter into those agreements without giving serious consideration to whether those agreements are necessary to advance some legitimate business interest, and whether a less restrictive agreement could achieve that same end.

Basically, it's education through enforcement. By bringing enforcement actions against specific businesses executing unjustified, overbroad, unfair, or anti-competitive non-compete agreements, others will take notice and adjust their agreements accordingly. For anyone like me who's worked in a big law firm, lots of client alerts will be sent out from law firms every time the FTC brings an enforcement action, explaining to clients the risk in light of the way that the FTC understands the law and its planned enforcement policies. With that in mind, let me turn now to provide some initial thoughts on how these traditional common law principles might inform the FTC's approach to the enforcement of unjustified or overbroad non-compete agreements. As I described previously, courts throughout history have differed somewhat in their approaches to non-compete agreements, but there's a through line from the common law tradition to today.

When evaluating the reasonableness of non-compete agreements under any authority, courts look to, first, whether the agreement advances a legitimate end of the employer, and second, whether the agreement is narrowly tailored to achieve that end.

Let's begin with whether the agreement advances a legitimate end of the employer. From the perspective of the antitrust laws, competition is the primary social goal. Why? Because we believe that robust forms of economic competition promote the common good by decreasing prices and increasing innovation, productivity, product quality, business creation, and wages. At a minimum then, we can say that a non-compete agreement that advances some anti-competitive purpose of the employer is not legitimate because it impedes the realization of the forces of competition that benefit the common good. Instead, the non-compete agreement must advance some pro-competitive interest of the employer, thereby advancing the common good that competition is intended to serve.

That is, the non-compete agreement should be necessary to sustain or increase the employer's capacity to compete, to innovate, to improve their product, to attract a skilled and dedicated workforce, et cetera. Indeed for centuries, common law courts enforced non-compete agreements where they were necessary to ensure that the buyer of some business would have some limited time or space to develop

its competitive capacities vis-a-vis its potential rivals, including most especially the seller of that business.

Similarly, a business may have legitimate pro-competitive interests in protecting against the transmission of competitively sensitive information to its competitors, information regarding technological innovation, prices, wages, business practices, or trade secrets, because preserving the confidentiality of this knowledge is essential to the capacity of that business to compete against its rivals and to ensure that the market rewards merit rather than espionage.

It may also be legitimate for a business to wish to protect its investment in training its employees to acquire a skillset unique to that business, if that training and skillset is essential to its capacity to compete with its rivals. In both cases, the aims that may motivate non-compete agreements could be justified, but the assertion of a pro-competitive justification alone is not enough. And as is true in other antitrust contexts, we must consider whether the non-compete agreement is narrowly tailored to achieve a pro-competitive purpose sought by the employer.

The easiest way to answer this question is to ask whether a less restrictive type of restraint would accomplish the goal or goals that the non-compete is purportedly meant to promote. We have heard time and again that employers use non-compete agreements to prevent workers from soliciting their customers, but at the same time, those same employers often use non-solicitation agreements, which as their name suggests, are directly targeted to address that non-solicitation concern.

The same is true for non-disclosure agreements and trade secret law, which can promote investments and confidential information without requiring a non-compete agreement. That is not to say that those alternatives will be adequate substitutes for non-compete agreements in every case. In some circumstances, a non-compete agreement may be the only way to achieve the employer's pro-competitive objectives efficiently, but that is the question we should be asking. Can the employer achieve its pro-competitive goal through less restrictive means than a summary prohibition on competition?

Even where no less restrictive alternative is available, the scope and duration of the non-compete agreement still must be limited to what is necessary to advance the employer's pro-competitive interest. It is hard to imagine any case in which a non-compete of unlimited duration or nationwide geography, for example, is reasonably necessary to promote an interest or transaction that cannot be achieved through a more tailored restraint.

My view then is that the FTC should focus its enforcement resources on those non-compete agreements that do not advance a pro-competitive purpose, or else are not narrowly tailored to advance that pro-competitive purpose.

Today's workshop will help us better understand how to implement this general principle. We want our enforcement actions to have maximum effect. We want each enforcement action to protect as many workers as possible. We want to focus on the industries most burdened by non-compete agreements, and we want to bring enforcement actions that will communicate a strong message about how the FTC understands the law to firms beyond merely the targets of that particular enforcement action.

The panels today will illuminate these topics and inform our enforcement agenda in the coming months and years. Under the Trump-Vance FTC, companies with unjustified or anti-competitive non-compete agreements will incur a significant risk of legal action. If a firm imposes a non-compete agreement that is not tailored to achieve a pro-competitive objective, that is intended to suppress competition or the bargaining power of American workers, or that contains an unlimited scope or duration, then the FTC will enforce the antitrust laws against that firm.

To mitigate this risks, prudent firms will review their existing non-compete agreements in light of these principles and apply them to any future employment agreements. Days of unreflective, unjustified, and anti-competitive non-compete agreements are over. If a company wants to execute a non-compete agreement, they had best be prepared to defend it. Thank you again, to everyone who's participating in today's workshop. I look forward to learning from everyone.

Logan Wilke:

Thank you, to the chairman for the introduction, the attention to this issue. My name's Logan Wilke. I'm an attorney in the FTC's Bureau of Competition. I'll be moderating the first of our panels today.

As the chairman noted, non-compete agreements continue to impact workers and competition throughout the economy. Some studies have estimated as many as one in five American workers are bound by a non-compete.

Chairman made clear that the commission is committed to rooting out unjustified, unfair, or otherwise anti-competitive non-competes, and doing so requires us to continually listen to, and engage with those affected by them.

This is part of why we initiated a request for information this fall in which we sought names of employers currently using harmful non-competes, as we look to bring additional enforcement actions. Although the RFI is closed, we continue to review submissions to our email inbox, noncompete@ftc.gov.

This is also why we will hear today from a sample of those harmed by non-competes on our first panel. They will share their own experiences with non-competes. We are grateful to the members who have joined us today to share their stories. With that, I'd like to introduce the members of our first panel. We have Dr. Selvam Mascarenhas. He's currently the chief medical officer for AmeriHealth Caritas Delaware for long-term services and support. He's also governor for the Delaware Chapter of the American College of Physicians, which is a professional physician organization for internal medicine physicians with a membership of 160,000 physicians.

Dr. Mascarenhas has worked clinically in primary care, hospital medicine, and skilled nursing facilities, and has spent the last six years working in population health and utilization management.

We also have Cindy Holbrook, a licensed cosmetologist with nearly three decades of experience in the beauty industry. After she spent one year working at a salon under a restrictive non-compete agreement, she was prevented from continuing her career independently. She can tell us more about that momentarily. Her story's been featured in the New York Times and the Ohio Capital Journal.

We also have Dr. CJ Caniglia. He's a veterinarian and one of only four board-certified large animal surgeons in the state of Maryland. He and his wife own and operate their own veterinary practice, Chesapeake Equine Performance out of Central Maryland.

In 2024, Dr. Caniglia led a successful grassroots campaign to petition the Maryland state legislature to pass a law prohibiting non-competes for veterinarians as well as most human healthcare medical professionals.

Finally, we have Dr. Jennifer Kendall. Dr. Kendall serves as the program lead for the Physical Medicine and Rehabilitation Spine Program at Hennepin Healthcare in Minneapolis, Minnesota. In addition to her clinical responsibilities, she holds academic appointments at the Des Moines University College of Osteopathic Medicine and the University of Minnesota. She also serves as a member of the AOA Board of Trustees and the board of directors for the National Board of Osteopathic Medical Examiners.

Dr. Kendall previously served as president of the American Osteopathic College of Physical Medicine and Rehabilitation, as president of the Minnesota Osteopathic Medical Society, and as the osteopathic

physician member on the Minnesota Board of Medical Practice. Thank you again, to each of you for joining us today and being willing to share your stories.

Dr. Kendall, I'd like to start with you. Could you please share your experience with non-competes?

Jennifer Kendall:

Sure. Thank you so much for having me today. I am sorry I can't open my video. It's saying that it's not allowed by the host, but thank you so much for having me today to share my experience with non-competes.

I'm an osteopathic physical medicine and rehabilitation physician and I subspecialize in interventional spine care, which means that I take care of patients who have neck, back, and joint pain, as well as patients who have painful conditions like fibromyalgia and joint hypermobility syndrome.

I use a holistic approach to care and offer them all non-surgical treatment options for their pain, so things like physical therapy, medications, cortisone injections. And I also perform osteopathic manipulative treatment, which is a type of hands-on therapy that is very effective for patients with pain.

I've been in practice for 14 years and I've had two non-competes with two different employers during that time. The first non-compete was not overly

Jennifer Kendall:

Really restrictive. I was not allowed to practice within a three-mile radius of any of the three hospitals within that health system. Despite the fact that I only worked close to one of the hospitals, I still couldn't practice within three miles of the other two hospital locations. It didn't limit me from being able to find a second job, but when I left my second job, that non-compete was extremely restrictive. I was not allowed to practice in the 11 county greater metropolitan area of the Twin Cities, which was approximately a 55-mile radius. I also was not allowed to practice within a 25-mile radius of any of the four sites that I had practiced at with that organization. And one of the sites that I worked at was on the border of Minnesota and Wisconsin, so I was also restricted from being able to practice in Western Wisconsin under that non-compete.

I think with having these non-compete clauses for physicians, it really puts a lot of power in the hands of the employers. They have physicians essentially over a barrel. They control the physician's salaries, they control their work hours, and they can force physicians to practice in unsafe conditions for patients. They know that they can do these things because physicians are hesitant to leave when there's very restrictive non-compete clauses. When I left my employer, I thought maybe they wouldn't enforce the non-compete against me because I was a different specialty than the main specialty of that practice, but they told me that they would likely enforce that non-compete. So then I looked at what it would take to try and fight the non-compete. And after speaking with physicians in Minnesota, I was told that I was looking at a minimum of $50,000 in legal fees and that it would be very stressful and time-consuming, and the outcome would ultimately rely on which judge was assigned my case.

My husband and I decided that it wasn't worth going through something like that. So we started to look at what options were available to me under my non- compete. And really, there was only one option that I could take to continue practicing in the Twin Cities. And that job, unfortunately, would force me to take a between 125 to $150,000 pay cut compared to what other health systems in the Twin Cities were paying for my subspecialty. My husband and I, we weren't happy about that, but we were grateful that we didn't have to move. He didn't have to find a new job. We didn't have to pull our daughter out of the school where she was thriving, and we didn't have to leave our support system of family and friends that

we had built up over the years. So we were grateful for that, but I know a lot of my colleagues, they don't have that option.

They have to completely uproot their lives in order to continue practicing under the restraints of their non-compete. And while I think it's important to note what happens to physicians under these non-competes, I think the more poignant point is the impact that these physician non-competes have on patients. I'm one of only a handful of physicians and the only woman that I know of in the Twin Cities area that offers osteopathic manipulative treatment or OMT and takes insurance for that type of treatment. All other physicians in the Twin Cities only take cash. And so when patients can't follow me and they can't afford to pay cash for that treatment, they lose access to a safe, effective, and non-opioid treatment for their pain. I remember when I had to tell patients that I was leaving, patients were crying, I'm trying to console them, I'm trying to help them find resources and other options.

Even if we could find another physician who performed OMT that took insurance, I remember a lot of patients saying, I don't want to see anybody else. I want to see you. You know me. I know you. I trust you. I don't want to have to start over with somebody else. For patients who lose their primary care physician, it can be even more devastating. Those physicians know the intricate details of a patient's health history and they know the finer details of their life that impact their care. Many of these patients have been with their primary care physicians for years and they've developed that trusting relationship that seems almost impossible to replace if that physician leaves. For patients who have complex health issues or multiple medical diagnoses, having a disruption in their care can have grave consequences for them. Many may have to undergo redundant testing, tests that they've already undergone.

This can leave them with a significant out of-pocket expense. And in worst case scenarios, a lot of these patients may have a bad outcome and be left with serious long-term effects. For patients who are in rural areas, access can be restricted in already underserved areas. And for patients who need specialty or subspecialty care, those services can be completely eliminated when a physician is forced to leave the area. So the bottom line is that these physician non-competes hurt patients. They disrupt continuity of care, they decrease quality of care, they worsen healthcare disparities, and I think most importantly, they limit patient choice and they put an undue burden on patients who are already struggling to navigate a very complex health system. So for profit or not-for-profit, these physician non-compete clauses need to be completely eliminated in order to protect patients and to maintain high quality healthcare. So I thank you for allowing me to advocate for our patients today.

Logan Wilke:

Thank you, Dr. Kendall. Let's move to Ms. Holbrook next. Ms. Holbrook, what is your experience with non-competes?

Ms. Holbrook:

Hi there. Thank you for having me. My experience with a non-compete agreement dismantled a career that I had built for over 24 years. In 2021, I moved from Michigan to Ohio where I had had my practice in Michigan for roughly 23 years. I began working at a salon in Perrysburg, Ohio. I brought with me some of my clients who were willing to travel the distance. Within three months, the management, roughly about 90 days, had approached me and told me that it was time to sign my non-compete. And prior to that, I had not been presented with a non-compete, and so it surprised me. They advised me that I would be allowed to take it to an attorney to have them review it. I decided that I would sign it against my better judgment and not having any other option. Within another three months, I realized that I was making poverty level wages. The salon was using a tier system that kept stylists at a lower commission level and the salon owners at a higher profit margin. I knew that I had to leave and go back to being

independent. Having only lived in Ohio for roughly a year, it was terrifying to start over again at now approaching 25 years worth of doing hair with a very small clientele in Ohio that I had built for that year. I found a new salon 14 miles away in a different county per GPS. My contract restricted me for 15 radio miles. Four months later, myself and the new salon owner received a cease and desist letter. After paying two attorneys, including one employment law attorney, I was advised to comply stating Ohio law is black and white, and fighting it would likely cost me $20,000 or more and that I would lose.

The salon drew a straight line from their location to the new location, putting it 11 miles and putting me in violation. Both I and the attorneys agreed that the law did not protect me, the restriction was unreasonable and that I should comply, which I did. And then I watched my career crumble beneath me. I was forced to stop working in my profession in the cities of Perrysburg, Toledo, Mommy, Sylvania, and approximately 11 other smaller cities within the restricted area. I dispersed my clientele and every other Sunday I began driving back to my former hometown about an hour and 20 minutes away from where I was currently living in Ohio just so that I could make some money. Thankfully, some of my former clients and previous salon owner welcomed my return and I was able to provide for my household. Also, thankfully, the year prior to that, I had sold my home and I had made enough of a profit that I was able to continue staying afloat financially and not a lot of workers are that lucky. Over the last three years, I have taken serving jobs, managed a wellness center, and worked as a sales coordinator in a hotel, all of which are outside of my career and professional practice. The non-compete even barred me from working with former coworkers for at least three years when I had the opportunity for obtaining a position in a salon outside of the restricted area. I've seen them negatively impact my clients and my coworkers. It has been my experience that non-competes have been devastating to my professional advancement. They have caused me more financial stress, time missed with my family, and at times an unbearable amount of hurt. It has been devastating to my livelihood.

Logan Wilke:

Thank you for sharing that, Ms. Holbrook. Let's hear next from Dr. Caniglia. Dr. Caniglia, what is your experience with non-compete agreements?

Dr. Caniglia:

Thank you, Logan. My name is CJ Caniglia and I'm a veterinarian and boarded large animal surgeon from Dio, Maryland, and throughout my career, I've been subject to many non-competes as they're very pervasive in the veterinary profession. And non-compete certainly caused tremendous hardships on veterinarians, but also our families, and most importantly, our patients, as others have already referenced. I'd like to highlight though how non-competes can jeopardize patient care. I've been in situations where in my professional opinion, veterinary practitioners jeopardize patient care, causing increased complications and suffering. I've had to console animal owners when they've asked why did this happen to their beloved pet. I've spoken up about these issues in order to improve patient care and subsequently faced employment retaliation, including having a non-compete hung over my head. This put me in the impossible ethical dilemma of providing for my family and upholding the oath to my profession.

Eventually, the struggle became too much and so I was forced to leave. I was subject to a two-year, 30-mile non-compete agreement from practicing equine medicine. After years of specialty training, practicing veterinary medicine on horses was all I knew how to do. Some unique things about large animal medicine is that most of the time, patients are seen on the owner's farms, and the need to provide emergency care requires that you be close by. This means being 45 miles away from your patient base is not only impractical, but it also hinders emergency care. My wife is also an equine

veterinarian and was subject to the very same non-compete agreement. We did not know how we would be able to provide for our two children without uprooting them from their home, their grandparents, their schools, their friends, but we knew we could no longer stay in an environment and watch patients suffer.

Currently, only about 1.3% of graduating veterinarians go into equine medicine, and only 50% of those stay beyond five years. After that, they either switch to small animal medicine or leave the profession altogether, and many of these are due to non-compete agreements prohibiting them from practicing equine medicine. Determined to stay in the profession, I looked into relief work, which is where you work temporarily at a practice that has a current shortage of veterinarians. This would require me to spend one to two weeks away from my family every month. However, despite this practice being over 80 miles from my home, they still wanted me to sign a non-compete, a non-solicitation, a covenant of loyalty, and a confidentiality agreement. The non-compete was for two years and for a 50-mile radius from any office in which that employer did business. And this radius from multiple locations is often a trick that large consolidators play on unassuming veterinarians.

As a relief veterinarian with no interest to move to this area, thus no ability to leave and then take clients with me, what threat was I to this employer and what legitimate business interest was this non-compete protecting? Relief veterinarians by definition work for multiple practices when they have shortages, and to encumber them with non-competes drastically reduces their ability to serve other practices in need. This reflects a broader issue that was reported in a '23 poll by the small business majority group in which 35% of small business owners reported that they were unable to hire a prospective employee due to a non-compete. Furthermore, this and every non-compete I've ever seen in my career has had clauses that allowed the employer to terminate you and still enforce the non-compete. So the employer can fire you, say, you can't work for me and you can't work for anyone else either. Taking it one step further, if the employers have the opinion that you're not a capable veterinarian and you need to be terminated, again, what threat to their veterinary practice are you really?

Additionally, all the non-competes I've seen in my career had an assignment clause, allowing the employer to transfer your non-compete to their designee. Veterinarians can get passed from owner to owner, like some form of glorified indentured servitude, and it guarantees an imbalance of power when you're trying to negotiate your contract with a new employer. I tried to negotiate these terms with the relief practice and it was a hard stop from them, so I refused to sign and I moved on. When this fell through, my wife and I decided to carve out a niche practice, mainly focusing on orthopedics, which wouldn't require us to be as close to our patients for emergency care. I commuted over two hours each way to a facility outside the non-compete radius to see patients. We put over 48,000 miles on our work vehicle in just eight months, and we spent countless hours away from our children.

We would not have survived this time as a family without the help of my mother who had purchased the house next door shortly before we left our jobs. This was an additional emotional strain as she had moved close to us in order to be near her grandchildren and now because of the non-compete, there was a chance that we were going to have to move away. This just was not right that an employer could have this much control over our family and where we were able to live and work, and so I took action. We opened a claim with the National Labor Relations Board to investigate the validity of the non-compete. This unfortunately took over a year and a half with no progress or action. We investigated filing a declaratory judgment lawsuit to get the non-compete voided, but when told it would take about two years to get a decision either way, what good would that do? The non-compete would be over anyway.

When you need to provide for your family and your patients need you, years are simply too long. You need an answer in weeks or months, and it's this lengthy timeframe that always gives the employer the upper hand with a non-compete. So I initiated a bill with delegate Terry Hill, a physician in the Maryland state legislature, to prohibit non-competes for veterinarians and human medical professionals. I met with countless legislators, lobbying groups, and led a grassroots effort to change the law. The legislature was convinced of the undue hardship and third party harm that non-competes cause, especially in healthcare. And in one session, we got the law passed, declaring that non-competes were against the public policy. It was a momentous day for healthcare and a solution to our hardship. However, the elation did not last long as we were subsequently sued after the law change, alleging that we had violated our non-competes during our previous employment.

Despite the law change, I still receive numerous calls from colleagues in Maryland about practice owners wanting them to sign non-competes, even though they are completely prohibited. What consequences are there for employers who disregard the law in this manner? If the veterinarian signs the non-compete, that still gives the employer the standing to sue them, and the vet will have to petition the court to dismiss based off the law. On the other end of the spectrum, I get calls from colleagues out of state for advice on their non-competes with the notion that they will never hold up in court. And unfortunately, that simply isn't true. A good friend of mine called me about their non-compete, which prohibited them from practicing in every state in which the employer had offices, which was at least three. The non-compete went a step further to prohibit them from providing services to any client of the practice, regardless of location.

And although this one likely would have had trouble in court due to its overly broad geographic radius and its interference with third party free will, I had to explain to them that the non-compete, the employer could still sue them, and you would be drowned in an expensive, lengthy legal battle. Its unreasonableness will not protect you from getting sued by a large consolidator with in house counsel, and so the in terrorim effect of this non-compete will result in its enforcement. I can only hope that my story is a message to all veterinarians out there to never sign a non-compete. The irony in this is that with the tremendous shortage of large animal veterinarians, there are literally not enough doctors to see all the patients. There is no competition. Due to shortages, veterinarians are often traveling farther to see patients, which can leave emergency coverage sparse at times.

We need all hands on deck where the public pays the price. I'm one of only four boarded large animal surgeons in the state of Maryland, and I was the only surgeon that saw emergency referrals and surgeries. During the time of the non-compete, there was no place in the entire state to receive this care, and animal owners had to drive their patients to Virginia or Pennsylvania. Patients suffered during this time, and it's an example of how even just one non-compete can completely wipe out access to care, especially considering specialty care. I distinctly remember one patient who I had treated for enteritis one year prior. The patient became sick again during the non-compete period, and the owner was unable to get him the care he needed on the farm and was forced to trailer him over two hours to Virginia. The long trip and lack of continuity of care resulted in the horse dying.

To quote the owner, "We no longer had access to the valuable knowledge of a vet who had known the horse and his quirks for years, and in this case, who had even the experience of diagnosing and treating a similar episode of illness in the recent past. This time my horse did not recover and passed away the next day." This patient still weighs heavily on me today. If I had not been subject to a non-compete, this horse owner and countless others would not have been put in this situation. This leads to the subject of mental health, which is a huge struggle in veterinary medicine. Unfortunately, we have one of the highest suicide rates of any profession. Long hours, student debt, dealing with euthanasia are common reasons, but non-competes play their role as well. Feeling trapped in an infeasible working environment and watching patients suffer adds to this stress unnecessarily.

With the shortages in our profession, we truly need every vet, not one more vet leaving the profession, or worse, leaving this life because of a non-compete. I sincerely appreciate the attention the FTC is devoting to this important issue, and I would humbly ask, is there a way to intervene more quickly than the current legal system allows? Staring down lengthy litigation from a business or large consolidator with far more resources is overwhelming for any employee. In Maryland, we now have a law that's an immediate stop to our non-compete, but how many of our colleagues and patients are stuck in limbo across the country? When your livelihood and your family and patients are on the line, everyday matters. I sincerely thank you all for hearing me today and inviting me to be part of this panel.

Logan Wilke:

Thank you, Dr. Caniglia. Finally, let's turn to Dr. Maskarenas. Dr. Maskarenas, hello.

Dr. Maskarenas:

Hello.

Speaker 2:

What is your experience with non-competes?

Dr. Maskarenas:

Yes. So thank you for the opportunity to speak. I'm an internal medicine physician, so by definition, that is a medical doctor who specializes in prevention, diagnosis, and management of adult diseases, and the emphasis is on prevention and we manage a whole range of acute and chronic conditions. And we work in different settings out in the community in the primary care space. We also function as hospitalists in the hospital internal medicine space, and we also function in skilled nursing facilities, acute rehabs. And we can also be subspecialists as well too, such as your cardiologists and nephrologists that are an important part of the healthcare ecosystem. My experience with non-compete started right at the time when I was finishing up a residency, trying to look for my first job. And pretty much everywhere I went, and I had interviewed as far as India, I was training in Connecticut, and I went over to Massachusetts, even within Connecticut, looked at jobs, went to New York and Indiana, Ohio, and Virginia.

And every place I ran into, everyone had very strict non-competes where if I wanted to leave, I had to have a significant amount of relocation. And it was very ironic because as a hospitalist, you don't really have your own practice per se. So it's not that patients would follow me even if I went and worked in the hospital down the road. They had no obligation to me of the short-term, fragmented state and experience that they had with me. But regardless, this was the expectation from the employers as well as private practice groups that I sign a non-compete. So in the end, I ended up actually settling in Delaware, where in Delaware, the law is such that for clinical practice of medicine, non-competes cannot be upheld if there's litigation involved. And the reasoning behind that is state is very small, and if you do the math based on the diameter, you're going to wind up very quickly in Maryland or Pennsylvania and New Jersey.

And that's the reasoning behind why it's such like that. But what they do in Delaware is that they have a defacto non-compete. It's called a damage clause. And principle behind it is actually very reasonable, and it is for the purposes of having a new hire that would need to be credentialed and you hire a new physician, they may need staff, may need a new code of malpractice salary, given that it can take some time for insurance reimbursement to take place, and this can take up to a year and a half to close to two years. So on the surface, it's very reasonable. But I was lucky the contract lawyer that I had worked with who signed my original contract was savvy enough to recognize that there was a defacto non-compete

in there. So what she was able to do on my behalf, and I came to appreciate that only a year later that she had actually capped it for two years, and she had made it very specific if there was some sort of acquisition or transfer, this would not be upheld.

And within a year, the practice that I was a part of got acquired. And my previous employer wanted to hold me to the damage clause, which was up to $50,000. And being someone fresh out of residency, just making your first couple of paycheck, that is a lot of capital to be able to come up with in one sitting. Fortunately, between the contract and the new employer, that never came out to be. But in a way, I had sort of dodged a bullet, for lack of a better word, in that standpoint. And then also, even in my wife's case, when she finished up a fellowship, we thought that there was an opportunity to perhaps relocate. We looked at Pennsylvania rural areas, and we actually really liked an area in Florida and Central Florida, but we ran into the same problem over there. The non-competes kind of crept into place.

And I think we were a little bit surprised because those areas definitely are underserved. Access is an issue, but despite that, private practices as well as healthcare systems were not willing to budge in that regard, essentially, and were very concerned from their standpoint of maintaining their stance with regard to the non-competes. So in the end, we ended up actually staying in Delaware. And obviously my wife ended up joining a private practice, infectious disease is her specialty, and it's one that is in high demand in Delaware. And we ended up having a good amicable discussion with her new employer who wanted some level of protection on his side, which we understood. And so we were able to cap it at two years with good, solid language to be protective and that was satisfied to both sides. And I think it ended up being reasonable and it never ended up being enforced in a sense with that regard.

But even in my new contract that my wife has right now, she is able to, if she leaves the current practice, be able to open up a new practice, given how she was able to not have a damage clause and not have any language that sort of resembled a non-compete as well too. And the other thing that we see in Delaware is that because you can't have non-competes, you tend to have very strong non-solicitation agreements as well too. Some very reasonable, but some are very aggressive to the point where someone can be held to litigation even if a patient came to the new practice by their own choice as well too. So the details of the language of the contract become very important. I have seen firsthand, especially in my governor role as Delaware for the American College of Physicians where I hear from my colleagues all the time, where given that the fact that they have signed certain contracts where they have very excessive amounts of damage clause anywhere from 50,000 to about 100, 000, and those, there's generally not a way around it.

And so as a result of that, they often have to wind up leaving the state. And sometimes that's uprooting a spouse, uprooting children to relocate in Pennsylvania, New Jersey, and Maryland. But at the same time, oftentimes that is someone who has two, 3,000 patients in their practice panel and there isn't someone that you can quickly go and see. So that creates a massive access issue. And particularly if you're in specialties of internal medicine, you're dealing with older adults or aging who have chronic medical issues. And if these issues are not addressed in a timely manner on a good cadence, these patients will unfortunately end up in the hospital. And that is not a good outcome to keep running into so that it really can potentially cause fragmented care, loss of access, loss of coverage, and then also cause a lot of stress for the physician and sort of contribute to burnout moral injury and mental health issues that can develop along the way as well too.

And I see this happening on a regular basis in Delaware because even though we don't have legal non-compete for clinical care, there are defacto ways of finding ways around that essentially. And I do think moving forward, I know private practices also need to have that as part of their process of how that can be regulated. And I think nonprofits tend to be exempt from non- competes, but there has to be some sort of standard that can be agreed upon for maintaining that nonprofit status when it comes to non-

competes because at the end of the day, if the patients lose their access to the physicians, whether it's surgical or medical obstetrics, that is going to have only a negative impact. So I think, Logan, that's all I had for now. So thank you. And thank you for the chance to share.

Logan Wilke:

Thank you, Dr. Maskarenas. Thank you to each of you for sharing your stories. I do have a few follow-up questions. Perhaps Dr. Maskarenas, I can start with you if we have you up here still. One point you mentioned was that you as the hospitalist perhaps don't form as strong client relationships.

Dr. Maskarenas:

Right.

Logan Wilke:

Did your employer at the time or employers you've seen give any justifications for their non-competes? And if so, do you think they were credible?

Dr. Maskarenas:

There is no real strong justification for a hospitalist to have a non-compete because... I mean, the reasoning that was given to me was the concern was that I would create a competitive group in the same healthcare system essentially. And to be able to do that on paper is theoretical, but in reality, to be able to structure a group where you are now providing twenty- four seven care seven days a week, unlike say a private practice where you work Monday through Friday, yes, you might be on call, you can also block out some time over the weekends where you can get some relief. Whereas in a hospital, you are physically having to be there twenty-four seven and be available for the coverage for emergencies. At a certain point, it just seems for something that they needed on paper versus something that actually could legitimately take place essentially.

Logan Wilke:

Thank you. One other point I think worth expanding on a little more. You mentioned the impact to your ability to provide continuity of service and reach potentially underserved areas or populations. How have you seen non-competes contribute to this?

Dr. Maskarenas:

What I've seen happen is that folks who are willing to go to underserved areas, they end up actually either signing contracts that are negotiated that are reasonable. Sometimes they're fresh out of residency and they may not necessarily know what exactly they're signing, and now they've sort of put themselves in a situation that is not easy to come out of. But ultimately what ends up happening is oftentimes they may or may not be from that area, and so they end up leaving and you've created a big gap in care. So I think that's the biggest, from a population health perspective, that's a big concern essentially, because ultimately we have a healthcare system that tends to react versus prevent. And I think particularly if you're dealing with a family medicine physician on internal medicine, primary care, pediatrics, where the focus is prevention, you are taking away that prevention interventionalist essentially.

Logan Wilke:

Thank you. One final question for you. I think you mentioned your wife's experience briefly. How have you seen non-competes affect your or others' consideration of whether they could start their own independent practice?

Dr. Maskarenas:

I think speaking in Delaware, it really comes down to what exactly you have signed in your current contract. So in my wife's case, the contract that she has right now, even though she's a partner in the practice, they still have a contract, she is able to leave and able to put up her own shingles and start right away. But I do know in the private practice landscape, it's not always the case for every single physician essentially. Whereas if a physician actually worked for a healthcare system in Delaware, they can actually leave their employed position and start their own private practice if they so choose to do so. So it really comes down to who you're working for and how the contract's written essentially.

Logan Wilke:

Makes sense. Thank you, Dr. Maskarenas.

Dr. Maskarenas:

Thank you, Logan.

Logan Wilke:

Dr. Kendall, if you're available, we have a couple follow-ups for you, probably the same questions for Dr. Maskarenas, but first, did your employers, either one, give justifications for the non-competes? And if so, do you think they were credible?

Jennifer Kendall:

So the justification that they gave, one group said, "If you leave and patients

Jennifer Kendall:

... patients follow you, that's going to hurt us financially to lose those patients. That was when I was with a health system. I didn't think that was necessarily a valid argument, especially because a lot of patients are kind of bound to a health system based on the health plan that they choose.

So a lot of patients, even if they wanted to follow me and I was just up the road, couldn't necessarily do that without going out of network, which wasn't an option for a lot of patients to pay that out of network cost. I had another, the other group said kind of along the same lines, "We can't have you working for a competitor, taking patients away from us. It would hurt financially."

But I think while that may be a valid excuse, I think that patients should have the option to see who they want to see and that there should be some onus on employers to make sure that their physicians are happy and want to stay with that practice. Because currently the way that it is, there's no onus on the employers to make sure that physicians have fair and good working conditions. So, I can see both sides of it, but at the end of the day, I think patients are the ones who have their choices limited by these physician non-competes.

Logan Wilke:

Thank you. And I guess to expand further on that, you touched on potential impacts to patient access and particularly in underserved areas or populations. How have you seen non-competes contribute to that in your area?

Jennifer Kendall:

Yeah. I mean, talking to physicians in rural areas, it's hard to get physicians, like Dr. Mascarenhas said, to go to those areas. And when they sign those non-competes, which we're being told, "Oh, it's just part of the deal." And they want to take that job for whatever reason, maybe not fully understanding what that means. If they leave these patients, the access for these patients is so difficult already. They're already in an underserved area. These patients may already be driving an hour just to see this physician. And then if the physician leaves and now the patient has to drive maybe two hours to see a physician or a subspecialist, there's just such burden on the patient, especially in these rural areas.

Logan Wilke:

Okay, Dr. Kendall. All right. Dr. Caniglia, one follow up for you if you're ready. One point you mentioned was that small businesses have cited that they can be prevented from hiring workers due to their non-competes. Is this the dynamic you've seen or experienced for veterinarians? And if so, how have you seen it impact veterinarians and their patients?

Dr. Caniglia:

Yeah, I think I touched a little bit on it with the relief aspect, but I think probably more personal for me going forward is now as a business owner myself, even with the law in place in Maryland, I would still give some pause to hiring a veterinarian that had an existing non-compete agreement in place just due to the aversion of wanting to avoid litigation.

Again, the law's pretty clear in Maryland at this point, but it would still affect my decision potentially to hire somebody at this point.

Logan Wilke:

Thank you. Dr. Caniglia, thank you for your remarks. Last but not least, Ms. Holbrook, a couple follow-ups for you. You touched on this somewhat, but how did your non-compete affect your consideration of whether you could or the extent you could operate your own independent business?

Ms. Holbrook:

In my area with the radial miles that was the restricted area, I had to base decisions on which salon I would go to for what was best. I have a 10-year-old. At the time she was seven, and so, I had to base my consideration of where I would go and work on how I was going to be available for her.

I'm a single parent, so anything that was going to be outside of 20 minutes commute was not reasonable for me to be able to go to work. I had originally been working 10 minutes from my home and went another 15 minutes in the opposite direction. And it was putting a strain on me as a parent to be there for school drop-off, school pickup.

Even afterschool care wasn't an option. This was directly post the reopening of the states after COVID, so it was still impacting my decision for my daughter, for my family. And I researched that radial miles, there was roughly 900 salons in that metropolitan area.

And I felt that I had my hands just completely shackled. I could drive 30 minutes, but then I'm incurring more costs after school care when I had always been able to schedule my time being a hairstylist. I could book clients after drop-off and before pickup and then go back. So, it was an impossible situation.

Thus my driving back to my hometown because I based that every other Sunday on the time that my daughter was going to be with her dad. So she was under care. I could go work a 12-hour day, including that commute, put me 14 hours and just exhaust myself to try to make money.

Logan Wilke:

Sorry you went through that. One last question. Did your employer give any justification for your non-compete? And if so, do you think it was credible?

Ms. Holbrook:

Their justification was the money that they would lose by a clientele following me. When I began working there, I had already had 23 years, close to 24 years' worth of experience. So part of their non-compete restrictions are so that a stylist doesn't take the trade secrets and the skills taught and the time invested that is incurred by the salon.

My first husband and I had formerly owned two hair salons, so I do know the amount of time and money invested in building somebody in their career. And so, I can understand that side of a non-compete to protect the company. However, this is the reason that there needs to be some regulations and stipulations placed on them, because in my case, I already came with all of the experience.

The stylist that they had put me with as working as her associate, I had already been in the industry 13 years more than her. She stated, "You should actually be the one teaching me, not me teaching you." And they had, with their tier system, I had to go about six weeks as an associate, so assisting her. And when I had worked through their ranks and their system, I had began pushing back and stating, "This isn't building me, this isn't building my career. I am currently making poverty level."

And my employer stated that I just needed to do more, I needed to work more. And when we came to a complete head, I just stated, "It's time for me to go because I know what I'm capable of as a stylist with the years of experience." And she stated, "Don't forget, you have a non-compete." And from that point on, it was like the shackles got put on my career.

Logan Wilke:

Understood. Just quickly, on the point about soliciting clients, is it right that you also had a non-solicitation clause?

Ms. Holbrook:

Yes. And that was also reminded to me the day that I resigned. The non-solicit clause was to inhibit me from obtaining a clientele list and reaching out to my clients and letting them know that I was now gone, was going to be in violation of that. Much like the doctors on board, clients want to go to who they want to go to.

You build a rapport, you build a relationship and bonds with these people, and a person's appearance and hair matters to them. They feel good and more confident. Business people need that day, sometimes weekly care. And when they trust you and when somebody trusts a stylist with their hair, they don't want who the salon is going to put them with. They want the choice to choose to who they're going to go with.

And so, I wasn't able to reach out to my clients and say, "I'm now leaving." Like when I moved from Michigan to Ohio, I made sure that each one of my clients that were remaining in Michigan had somebody that I could refer and recommend to them.

And in this case, that non-solicit clause inhibited me from being able to further care for my clients and tell them, "I'll contact you in a year. This is where I'll be in a year" or whatever. It just, again, it shackled my career.

Logan Wilke:

Okay. Thank you, Ms. Holbrook.

Ms. Holbrook:

Thank you.

Logan Wilke:

And thank you to all of the panelists we had for the discussion today. Thank you for your bravery and speaking openly about these very personal and difficult issues. We've heard from many workers around the country who shared their stories with us elsewhere. I know that many of them would've loved to participate too, but cannot either for personal reasons because they're still bound by a non-compete, or out of fear of employer retaliation.

I know many of them would thank you for sharing your stories as well. So we appreciate you for shining a light on these issues today and know it will help advance the work to root out the harmful use of non-competes. And with that, we concluded the first panel.

I see Commissioner Meador has joined, so it is now my privilege to introduce our next speaker, Commissioner Mark Meador of the Federal Trade Commission.

Dr. Maskarenas:

Thank you, Logan. And thank you very much to Chairman Ferguson and Kelse Moen for convening this workshop on a very important issue, non-competes and the FTC's role in addressing them. But before we get into the weeds, I think it's important to underscore why we're having this conversation in the first place.

One of my biggest priorities as an FTC commissioner since day one has been affordability. The phrase I've used in the past, including at my confirmation hearing, is kitchen table issues, what working people discuss around the dinner table in the evenings. What they're discussing are stories like the ones we just heard from the speakers on the previous panel, painful stories that drive home the true cost of anti-competitive behavior in our economy.

To help people like them, American family budgets must be a key priority for all of us. We don't just need economic growth in the abstract, but growth that really benefits the people we're here to serve. And happily, one of the greatest privileges of serving at the Federal Trade Commission under President Trump and Vice President Vance is that here we're in a position to help do something to achieve that.

Here at the commission, affordability is a challenge we can work on from several different directions. When we talk about a big picture issue like affordability, it can be easy to think about the issue in supply side terms. And by that, I mean a focus on the prices of goods and services. So, many policy interventions end up helping tackle the costs of food, healthcare, housing, and so on.

All of that is critically important, and it's a major part of what we do here at the commission. I'll have much more to say about this in the near future, but affordability isn't just a supply side issue. It's also a demand side issue. And by that, I mean that you can't have a healthy economy if nobody gets paid enough to buy anything. A healthy economy requires healthy consumer demand, and so it follows from this that American workers deserve to be paid high enough wages to meet the needs of the moment.

What we saw under the past administration was a major collapse of this logic, and a lot of people suffered for it. When goods and services cost more and wages are driven down, you have a perfect storm of misery. This is the backdrop against which we're having this conversation about non-competes today.

In the simplest terms, non-competes when pursued for the wrong reasons and directed at the wrong workers, suppress wages and thereby make everything less affordable. Now, that's not to say there can never be a place for non-competes, but let's use some common sense here. I think it's fair to say that over the last few decades, we've seen a mushrooming of non-competes across multiple sectors of the economy, and more and more often, ordinary working people are pressured to sign them.

The Financial Times recently recounted the story of a nurse and single mother named Laura, whose contract stipulated that after leaving her job, "She could not work for a rival within 30 miles for at least two years." When she quit her job for higher pay, her bosses threatened her, telling her that she needed to run job applications past them. Her concerns over her non-compete clause left her driving over an hour away across state lines to a hospital far away from her family.

Then there was Deborah, a bartender who filed a complaint with the commission not long ago about just this issue. Deborah's non-compete banned her from working at a competitor within 50 miles for two years. When she changed jobs, her old employer tried to sue her for $30,000. And it can get even worse than that. The Wall Street Journal reported a few years ago that it wasn't just full-time workers being asked to sign non-competes, but in some cases, interns. Today, at least 30 million Americans are impacted by non-compete clauses. Many of these non-competes, to be clear, would likely be unenforceable in court. As such, they're scare tactics. They are scare tactics designed to take advantage of working people who don't have the money to get a lawyer to tell them this. That is exploitation. It is predatory and it is morally wrong.

Is an abusive tactic that makes life less affordable for the people who form the backbone of this country, nor is there any countervailing benefit. In cases like these, non-competes make little sense. The worker's skillsets in question require some mastery, but they are not so niche, so uniquely specialized, that an employer would be disadvantaged by their choosing to labor elsewhere. Nursing and bartending are professions that thousands of people learn to enter because they offer viable paths for lots of people to make sustainable livings.

As far as the logic of non-compete clauses go, there is a vast gulf between these jobs and the job of a machine learning research scientist who is one of only four or five people in the world with her unique skillset. As I see it, non-competes can violate sections one and two of the Sherman Act and Section five of the FTC Act.

And where that happens, the commission should vigorously enforce the law. Because when non-competes are abused, hardworking people bear the brunt. They bear the brunt because affected workers can't easily change jobs, which means they have no leverage to push for higher wages. And so the entire world becomes less affordable. Here at the commission, we take this seriously.

This is not to suggest that there's a one-size-fits-all remedy that can be applied across the board. In my view, a proper treatment of non-competes calls for case-by-case analysis instead of a catchall rule that paints with too broad a brush. At the end of the day, all non-compete agreements aren't created equal.

As I recently wrote in a commission statement, non-compete agreements can, in the right narrow context, protect legitimate investments in training, encourage intra-firm collaboration, and safeguard proprietary and confidential information.

There are cases where we're talking about uniquely sophisticated parties with very niche skillsets. People who are typically paid commensurate with that expertise. Where companies have entrusted key employees with vital trade secrets or other resources, it isn't unfair for them to want to protect that investment, or else companies would have little incentive to innovate or to hire at all. That would harm shareholders, workers, and the economy as a whole.

And so today, in what remains of our time, I want to briefly outline some principles that in my view should govern how we evaluate non-compete agreements. No single one of these elements is necessarily dispositive, but as I see it, this is the basic universe of factors that we should bear in mind.

Let's start with some contextual factors, which bear on whether non-competes have anti-competitive effects before moving to a possible legal framework. To begin with, we should consider employee wage and skill level. Non-competes are less appropriate when workers lack extensive training, have limited access to non-public information, and are not performing specialized functions.

As I've said, the use of non-compete agreements in this context is likely to harm worker mobility, keeping them from effectively competing for better wages and working conditions by taking their labor to different jobs. In this context, non-competes often don't make much sense. Conversely, where workers are paid higher wages, where they have access to specialized training or information, non-competes may be more appropriate, but even then they should be carefully tailored to business needs.

That means that the scope and duration of such agreements must be reasonable. The considerations justifying a particular non-compete agreement, even where a specialized employee is concerned, don't remain indefinitely static. Deployment in a distribution network matters too. Non-competes across a distribution network, such as in the franchise context, can be anti-competitive to the extent they prevent independent operators from competing for employees.

Finally, when we're considering non-compete agreements in an independent contractor context, our analysis should account for whether contractors operate under exclusive terms or receive dedicated resources or training. Again, all cases aren't equal. We need to draw these kinds of distinctions when we address these issues. Now, that's not an exhaustive list of contextual factors that should govern how we think about competitive effects in the non-compete context, but I think at the very least, it's a starting point.

Turning now from this to the more specific legal framework we should bear in mind, we should consider, among other things, the following: the likelihood of free riding. Has an employer made significant investments in training? Does the employee have access to confidential know-how or proprietary information?

That cuts in favor of finding a non-compete agreement permissible, but we shouldn't just take an employer's word for it. Now, to be clear, I have strong opinions about the best way to pour Guinness, but that is not proprietary knowledge of the sort that makes a non-compete appropriate in the bartending context. Availability of less restrictive alternatives. Is a non-compete reasonably necessary to prevent harm? Are there other means such as non-disclosure agreements that might address the problem without restricting the worker's mobility? Oftentimes there are.

So employers pushing for non-competes should be able to explain why a non-compete is the only way to protect their interests. Scope and duration of the non-compete in question. As I've said, individual cases matter. But I think in general, non-competes that run beyond one or two years that exceed the

geographic scope of the employer's operations or the employee's work area, or that impede an employee's ability to work in other lines of business are more likely to be anti-competitive.

Market power. Where a firm has greater market power, a non-compete raises greater competitive concerns. If there are only a handful of buyers for an employee's labor, a non-compete has much more pronounced effect. Finally, evidence of economic effects. Is there widespread use of non-competes across a whole sector? Is there potentially a horizontal agreement among competitors like a no poach agreement? Do employees affected by non-competes have an opportunity to challenge them by demonstrating pro-competitive effects? These and more should factor into our thinking.

Taken together, these are the kinds of considerations that should inform how we as the commission think about whether non-compete agreements violate the law. We don't need a unilateral top-down regulatory policy decision. Instead, we need to exercise sound legal judgment and look at the whole range of relevant factors. This approach will allow us to serve workers and businesses more effectively than through top-down policy edicts.

Individual circumstances matter here just as they matter anywhere else, and our enforcement decisions should account for that going forward. So to bring this things full circle, when we tackle a big issue like affordability, we need to be thinking about this in a wholistic way. That means looking at both supply issues and demand issues. The wrong kind of non-competes by suppressing wages make the world less affordable for working people, and that's a problem, but we can account for this and fight these harms without blinding ourselves to the narrow context in which non-competes do make sense.

Striking that balance is what responsible enforcement looks like here. Thank you all for your time, and I look forward to seeing what comes next on the future panels. Thank you.

Kelse Moen:

All right. Thank you, Commissioner Meador, for those remarks. We are actually ahead of schedule. So we are going to be taking a short break, and we will resume with panel two, our public policy panel, at 3:00 PM. So, everybody have a cup of coffee, stretch, come back, and we will see you at 3:00. Thank you.

Kelse Moen:

All right. Welcome back, everyone. Thanks for staying with us for the second portion of the day's events. As I mentioned before, my name is Kelse Moen. I am a deputy director at the FTC and also one of the co-chairs of the FTC's Joint Labor Task Force, and now I have the privilege of moderating our second panel which is called Unleashing the American Worker: Policy Perspectives on Non-competes. We have a very interesting panel lined up with some impressive speakers across both government agencies and public policy organizations.

So first we have Chris Griswold. Chris is the policy director at American Compass and a non-resident fellow at the Research Institute of Economy, Trade and Industry in Tokyo. He was previously a senior policy advisor to US Senator Marco Rubio and has held research fellowships at the Council on Foreign Relations and Rutgers University School of Management and Labor Relations. His writing has appeared in the New York Times, National Affairs, Newsweek, American Affairs, Comment, and many other publications.

Next, we have John Lettieri. John is a co-founder of the Economic Innovation Group and serves as the president and chief executive officer. Before founding EIG, John worked across the public and private sectors, including as vice president of Public Policy and Government Affairs for a leading business association and as director of public and government affairs for a global aerospace manufacturer. Earlier

in his career, he served as a foreign policy aid to former US Senator Chuck Hagel on the Senate Foreign Relations Committee.

Moving down the line, next we have Jonathan Berry. Jonathan is the solicitor at the US Department of Labor. He leads the department's lawyers in advising the secretary and agency leadership on all aspects of law and in representing the department in court. Earlier, he headed the regulatory office at Labor and also served at the Department of Justice during the first Trump administration. Mr. Berry served as a law clerk to Judge Jerry Smith of the United States Court of Appeals for the Fifth Circuit and also to Associate Justice Samuel Alito of the US Supreme Court.

Then finally, we have the FTC's own Mark Woodward. Mark is the assistant director of the FTC's Anticompetitive Practices II Division of the Bureau of Competition, where he focuses on enforcement work targeting anti-competitive and unfair conduct. He has contributed to law enforcement actions across a range of industries and issues, including actions and investigations involving the use of non-compete terms in employment agreements.

So all four of you, welcome to the panel. Happy to have you here. So for the first question, let's start with Chris. Chris, your organization, American Compass, has taken positions on lots of issues relating to American workers' bargaining power, their economic kitchen table concerns. How do you see non-compete agreements affecting the types of issues that your organization cares about?

Chris Griswold:

Apologies. Can you hear me?

Kelse Moen:

We can now, yeah.

Chris Griswold:

Great. Sorry about that. Yeah, no, it's a fantastic question. Thank you so much for having us all here. Yeah, the widespread use of onerous non-competes has several negative effects on the American economy broadly and American workers in particular, and I know we'll get into that, but I think what you're getting at is the deeper meaning that's at stake when we're talking about non-competes. What we need in America is an economy that works for working families. American workers do not feel like they have a voice in the economy. They haven't felt that way for a long time because in many ways it has in fact been true for many decades that our economy has left workers behind, and there are lots of reasons for that. But one of the most basic ways a working person can exercise their voice is to compete in the labor market, to vote with their feet and leave one job, try and find a better job, negotiate with their current employer or new employer for better wages, to take their skills and start an enterprise of their own.

The widespread use and abuse of onerous non-competes directly inhibits that, directly. It tells workers that their voice actually does not matter and that the proper functioning of the free market, which is premised on free competition, does not apply to you or your right to compete in the market for your own labor, and all the economic harms of the abuse of non-competes flow from that basic violation of the right of workers to freely compete in the labor market. It restricts them from seeking better terms elsewhere. Workers get locked into their own jobs. It reduces their ability to negotiate better wages. Many studies have shown a demonstrable chilling effect on wages in context where non-competes are widely abused for that reason, and similarly with non-competes' effect on innovation and entrepreneurship. Studies as well show very clearly that when a given state, for example, allows the

abuse of non-competes, it inhibits entrepreneurship because people can't take their ideas and go elsewhere with what they've learned.

So that's how I would answer your question. The issue here is whether working Americans are in fact free to exercise their liberty, to compete in the market for their own labor, and an economy that works for working people has to tell workers unambiguously that the answer to that is yes, you do have that freedom.

Kelse Moen:

Yeah. Well, thank you for that. And so John Lettieri, your organization, EIG, has also done a lot of work digging into the data on non-competes, like understanding how they actually work in practice. So what else can you add to kind of the broad picture that Chris has sketched out?

John Lettieri:

Yeah, thanks, Kelse. I would echo much of what Chris said there. I think he's exactly right on the premise of why non-competes are such a problem, such an important issue for policymakers. Look, I think what the totality of the evidence presents to us is that the broad use of non-competes, which is the norm today in the labor market, is simply incompatible with an economy where we want workers to be able to thrive and rise to the level of their capabilities and their ambition to develop true economic independence, to have true mobility, to put their skills to the highest and best use. And so it's really a fundamental factor in so many areas of worker wellbeing that counteracts many ambitious efforts to raise wages, to boost innovation. So what we may be giving with one hand with certain policies, pro-worker policies, we're taking away with the other by allowing non-competes to be so pervasive and to get in the way of the market working naturally to the benefit of workers and their families.

In terms of the research, I think we now have a really compelling body of evidence, number one, about the widespread use of non-competes. At the low end, we can estimate about one in five private sector workers is covered by a non- compete right now. A much higher percentage will be affected by a non-compete directly at some point in their careers. When we look at employers who use non-competes, we can see that they tend to apply them very broadly across their workforce. These are not tailored to just the high end of the worker distribution or the wage scale. These are applied down to hourly workers, part-time workers, volunteers, interns. So there's a huge volume of kind of absurd illustrations of how non-competes have been overused by employers. It's just a standard part of their package, right? They expect everybody to sign them. Whether or not the stated reason for non-competes, which is often to protect trade secrets and to protect competition for the most valuable members of their workforce, it puts the lie to that claim when we see how broadly workers are subjected to them.

They don't do a great job at preventing the leak of proprietary information, but they do crush wages, they do crush job hopping, they do reduce patenting and innovation activity. So across almost every area that policymakers would, I think, unanimously say they care about certain outcomes, non-competes have a deleterious effect on those very outcomes. And so I think they're a prime, for that reason, a very prime area of focus for policymakers, and increasingly we see that across the country where policymakers are taking heed of this research evidence and taking action.

Kelse Moen:

Great. And I think the word you used was absurd. So let's dig into that a little bit. What are some examples of some of the most absurd non-competes that you've seen?

John Lettieri:

Well, it's a long list. I mean, again, you see them apply to interns and volunteers, summer internship programs having non-competes attached to them. So there's no possible way that that could be justified under the stated rationale for non-competes. One of the most egregious categories is having non-competes be enforceable after an employee has been terminated. So even if they don't choose to leave their employer, if they are fired or let go for reasons outside of their control, they're still subjected to the limitations of the non-compete in many states.

You have employers in states that almost unilaterally don't enforce non-competes, the four states that don't enforce them at all, even in those states employers broadly expect their employees to sign them because of that informational asymmetry where a worker may not know what laws or rights come into play and they may sign a non-compete believing that it is enforceable, and it ends up having a chilling effect in spite of the fact that if they were to take their employer to court, that non-compete would be thrown out immediately. And so really every area of latitude that employers are given, they try to exploit that to protect themselves from competition.

I would hasten to say that this is not an employer versus employee issue alone. This affects employers themselves in a very significant way by shrinking the pool of available workers. And so for startups in particular, you see a particularly negative effect because new and small firms that are trying to find the talent that they need are at a big disadvantage because of that shrunken labor pool. And so the absurdity really runs across the gamut.

The harm to the broader economy, even though much of the absurdity we focus on these case studies with lower income workers or again, part-time, hourly gig workers, those types, the broader harms to the economy are really most felt through the enforcement of non-competes against higher income workers, the most highly skilled, the most productive, the most educated. So really no matter where you look across the American workforce, you see these examples of dramatic overreach and significant harm as a result of the use of non-competes.

Kelse Moen:

Thank you. And yeah, so when we talk about the low-wage workers, and I think this is an important area, it may be worth just drilling down on it for one more question. Certainly there's no small job. Everyone's job is important. So we're not saying any... when we call them low wage or low skilled, we're not saying that to denigrate them, but generally these are people without access to trade secrets with very little bargaining power. And yet we're seeing them, for instance, I'm sure you saw the FTC's enforcement action against Gateway Pet Cremation where the people who are essentially driving around the remains of deceased pets are being covered by non-compete agreements. Is that something you're seeing often throughout the economy? And what possible justification is there for imposing a non-compete agreement on workers like that?

John Lettieri:

Yes. Unfortunately, examples like that are quite common, and it's less about the justification being given than it is the fact that employers had very little disincentive to broadly apply non-competes to their entire workforce. There's very little to hold back or create a disincentive for employers to use them very liberally. And so while you'd say good judgment or basic fairness might hold back an employer, if an employer can gain an advantage or protect itself from competition and there's no disincentive to do so, and if they assume that their competitors are going to be doing the same thing, then there's a bit of a ratchet effect where the arms race between employers to acquire and protect their talent at any part of the scale, from low-wage entry jobs to higher skilled, if there's no disincentive, we can assume that

employers are going to use whatever means are necessary or available. And so that's exactly what we see.

Kelse Moen:

All right. Well, thank you for that perspective. Mark, I would like to move to you. So you deal with non-compete enforcement activity every day at the FTC. Does what we have heard today ring true to you in terms of the types of cases that you're seeing to the extent you can comment on that? And if so, how does the FTC deal with these types of issues in our day-to-day enforcement?

Mark Woodward:

Thank you, Kelse, and it's a pleasure to be on this panel today. I'll just quickly note that the views I express today are my own and don't necessarily reflect the views of the commission or any individual commissioner. As to your question, I can certainly affirm that in our work at the FTC we've seen some of the issues that Chris and John have talked about that you've just highlighted, including impacts on American workers who lack bargaining power in their employment relationships. This is highlighted in the enforcement actions the agency has brought in this area.

You just mentioned, Kelse, the Gateway case which was filed in September 2025, and that it involved workers who provided pet cremation services after the death of a family pet, and the company broadly imposed non-competes on its workforce, as you mentioned, on hourly workers who picked up deceased pets from client homes and workers who operated the company's crematories. Critically, the FTC's investigation showed that there was really no individualized consideration of workers' roles or particular justifications for the non-competes that the company deployed. For example, the agency's complaint notes that the employees that Gateway had taken on through company acquisitions had to sign non-competes across the board when the company they previously worked for was acquired by Gateway. So again, no real individualized consideration for whether these non-competes were needed.

A case that the agency brought a few years ago against a company called Prudential Security highlighted these same issues. That case involved security guards in Michigan who had, again, no real bargaining power. The company's security guards made minimum wage or quite close to it, and yet they were required to sign non-compete agreements that contained a $100,000 liquidated damages clause for violating the non-compete. So again, as others have said, no real justification for that.

And then also a few years ago, the agency brought a series of cases against companies in the glass container manufacturing industry, and these non-competes involved employees working in glass container manufacturing plants, including workers in engineering and quality assurance roles, and again, a common theme here, the non-competes were broadly deployed and not justified on an individual basis.

And then I just want to highlight briefly the FTC's most recent case involving labor issues against a company called Adamas Building Services. This was brought in just in December last month, and the case involved no-hire agreements between a building services contractor and building owners to not directly hire workers like janitors, maintenance workers, and doormen. That case is a little different than a non-compete between an employer and an employee, but it highlights the general theme that we're talking about here that workers who feel the adverse effects of these agreements lack bargaining power in their employment relationships.

Moving back for a moment to the FTC's, excuse me, non-compete cases, we've observed a few other common themes in these cases. One I've mentioned already is the lack of legitimate justifications for non-competes on a particularized basis. As mentioned in the Gateway case, there was no real consideration for whether non-competes were needed for specific roles, and frankly, we tend to see this

a lot in our work at the FTC. Companies include non-competes in employment agreements with little analysis for why this is even needed, or the why doesn't match justifications that may be later asserted in our investigations.

The cases that we've brought in this space at the agency have also highlighted adverse effects on workers which we've talked about in general. Non-competes do tend to restrict labor market mobility and act as a constraint on wages. I think we heard some pretty compelling examples of this in the prior panel, and I'm sure we'll hear more about some of the literature on this on the next panel, but we really see it in our work at the FTC.

One scenario that really stands out for me is that workers who want to leave their jobs to start a small business and can't do this or have to wait and hold back their businesses for substantial period of time because of a non-compete clause. That really leads to negative effects both on the workers but also on small business formations, so the economy as a whole, as John was saying earlier.

Another thing I really want to highlight from our cases is that these adverse effects can occur even when non-compete terms are limited in time or geography. So in the Gateway case, non-competes were limited to a one-year term. In this Prudential security guards' case, the non-competes were limited to two years and a hundred miles, and geographic or time limits are certainly relevant to our analysis from a competition perspective, but they're not necessarily dispositive. And why is that? I think we heard, again, some of that on the prior panel. Most American workers cannot go a year without a paycheck, and American workers, many of them have very good reasons to not move a hundred miles away for a new job, and these factors in turn have broader effects on competition, and it's these effects on competition that we're focused on in our enforcement efforts at the FTC.

So just to be clear, limits on time or geography are relevant, but will not necessarily justify the use of a non-compete agreement from a competition perspective. And then a final theme in some

Mark Woodward:

... of our cases is something that, again, John referenced earlier, which is the impact on competition in not only labor markets, but also product markets. And Chairman Ferguson highlighted this in his remarks as well. So for example, in the Gateway case, the FTC's complaint notes that when a particular rival to Gateway entered a local market for pet cremation services, Gateway made sure that all of its employees had up-to-date non-competes in place. And the complaint alleged that these non-competes generally tended to impede entry and expansion by competitors. And similarly, in the glass container cases that I mentioned earlier, the FTC's complaints alleged that non-competes impeded entry and expansion of rival firms. So in sum, when we investigate non-compete agreements at the FTC, we are generally focused on these issues that we've been talking about on the one side of the equation, impacts on workers and on competition.

And then on the other side, asserted justifications for the use of non-competes and whether those match the circumstances in which they're used.

Kelse Moen:

Yeah, thank you. And those are some really helpful distinctions, especially on the difference between when you analyze this as a competition matter versus a matter of employment law. So thank you for that. And I should also just clarify, when we speak about these cases, we talk about Gateway, we talk about the glass investigations. Those are just examples of past practices. That's not the totality of everything that the FTC is doing in this area. That's just what you are able to speak about because that's public.

Mark Woodward:

That Is absolutely correct. Yes, I'm highlighting cases that we've brought and you can read more about on our website, but we have non-public investigations ongoing and I'm prohibited from commenting on those.

Kelse Moen:

Yeah, certainly. And so in the previous panel, we heard from some doctors, I think we've heard about healthcare issues specifically a few times today. Could you explain some of the public activities that the FTC has taken to investigate non-competes in healthcare markets?

Mark Woodward:

Some of those comments from earlier today were really quite striking, as you mentioned, Kelsey, and healthcare has been a particular focus for the agency recently. First, as Chairman Ferguson mentioned in his remarks earlier in September of last year, the FTC issued a request for information highlighting potential concerns about non-competes and seeking more information from the public. And that request for information notably noted that concerns about non-competes may be especially significant in healthcare markets, where non-compete agreements may limit employment options for medical professionals and critically restrict patient choices for who provides their medical care. And around the same time, also in September of last year, Chairman Ferguson issued warning letters to a series of employers in the healthcare industry where non-competes are quite prevalent. And these warning letters highlighted some of the issues that we've discussed here, including that non-competes in the industry may not be justified and may have adverse effects on labor market competition and on patient care.

And then the FTC has received a number of responses to the request for information, including from a number of participants in the healthcare industry. And these responses have highlighted some of the issues we've been talking about and some of the issues that we heard about on the prior panel, including that non-competes may not be justified for particular reasons in the healthcare industry. So for one, some of these comments highlighted that training for doctors happens significantly in medical school and in residencies, and not necessarily in on the-job training later in a doctor's career.

Second, in certain specialties, and here, emergency medicine might be a good example, patients come to the hospital not because of any kind of doctor-patient relationship, but because they're facing an emergency that just needs to be treated in the hospital. So a non-compete in this space doesn't seem to be about protecting client relationships. And we heard about this, I think, from Dr. Mascarenhas earlier in his remarks. And then sometimes confidentiality concerns are used to justify non-competes. But in this space, health privacy laws pretty comprehensively address privacy concerns and confidentiality concerns. So again, you wouldn't think non-competes would be justified on this basis. And then the comments that the agency has received in response to the request for information has also highlighted some of the effects of non-competes in the healthcare space, including about the effects on physician mobility, as we heard about some earlier. Young doctors we've heard often face loads of student debt and may not be able to move to a better job because of a non-compete.

And then as doctors gain experience, they may be prevented from branching out to join or start a smaller physician practice. This in turn has broader impacts on competition and this at a time when the medical industry has seen a lot of consolidation and a decline in small physician practices. Comments that we've received have also noted potential negative impacts on patient care. So for example, patients might have to move out of the area that they're practicing in entirely to avoid a non-compete agreement, and this exacerbates physician shortages in rural and other underserved areas in particular,

a concern, of course. And some of the comments that we've received have highlighted that these effects can be particularly impactful in specialty practices like urology or radiology as examples, where there might be a relatively small pool of labor in a particular geographic area. And so thereto, non-competes can have adverse effects on patient care if they force specialists out of the area.

I'll just briefly mention a case that the agency has pending in federal district court against US Anesthesia Partners and another concern about non-competes that that case highlights. According to the FTC's complaint in the USAP case, non-competes were linked to an acquisition strategy by USAP, which bought up anesthesia practices in Texas and non-competes that the physicians had to sign created barriers to entry for any firm looking to challenge USAP's dominant market position. So again, that's an effect in the product markets at issue. So just summing up the request for information, the warning letters, other work at the FTC, I think are part of the agency's focus on case by case enforcement in this space. And along these lines, I'll just mention that whether in the healthcare industry or otherwise, we're always open to hearing individual complaints about specific non-compete agreements. And for non-compete complaints, we have a dedicated email address for this. It is noncompete@ftc.gov. Anyone can submit complaints via this email address. Again, that's noncompete@ftc.gov, and they can do that on a confidential basis and FTC staff will review those complaints.

Kelse Moen:

Yeah, thank you. And I can affirm that we definitely do have staff reviewing those complaints, so we definitely welcome those. And I think we've originated cases from that email, so that is certainly a useful tip for anyone out there who may be burdened by these agreements. So thank you for those comments. We're going to shift now to Jonathan Berry. So Jonathan, you are in a unique position relative to the rest of the panel in that you are visiting us from another agency, the Department of Labor, so welcome. I don't know a lot about the Department of Labor, but why don't you tell us how you view non-competes from over there where you are?

Speaker 3:

Thank you, Kelsey, for having this humble employment lawyer darken your door. I'm very grateful for the opportunity. Like Mark, I'll say at the outset, these are my personal views, do not necessarily represent the views of the United States Department of Labor. So the Labor Department, and especially through my office, is charged with enforcing many of the employment laws that directly protect the American worker as a worker, typically as an employee of an employer. These laws include the Occupational Safety and Health Act for Workplace Safety and Health, the Fair Labor Standards Act for minimum wage and overtime, and ERISA for employment benefits. We also enforce the limits on guest worker programs such as through our project Firewall on H1B visa abuse. I am not an antitrust enforcer, and I don't even play one on TV or Zoom as the case may be, but I welcome the opportunity to give some perspectives on how non-competes interact with the laws I enforce as the top enforcement official at DOL.

Keeping labor markets more competitive is one of the best ways to incentivize compliance with all of the statutes that we enforce. Especially for, as we were talking about, lower skilled, lower wage workers or the people who tend to be more directly protected by the laws that we enforce. In these labor markets, American workers having greater bargaining power and mobility enable them to avoid accepting work with employers that are giving them poor safety conditions or that are unjustly depriving them on their lawfully earned wages. Competitive labor markets therefore ensure good faith employers' compliance to help them attract and keep good workers. My department in turn can focus its resources, taking employers directly to court, focus those resources on the big, the bad, and the ugly violations by the

worst employers to optimally enforce our laws within our jurisdiction. Non-competes can seriously undermine the competitive labor markets that are at the heart of all our nation's employment laws. Especially when employers use them on low-skilled workers for whom there's often no meaningful pro competitive benefit to having the provisions in their contracts.

We've been talking about some of the examples here today for really rather low-skilled work. And of course, American workers deserve to draw the best wages that the market and their skills allow. Chairman Ferguson has already noted today that non-competes can have some pro competitive benefits in some contexts, but it is right and just to prosecute employers that abuse non-competes, to protect the competitive markets that in turn serve American workers just as our employment laws do.

As I've heard today, and as we've been talking about, employers attempts to reduce their employees' pay or otherwise degrade their working conditions, to do that through non-competes that illegally prevent the employees from going to a higher paying job and eliminate competition among employers for the workers' labor, those agreements very well can be illegal. And they're no less illegal than the wage-reducing violations of the Fair Labor Standards Act and the other laws that we at the department enforce.

Kelse Moen:

All right. Well, thank you. And so have you thought about any areas where there could be potential collaboration on these issues between the FTC and the Department of Labor?

Speaker 3:

Yes, and I'm glad to see those opportunities on the increase. I will admit to I was pleased to participate in an earlier iteration of this with the FTC and the DOJ and the first Trump administration, some of those earlier conversations about labor markets and protecting workers. And I'm really excited to see how those conversations have matured into the second administration. For DOL specifically, we have a past practice of assisting the antitrust agencies to the extent allowed by law by sharing information, referring potential violations that our investigators, wage and hour investigators, workplace safety investigators, benefits evaluators that we find in our own investigations. And collaboratively training our staff to detect labor market antitrust or competitive violations that may come up in our investigations. We currently have an inter-agency memorandum with the FTC on these policies, which we may revisit after a further consultation internally and with your task force.

There may also be other practices which employers commonly engage in that like non-competes may unduly reduce workers' market power and may merit attention going forward. Just as an illustration, one example is that employers often work with staffing firms to post advertisements for job vacancies that may not exist or that they have no intention of filling. And they use these so called ghost jobs to gather an outsized pool of applicants for when they do have a vacancy to reduce each applicant's competitiveness and thereby lower the position salary or wage, leverage their soft power on employees and existing positions to encourage them not to leave or ask for raise, and overall reduce labor market efficiency by distorting the job market. One study I saw estimated that more than one fifth of all job openings in the country are for these ghost jobs, anecdotally hear a lot about it. And that drastically distorts labor markets and making it that much harder to find a job, if true.

And to the extent true, the extent this practice is a real issue, of course, it wastes uncounted job seekers' time and money and makes the labor market much less efficient. The employment laws, my department enforces, also relate to competition. Specifically, they ensure that employers do not compete below a certain floor on issues like minimum wages, health and safety conditions and benefits through FLSA, OSHA Act and ERISA, and then also guest worker programs like H1B. But employers, of

course, do need to compete for these conditions above our law's minimum standards. And I think it's appropriate to be suspicious of employers that may be collusively setting wages, safety conditions, or benefits features, even if those conditions to which they agree otherwise comply with relevant employment laws. Agreements between employers about these subjects artificially decrease employees' choice among workplaces and impede them for meaningfully bargaining for safe working conditions.

And I would say to the extent our investigators come across evidence of these kinds of agreements, those may be fit candidates for referral to the FTC.

Kelse Moen:

Yeah, thank you. And that's certainly a very interesting issue. Just to give a quick plug for our labor task force, we're focused today on non-compete agreements. But if you read the memo setting up that task force, there's a lot of other stuff that we're interested in too. Non-competes have generated a lot of work for the FTC, but certainly these things like ghost jobs, the other things you mentioned are very interesting. It's also interesting in that it seems to both have, it has an employment angle from your perspective. From our perspective, it has both a competition angle and also an angle for my colleagues in our Bureau of Consumer Protection, which our task force was created with the intention of uniting us all together for the purpose of handling those types of issues. So definitely a lot more for us to think about, go through all the proper channels, but to think about possibilities for further collaboration.

Jonathan, I had one other question for you. You are also in a unique position as you are a political appointee. So you were nominated for your job by President Trump and you were actually confirmed by the Senate. Congratulations on that.

Speaker 3:

Thank you.

Kelse Moen:

But as a political person, some may say that it's inappropriate for a Republican administration to be focusing on this. So this isn't the type of thing that President Trump or the Republican Party should care about. So from your perspective, is non-compete enforcement an issue that the Republican Party should care about?

Speaker 3:

Thanks, Kelsey. The answer is absolutely. The American people elected President Trump and this historic administration specifically to help the American worker. President Trump came back to office with unprecedented levels of working class support. And I think it's precisely because people appreciated that he was caring about American workers for their own sake as workers, not merely as tools to grow the GDP. The GDP is important, but workers are what build the economy or who build our economy. I think in order to have that service mentality towards the American worker, it is important, especially for the FTC... I won't tell you how to do your job, but you did invite me here, so thank you again.

We have to remain cognizant of employers' market power. So in our case at DOL, generally speaking, the statutes that we enforce are our size agnostic. Unlike a lot of antitrust or competition sensitive conduct, a violation of the laws we enforce lies against businesses regardless of how dominant they are in the market. But that doesn't mean that we should ignore employers' market power when deciding whether to prosecute. Non-competes are a great example of why we should focus on market power in enforcement. They allow, as has already been talked about on this panel, I think especially the

anesthesiology example that Mark mentioned, non-competes appear and sometimes really do, they appear to allow dominant and leading employers to maintain their position by locking out their competitors with less power from the labor market they need. The buying power that those smaller entrants or newer entrants need to hire good workers.

While non-competes can be anti-competitive regardless of the size of the business that uses them, enforcing our laws against dominant firms with outsized market power... And these are the firms we should demand the highest compliance from. Enforcing laws against those dominant firms helps the American worker the most.

Kelse Moen:

All right. And Chris and John Lettieri, I'd like to get your perspectives on that too. Whoever wants to go first, Chris is off mute, so we'll send it first to him. Do you think that non-compete enforcement is a reasonable priority for the Trump administration?

Chris Griswold:

I think it's unbelievably, clearly, absolutely a reasonable and vital priority. I echo everything that Jonathan just said because he's right. The healthy functioning of the free market is premised on the freedom to compete, and it's out of that healthy competition that economic dynamism and higher wages, not prosperity, can flow. Because as Jonathan said, it's not just about how to best utilize working people as widgets of production to grow the GDP. Working people are people and need to be able to compete freely in the market just like the big firms they work for. And I think the key philosophical insight that this administration brings that is new relative to, I think, the more traditional right or center thinking, Kelsey, that you mentioned, is that that freedom of competition requires proper law enforcement to protect it. It is not self-sustaining. We heard from Chairman Ferguson earlier today, I think he put it extremely succinctly in his statement on the Gateway case that we were talking about earlier.

He said, got it in front of me, he said, "The antitrust laws protect labor market competition and therefore prohibit unreasonable non-compete agreements that limit that competition." Very straightforward. I think Commissioner Meador also put it very well in a speech he gave in an event that American Compass Hult put together last year. He said, "The antitrust laws reflect the fundamental American values of free enterprise and economic competition. A free market properly understood is a system of economic order rooted in fair dealing and voluntary exchange. The antitrust laws are the primary mechanism for ensuring that economic power does not calcify into private tyranny because free markets are not self-perpetuating. They require law enforcement to maintain." Clear thinking economics has always understood this and it's always understood this specifically in the context of the employment relationship. Adam Smith, the father of classical economics and the father of free market thinking wrote about how workers are always at a fundamental, inherent, our disadvantage relative to large employers.

And that was always going to have to be a concern of the law if workers and employers were to be able to meet on reasonable equal terms and have a real negotiation in the free market. I know we already had a panel on the victims of abusive non-competes. But just in case anyone's watching this panel that didn't see that panel, I wanted to throw one more story in. When Secretary Rubio was still in the Senate, he chaired a hearing on this issue that I will never forget as long as I live. There's a gentleman named Keith Bollinger, a highly skilled textile worker from North Carolina. His firm went bankrupt. He tried to get a new job, and his firm enforced a non-compete against him for trying to just make do in a tough environment where his firm was laying people off. He was unemployed for years. His family suffered financially, and I'll never forget what he said.

He said, "I had an opportunity to recover my losses by joining another company, and for that I was punished. My career has not recovered. It may never. There are other contracts a business could use that does not destroy careers. I thought this was a free country and a land of opportunity." And I think he's absolutely right that if you just ask normal people what they think it means to live in a free country and a land of opportunity, they don't mean the freedom to let businesses contract however they choose with workers who may not even know what they're signing or maybe under economic pressure to sign it anyway. It means the freedom to freely compete in the labor market and the market for your work. So yes, that's all just today I think is absolutely an appropriate focus of this administration and of law enforcement and of the FTC.

Kelse Moen:

All right. Yeah, John, do you want to chime in?

John Lettieri:

I'll add to that that I was privileged to testify at that hearing that Chris mentioned alongside Mr. Bollinger. And if you had told me in a few short years that non-competes would be getting the kind of attention now from federal policymakers and state and local policymakers nationwide that they're getting today, I would've been thrilled because it has come such a long way in a relatively short period of time. I would just add to all of this, that the political pitch on addressing non-competes is very strong. It's a unique issue in many ways because you can get better wages, you can get higher worker satisfaction, better worker mobility alongside faster economic growth, more innovation, more entrepreneurship, broadly speaking, more growth in economic dynamism. And if you told a lawmaker that you can do all this through a policy mechanism, the assumption I think would be for most policymakers, this is going to cost a lot of money to effectuate that kind of outcome. But in the case of non-competes, it really is as close to a free lunch as it gets in economic policy where just by prohibiting this one abusive area of contracting and this one onerous area of restriction on workers, you unleash the potential and the full dynamic outcome that we know that American workers in the American economy broadly are capable of. I think that's a very compelling case to anybody, a Republican or Democrat, that it's in a special category of high potential low cost that frankly, policymakers don't have a surplus of right now, especially when fiscal concerns are rightly on the front burner in so many ways. And so I'd add to all the other things that have been said, just the political case for this right now in particular is so strong as to put, I think, a unique focus on non-competes as a lever that policymakers from across the aisle should be focused on.

Kelse Moen:

And are there any specific industries that strike you as particularly important areas of focus?

John Lettieri:

I think from my perspective, from EIG's perspective, we'd like to see broadly applicable restrictions across the board on non-competes rather than a piecemeal approach. But some of the industries where that pain is particularly felt have been mentioned here on this panel. I think the healthcare industry, my primary care physician had to move five miles away from his previous practice when he left because of the non-compete agreement that kept him locked up for two or three years, and that caused a ripple effect on his patients and the ability to access care. So I've seen that in my own life and in the lives of friends and family members who are involved in the healthcare industry who have seen a lot of those kinds of negative effects. And we have certain areas of the country where the number of providers is

very small. And so anything that diminishes access to certain market providers, it's going to be acutely felt by consumers.

But again, I think the best approach is one that broadly liberates workers to pursue what's best for them, and to pursue the highest and best use of their talents in the labor force rather than government thinking on a piecemeal basis industry by industry.

Kelse Moen:

Great. Yeah, and hopefully this panel itself is sending the message out to the world about that we are here to enforce. I think the chairman mentioned that in his statement too, that we don't need a blanket rule banning all of these. But as long as we are taking a consistent enforcement approach and bringing cases, that we'll be sending the message to employers that this is something that-

Speaker 3:

Hey, Kelsey, can I glom on real quick to John's comments that in terms of special places to look, I think paying special attention to the lower end of the scale where there's the human capital per capita commanded by the individual worker, those are places where the cramp in bargaining power that comes from a non-compete is likely to bite harder for that worker. And the places where sometimes labor mobility impediments may be the most profound. So that's potentially one area of special concern. And again, I may be parochial in this regard just because that tends to be the workers who are most directly protected by a lot of laws that we enforce.

Kelse Moen:

Yeah, thank you. And I think another real striking thing that came out a little bit in the last panel too is in the healthcare market, as Mark mentioned. The two doctors who we had on the last panel had mentioned that the non-competes not only are driving down their own wages, but they're preventing them from moving to certain areas that are otherwise in need of doctors and that they otherwise would've moved. So Dr. Mascarenhas, for instance, chose where he decided to practice medicine based on which states were enforcing and not enforcing non-compete agreements. If not for that, he may have moved somewhere else where maybe his services were in greater demand, whether there was a greater need for him. But he's being artificially directed based on those kinds of decisions. So I think that the healthcare issue is really important. All right. Well, we're getting close to the end of our time. I'm going to send another question to Mark, but if anybody else has anything to chime in on, please do let me know. So Mark, I think one question for you is you've been working at the FTC for a long time. You've worked on all types of cases, deal with all types of different attorneys, probably some good and some bad. So taking that experience, if you had the opportunity today to give one piece of advice to an attorney who may be watching, who maybe represents an employer who has a non-compete agreement and they're watching this because they want to get a sense of the FTC's priorities and how we're approaching these cases, what is the one piece of advice that you would give an attorney like that?

Mark Woodward:

My advice would be pretty simple and it is consider alternatives. In our cases, and we've talked about this today, we often hear about motivations behind non-competes that frankly could be addressed through alternative arrangements that are far less problematic from a competition perspective. So just a few examples. Targeted non-solicitation agreements can protect investments in client relations, client relationships. Now I'll just note for a second that over broad non-solicit agreements can actually be problematic at times, at least to the extent that they operate as defacto non-competes. But again,

targeted non-solicits may justifiably protect pro competitive aims. And similarly, non-disclosure agreements can protect confidential company information. And fixed term contracts might be an alternative when there's a desire to protect investments in worker training. I mentioned these in part because less restrictive alternatives are often a key issue in antitrust and competition analysis. And that's very much the case in this space here, as we heard earlier from Commissioner Meador, I think.

Just as a practical matter, there are often less restrictive alternatives that match asserted justifications much better than non-compete agreements do. And thinking about alternatives also hopefully accords with common sense. We just heard from Chris and John as well about Senate testimony from a few years back. And if I got it right, it was something like there are other contracts a company could use, just that non-competes are particularly pernicious. And again, that's exactly right. There often are alternatives to non-compete agreements that would address the asserted pro competitive aims that we hear from companies that use non- competes. And my advice to practitioners about considering alternatives stems in part from the fact that I personally look forward to litigating some cases in this area, frankly. So far, the FTC has resolved enforcement actions relating to non-competes via consent decrees. We have not yet litigated a case to conclusion in court on this topic. And I can't, of course, commit the commission to a case. But if we do wind up litigating a case in court, I really like our chances on many of the fact patterns we've heard about today.

So from my perspective, we're really not going away, and I look forward to future work in this area.

Kelse Moen:

Yeah, I look forward to litigating these too. I think when you see the way that non-competes are applied in so many ridiculous industries where they serve absolutely no purpose, I agree. I very much like our chances if we have to stand up in court and address those. So thank you. And thank you to all of our panelists. I think this has been a great panel today. It's been very informative to hear all of your thoughts on this issue. This is an important issue. As Mark said, we're not going away. The FTC is focused on it, and we want to hear from you and from anyone else who's tuned in. We're always open to listening to understand how better to direct our enforcement

Kelse Moen:

... enforcement efforts, and to really address this issue that has really gone on for too long. So, thank you. Thank you to all the panelists. And with that, we will probably take a quick break and then move into our next panel.

Miriam Larson-Koester:

Hi, I'm Miriam Larson-Koester. I'm an economist in the FTC's Bureau of Economics and a member of the FTC's Joint Labor Task Force. I'm honored to moderate our third and final panel today, Counting the Costs: The Economics of Non-competes. We have a great group of economists here with a variety of backgrounds in studying the economics of non-competes. We have the pleasure today of hearing their opinions on the current state of the economic research, and I'll now introduce to each panelist. First, we have Evan Starr, who is a professor of management and organization at the University of Maryland's Robert H. Smith School of Business. His research focuses on labor markets, human capital, and employment [inaudible 03:01:05] contracts, with a particular emphasis on post-employment, restrictive covenants such as non-compete clauses. His work has been published in leading academic journals, widely cited in policy debates and has informed federal and state efforts to reform labor market regulation.

Next, we have Devesh Raval, Deputy Director of the FTC's Bureau of Economics, where he leads efforts on consumer protection and research. His research concerns industrial organization with a focus on production, technology, competition, and consumer protection. In addition to his expertise at the FTC, Devesh was a founding member of the economics team at Amazon and was the Victor H. Kramer Foundation Fellow at Harvard Law School from 2021 to 2022. Next, we have David Balan, who is managing director at EconOne Research with a pro-enforcement practice. He spent over 20 years as a staff economist in the Bureau of Economics at the FTC. In 2013 and 2014, he spent a year as senior economist at the President's Council of Economic Advisors. Dr. Balan has worked on a wide variety of antitrust cases, including numerous litigations, and recently testified as an efficiencies rebuttal expert in Colorado State Court in the Kroger-Albertsons.

Finally, Bruce Kobayashi is the Paige and Henry Butler professor of law and economics at the Antonin Scalia School of Law, where he's been faculty since 1992. He was Director of the FTC's Bureau of Economics from May 2018 to December 2019. He also was the founding Director of the Global Antitrust Institute and has taught antitrust economics to hundreds of foreign competition officials and judges. Kobayashi has also served as an instructor for the Law and Economic Center's Judicial Education Program at George Mason University, where he has taught economics to hundreds of US federal and state judges. So, I'm really happy to have you all here. Welcome to the panel. And I think we'll kick it off with you, Evan Starr. You're a leading researcher on non-competes, and I'm wondering if you would do us the honor of giving us an overview of where the economic evidence stands on the impact of non-competes.

Evan Starr:

Thanks, Miriam. Thank you to the organizers for having me today. My name is Evan Starr. I'm an economist at the University of Maryland, and over the last decade, I've been studying the use and effects of non-compete agreements and related restrictive covenants, as well as the effects of different regulatory approaches. And Miriam's asked me to provide an overview of the evidence, and so I'll try to do that in a few minutes here. It'll be difficult for me. So, what I want to do is try to ask and answer a few of the common questions that have come about both before the FTC's rule and then afterwards that were kind of the subject of important debate. So, the first is just how common non-compete clauses are. And if you scan the literature, it's easy to find extreme examples and anecdotes. My favorite recent one is a five-year non-compete for a window cleaner who's working as an independent contractor. And you can find these left and right. They're not that hard. But I think the broader question is: how common are these sorts of agreements? And so I think that the best evidence we have to date in the US come from firm level surveys, which tend to show that approximately one in three companies use non-compete agreements for all workers. And there's a broader portion, about a half of workers use them for some workers. And so what you have in the situation is where a company is adopting this language is sort of boilerplate and it's covering all sorts of workers, and that's how you get examples of window cleaners and independent contractors and janitors and all sorts of other workers who have non-compete agreements. There's been new evidence over the last few years in OECD countries, which suggests that the US is in line with the rest of the world in terms of the use of non-compete, and in some countries, it's actually larger.

The second key question is: do non-compete agreements help or harm workers? And here, the core theoretical argument that we've been discussing is that it's possible that while non-competes constrain workers by prohibiting them from starting a competitor or joining a competitor, taking that better job, it's possible theoretically that workers trade off that loss and freedom for something better in exchange, which could be higher wages, it could be more training, something that they value. And so it's kind of an empirical question about which story is right. And so there's a wide swath of empirical evidence trying to

answer this question. And I think the key is that there's correlational evidence and there's evidence that attempts to be causal. And the correlational evidence tends to compare workers with versus without non-competes.

And you will find in that evidence that workers with non-competes tend to earn more. And the core challenge there is that when you compare workers with non-competes to workers without non-competes, that comparison may say precious little about the effects of non-competes themselves because those workers differ on a variety of other dimensions. And so what researchers have tried to do to try to ascertain the causal effect of non-competes is look at state policy shocks, where non-competes have been banned or whether they're more vigorously enforced in some states. And using those policy shocks, researchers tend to find that non-competes, or at least non-compete enforceability, reduces wages typically on the order of 3 to 4%.

There's recent field experimental evidence that I've worked on with Bo Cowgill and Brandon Freiburg, where we randomized the use of non-compete agreements at firms, and we similarly found that they reduced compensation. And so I think the evidence broadly suggests that non-compete agreements tend to harm workers. There may be a few caveats for super high income workers where the evidence is a little bit more mixed, but that's sort of where the evidence falls down right now. There's another question though about getting outside of just the single dyadic worker firm relationship and thinking from a market perspective. There's recent evidence from Jarosch and Gottfries and a variety of other studies that the use of non-compete agreements writ large in an industry can have spillovers that harm the whole industry.

And I think this is an important point to make that in industries where non-competes are super common, it may not just be the workers with the non-competes who are harmed, but also the whole industry might suffer if it closes often opportunities to move, which could, in fact, even affect workers who don't have non-compete agreements. The next really important question is: are non-competes necessary and can other protection tools suffice? And so if you look at the literature, proponents of non-compete agreements tend to argue that they need non-compete agreements because they prevent harm from being done in the first place.

If a worker moves, they can share information. And so you can stop that by just stopping the worker from moving in the first place. But there's a counter-story which is that maybe NDAs and non-solicitation agreements that allow the worker to move, maybe those are sufficiently protective if a worker moves, but they just don't share information or reach out to clients that they shouldn't reach out to. And so there's been a few new papers which have tried to look at that evidence and it generally tends to find that non-compete agreements are broadly not necessary to protect firm interests. I'll summarize some of that evidence briefly.

There is a field experiment paper, the one that I was just describing with Bo Cowgill and Brandon Freiburg, where we look specifically at whether or not information shared with one company is shared with another company, a competitor, and whether the non-compete agreement works to protect the firm from leakage, information leakage to a competitor. And in that study, we find that even though the non-compete agreement reduced mobility by around 50%, it didn't affect information sharing at all. In other words, what happened was the non-compete agreement just prevented the move, it didn't prevent the workers from sharing any more or less. And so basically the story is in that situation, that workers who abided by a non-compete would have also abided by the NDA, and workers who violated their NDA would have also violated their non-compete.

There's another paper that I wrote with Bruce here and Brad Greenwood, looking at what happens when you ban non-compete agreements. And there's a common argument that if you ban non-competes, then companies will have to resort to trade secret litigation when workers move more

frequently. And so all we did in that paper is look at what happens to trade secret litigation when non-competes are banned. And we find that mobility rises and wages rise, but we find no evidence that trade secret litigation goes up. And so that kind of counters this claim, this narrative that's out there that trade secret litigation will fly through the roof when non-competes are banned.

And finally, there's a paper with Takuya Hiraiwa and Mike Lipsitz and myself looking at what happens when Washington ban non-compete agreements for workers making under $100,000. And this particular study is interesting because it allows us to test a very specific proposition about how much firms value non-competes. And the idea is very simple. Before this policy comes into play, a worker making $99,000 can have their non-compete enforced subject to a typical reasonableness test. After the policy, they're below the red line, the non-compete is not enforceable, unless the company gives them a small raise. And so what we can do is look at bunching just above that threshold to see if companies are willing to pay more workers to have the chance to enforce their non-compete agreement.

And if we don't see any bunching, that would be indicative that companies don't value the non-compete. And so what we find in that paper is that companies are not proactively giving workers raises at $100,000 to get them to enforce their non-compete clauses. And in a survey of lawyers, the lawyers said the reason this is not happening is broadly because companies have alternatives that are sufficient for workers at that $100,000 level. And so broadly that evidence suggests that non-competes are not necessary for protecting core firm interests. Of course, that evidence is limited to the studies there, but it is growing, I think, at this point. And the last point is about innovation. How do non-competes affect innovation? Arguments are on both sides of this, that firms need non-competes to protect their investments. Another side is maybe non-compete agreements impede innovation by blocking workers from starting their own companies, from achieving the gains to their own effort.

And so broadly, this evidence I think comes in some recent studies by Mike Lipsitz and Alison Pei and Matt Johnson and Reinmuth and Rockall. They find similar things, that the enforceability of non-competes tends to reduce innovation. And that's sort of the best evidence that we have at this point. And so just to conclude briefly, again, I could talk the whole hour here, so forgive me, I would say, at this point, the existing body of evidence suggests that non-compete agreements are broadly not necessary to protect from interests and that they are harmful to workers in society. And that doesn't mean that non-competes are bad in all instances and in all contexts, and there could be some caveats to that, but that's sort of the thrust of the literature at this point.

Miriam Larson-Koester:

Thank you so much, Evan. That was super informative. I want to pass it to Devesh Raval. The FTC must have spent a lot of time examining the evidence on non-competes, and I'm wondering if you have any thoughts on the literature, and in particular areas where further research is needed, building off of what Evan's been talking about.

Devesh Raval:

Sure, Miriam. So, we had to do an extensive literature review as part of the rule, and a lot of that was to learn both where there is a lot of evidence on non-competes and where there's not so much evidence. And so I'm going to first go into the places where I think we do have a lot of evidence, and then turn to places we don't. So, all of this literature is looking at what happens when non-competes become more enforceable, what happens to wages, what happens to mobility, what happens to innovation and so on. So, there's pretty robust evidence that when non-competes become more enforceable, wages fall. So, my former colleague, Mike Lipsitz and coauthors find about a 2% decrease in earnings for workers when non-competes go from the 25th percentile of enforceability across states to the 75th percentile of

enforceability across states. So, this is not we ban all non-competes, this is just changing the enforceability. There's a pretty significant decline in wages that's been found for low wage workers, that's been found for tech workers in other experiments as well. The literature also robustly finds decreases in worker mobility. The workers are a lot less likely to move around once they have a non-compete, as you might expect. Second, when we turn to innovation, so as Evan talked about, there's a lot of evidence on innovation now, typically looking at patents. When non-competes become more enforceable, patent rates decline, citations of those patents decline, and many, many different measures of innovation declines. So, I think those are probably the most robust pieces of evidence, and then the last piece would be on concentration. When non-competes become more enforceable, we find increases in concentration.

And one mechanism of that may be that now workers can't go and create their own firms, and so we found less firms in the market. And let me turn to what we don't know or what we know less about, so first on innovation... There's a lot of work on innovation in terms of patents. There's a lot less work on productivity, which is really important for aggregate welfare. So, here the question is: if we increase non-compete enforceability, is that going to decrease the productivity of the economy? Is that going to decrease GDP? So, you can broadly think of two stories. One is that non-competes, either because they prevent workers from creating spinoffs or optimal matching between workers and firms, will decrease productivity. This is really a net loss for the economy, and that's very much consistent with the declines in wages that are discussed.

The second is that it just affects bargaining between the worker and the firm. There you might think if the non-compete makes it harder for the worker to bargain with their firm, the worker gets less of the pie, the firm gets more of the pie, but the pie stays the same. So, I think we don't know that much about when non-competes become more enforceable, how much of this is about the change in the pie versus what slice of the pie workers get versus what firms get. Now, there are many things I think we know very little about. So, the first is effect on prices, effect on consumer markets. So, there is one study by Kurt [inaudible 03:15:21] and coauthors finding when non-competes become more enforceable, prices for healthcare go up, but we don't know about effects on broader sectors. We know concentration changes, but we don't know the effects on prices, and I think that'd be very important to think about the effects of non-competes more broadly.

Second, we don't know much about quality. So, first, there's the quality of the job. So, you could think of: it's not just wages that matter, it's working conditions that matter. And when we get comments in, we do see comments that talk about working conditions, but there's not been systematic economic evidence about working conditions. And similarly, we don't know much about the quality of products or quality of care. So, if you think about healthcare, for example, what may matter is not just the price of healthcare, but my relationship with my doctor. If a non-compete means that my doctor has to leave the state in order to get another job, that could disrupt care and potentially reduce people's health. But we've not seen much evidence either on quality of the job or quality of products and services that workers on non-competes produce.

Miriam Larson-Koester:

Thanks, Devesh. That's really helpful to hear. I'm wondering, given the discussion we've heard from Evan and Devesh about the varied literature on non-compete effects, Dave Balan, would you like to weigh in? As far as your knowledge of the literature, do you think that you could say that non-competes are categorically bad?

David Balan:

So, happy to be here. I did wish it was going to be in the building, so that I could go back for old home week. Still kind of homesick for the FTC. And I also wanted to correct Miriam, I am a managing director at EconOne, not the managing director, and I was a senior economist at the Council of Economic Advisors, not the senior economist, so I didn't want to leave a false impression. But okay, so the people who have already spoken know way more than I do about the empirical literature, so I'm going to be talking about other things. So, I think the overarching questions, number one: are non-competes bad in the sense that they're harmful mostly to workers, and if so, are they antitrust bad? Those are the two, as opposed to some other kind of bad, like labor policy bad or some other kind of bad.

And before I start, I want to make one important distinction up top, which is there are two basic stories where non-competes might be bad and might be antitrust bad. One, which is like the glass container case, the 2023 glass container case, that's where non-competes are used by an incumbent to sort of sew up a bunch of workers so that a potential entry doesn't have access to them to prevent entry from happening. So, that is more straightforwardly bad and more straightforwardly antitrust bad. The incumbent has a lot of value in front of the entry, and if they can distribute some portion of that value, but less than 100% of it to workers to get them to sign those non-competes, and then they prevent entry. And the harm is not to the workers, rather it's to the would-be entrants and to consumers.

So, that's the easy case, right? That's the easy one. What I want to talk about, what I think we're all talking about here, is the hard one, which is the stories where the worker is the victim, the worker is the harmed one. So, that's important going forward. That's what I'm referring to here, and I think that's mostly what others are referring to as well. Okay. So, are they bad, those ones, the ones where the purported victim is the worker? So, a lot of empirical evidence seems to say mostly yes, per what you just heard. And that very, very thorough literature review that the commission did in service of the rule, Bishop still has that in its hip pocket, right, even if the rule isn't going forward, that those results are going forward and that's very valuable for my [inaudible 03:19:40]-

Devesh Raval:

It's too big to fit in my hip pocket, Dave, because-

David Balan:

Say it again?

Devesh Raval:

It's a little bit too big to fit in my hip pocket.

David Balan:

Because it's like 500 pages long?

Devesh Raval:

Yes.

David Balan:

Right. So, what I want to talk about is not the empirical literature, but rather the theoretical arguments. People have been offering theoretical arguments literally for decades about the benefits of non-competes. And it had occurred to me a while ago, so I did a little bit of writing about it, a small, small fraction, a tiny fraction of what Evan has done and his many coauthors. But are these arguments any

good, or do they maybe even point in the opposite direction? And per sort of standard Bayesian reasoning, if your evidence is completely, completely convincing, then your sort of theoretical priors don't matter, but as good as it is and as thorough as it is, it's not completely, completely decisive. So, the quality of the underlying theoretical arguments does matter. And I want to talk about whether those arguments are any good, and then I'll talk very, very briefly if non-competes are bad, are they antitrust bad? But mostly about whether they're bad at all.

So, I identified sort of three main streams of argument that are used in favor of non-competes. So, the first one is that the worker agreed to it. The worker sort of agreed to the overall package and the worker sort of got the best deal they cut on the overall package. And to do full justice to this pro non-compete argument, I generally try to steel man rather than straw man opposing arguments, you have to introduce some variant of the well-known single monopoly profit theory. And then there is not time to do justice to that, except to say what I think the punchline is, I've written about this a little bit too, that it is a real result.

It's not a chimera, it's not a figment of anybody's imagination, but it is massively overblown and reliance on it has done a lot of damage in my view. But I can't say anything more about that just because of time, but what I do want to do is I want to just list what I think are five reasons why, despite these sort of voluntary... whether you add or don't add the scare quotes to voluntary, despite the voluntary agreeing to the non-competes, five reasons why it could be bad for the worker, even though they either voluntarily or voluntarily agreed to it. So, I'm just going to blast through the five. One... And by the way, importantly, some of these apply mostly or even exclusively to sort of less sophisticated workers or lower wage workers or something, but not all of them.

It's important to note that, at least in my view, the harms to non-competes are not confined to low wage or low sophistication workers. So, some of these sound like that, but the others won't. So, I'm going to blast through the five. The firm could just mislead the worker about the presence of the non-compete. They could just not tell them that they have it until it's time to enforce it or to threaten to enforce it, or they could tell them, but tell them too late, tell them only after they've accepted the job and turned down their other job offers. Or when the time comes and there is any ambiguity about the terms or interpretation of the non-compete, there will be a completely asymmetric resolution of that where the firm has much more resources than the worker does. All the worker can do is go hire a lawyer, which is out of reach for the typical worker.

Also, and this one is my favorite, suppose I did... like Evan was talking about, the worker got some compensation and agreement for accepting the non-compete. They accepted a non-compete and they got something else that they like, at least as much as they dislike of the non-compete. And then the firm reneges. I take the job, the firm reneges. What am I going to do, quit? I can't quit, I signed a non-compete. So, in some sense, it's self-refuting. And then that's four. And the fifth one is you might think that if these things are harmful like that, that labor market competition would sort of dislodge them, that if these things really are things that workers really hate, specifically if they're things that workers hate more than the firm values them, that competition would eliminate them, but I think there's good reasons why that might not occur.

So, that's my response to the first category of argument is: should we draw a strong inference from the mere fact that the worker agreed to the non-compete, that the worker is not harmed by the non-compete? So, the answer is something to do with the single monopoly profits, which I can't talk about now, and my little five bullet points. So, that's the first one. That's the first of the three. The second of the three... These ones will be quicker. The second of the three was efficient knowledge transfer. There's some knowledge that if you gave it to a worker, productivity would go up. It's better if the worker has it, but if you give it to the worker, then the worker now has it and can offer to sell it to an

outside employer, which means you either let them walk out the door and your rival gets it, or you have to pay them to not walk out the door.

And either way, you're better off not sharing it with them in the first place. So, that's the argument and not laughable, not that you couldn't imagine it, but I think much more limited than it's often made out to be. So, for the following reasons. Number one, it only applies to the increment. It only applies to the knowledge sharing that would occur with the non-compete, but wouldn't occur without the non-compete. It's only that increment. That increment might not be that big. A certain amount of information has to be shared to have the job at all. Now, maybe you could say that maybe some jobs cease to exist because of that, but that seems like a bridge too far. So, you're talking about this increment which might not be very large. That's the first problem. The second problem is that while we all understand the idea, that information in order for valuable information to be acquired in the first place, there has to be a reward for it. That's why we have patents, that's why we have a lot of things.

There has to be a reward for it, and maybe the non-compete is what's necessary to protect that reward. But, as in the world of patents and other intellectual property, that's an important part of the story, but it's not the only part of the story because it's also the case that the moving of ideas and the moving of people is itself innovative because the last innovation is an input into the next innovation. And it may be that people moving around unencumbered by non-competes and ideas moving around not encumbered by non-competes is a good thing and not a bad thing. And I think the best example of this is California, where non-competes are not enforceable, and it's the most innovative place in the world. It's not a proof. It could be that California would be even more innovative if non-competes were enforced, but I tend to doubt it.

I tend to imagine that that laxness about enforcement or that un-enforceability of non-competes is helpful to innovation, or at least neutral, not harmful to innovation and information sharing along with it. And then finally, maybe non-competes facilitate training, worker training. And I have two responses to that. One is the same argument as before, it's only the increment of training, the training that would happen with the non-compete, but not without the non-compete. So, if you're a hospital and it's a nurse, you have to give the nurse a certain amount of training for them to be a nurse. You can't withhold it and still have the nurse job be the nurse job. And then the second point has to do, which I will skip in the interest of time, has to do with the difference between firms... the labor economist distinction between firm-specific versus industry-specific or general human capital. A non-compete obviously can't protect firm-specific human capital, it's firm-specific.

It doesn't leave when the worker leaves, so it's only general human capital, and there's a whole separate avenue of argument about that as well, which I will skip in the interest of time. And then I will finish up by saying, finally, having now said, are they bad, are they antitrust bad, which was the second prong... And I will just make one very narrow and quick point about this, which is: it seems intuitive that if they're going to be antitrust bad, if non-competes are going to be antitrust bad, it's going to have something to do with monopsony power. It's going to have something to do with lack of competition in the labor market. And my leaning, at least, is that that's a mistake, that if you're going to have non-competes be antitrust bad, it's not because the labor market is not competitive, it's because the labor market is competitive or at least somewhat competitive, maybe not as competitive as you would like, but pretty competitive at least, but the non-compete prevents you from accessing it.

It's not that the labor market is no good, it's that the labor market is good and the labor market is what gets you stuff, what gets you good working conditions, and it's precisely the non-compete that prevents you from accessing it. I think that is a more viable path forward. There's tons more to say about that, but a more viable path forward than having to claim... I think both on theoretical grounds, done on case

bringing grounds, having to prove that there's a lot of monopsony power before you can bring a non-competes case is not the answer. And that with that, I, having spoken too long, will yield.

Devesh Raval:

As an aside, I fell into category number two of Balan. So, when I went to Amazon, I had to sign an offer letter. It mentioned that I would have to sign a non-compete agreement, but it didn't actually provide the non-compete agreement. So, the first time I saw the non-compete agreement was on my first day at work after flying to Seattle and finding an apartment and so on. And I think it covered all customers, suppliers, and competitors of Amazon, which is probably the entire private business market, but it did not cover the United States Government, so I was able to come to the [inaudible 03:29:51]-

David Balan:

And here you are. So, here you are.

Miriam Larson-Koester:

Well, glad that you're here, Devesh. And thank you so much, Dave Balan, for

Miriam Larson-Koester:

... that overview of the theoretical arguments. And I think I want to turn it back to Evan Starr. He already talked a little bit about empirically areas where we think non-competes can be pro-competitive, but they don't turn out to be. And so I'm wondering if you could give us a little more detail, including on your recent experimental work on information leakages.

Evan Starr:

Yeah. I think Dave and Devesh both provided such a helpful overview. And let me just recap. Theoretically, this idea that by preventing a worker from moving to a competitor, you can give the firm more interest in that worker's output. And therefore, you might invest more in that worker, you might share more with them so that they're more productive for you. That finding has some support in the literature. There's some evidence that non-compete agreements do spur training and investment. And so that argument does appear to hold some weight. I think what is sort of interesting coming back to some of the points that Dave made is that despite some of these positive investment effects that we see, we still nevertheless tend to find that the enforceability of non-compete agreements tends to depress wages despite the fact that it's increasing training, or it tends to suppress innovation even though it's increasing investment.

And I think that the way to understand those relationships is that innovation is... Sorry. Firm investment is only one input to innovation. There's many other inputs, including as Dave was saying, ideas circulating in the economy. And so it's very possible to have one input go up, the firm investment, but then on net for innovation to fall. And the same thing is true for wages. It might be that the firm invests more in training, but that wages nevertheless fall because the labor market is not necessarily as competitive now for that worker after they've signed the non-compete. And it might be the firm that captures most of the benefit of that training.

And so I think this is a hard point that people get stuck on sometimes, which is that you might cling to the innovation story. We say, "Okay, we want to spur innovation." That's great. But I would argue to push a little more downstream and say, "Okay, well, what are the downstream outcomes that you really care about?" If it's innovation, if it's wages, or as Devesh said, working conditions, or productivity, or

prices. And so we get stuck sometimes on these intermediate outcomes. And I think looking at the broader downstream outcomes is an important step to keep in mind.

Miriam Larson-Koester:

That's super helpful. Thank you. Bruce, we haven't heard from you yet. I'm wondering if you would like to add anything based on some of your work.

Bruce Kobayashi:

Oh, great. Great. I get to talk. Thanks. There's so much. Let me start with Evan, because Evan's such a central figure here in this area empirically. And I didn't want to make this try and pick apart all of Evan's stuff, especially this great article with Greenwood and Kobayashi. But I think what you have to do is you have to look at what the studies do and figure out what inferences you can make. Let me start off with the Cowgill, Freiberg, Starr field experiment, which is great. I saw it cited in early draft of a paper and it was under embargo. And field experiments, I think somebody, John List or somebody will win the Nobel Prize for it, but it's a sort of experimental setting that's more realistic.

And so Evan got a firm who hired people to look at resumes and things like that. And then he also got another firm, Firm B, which then allowed him to figure out whether people moved. And they randomly assigned non-compete agreements and things like that. And they figured out, did the guy look at page seven? How long did they linger over the page seven, which has a non-compete and stuff like that. And in the end, they conclude that non-competes reduce earnings and mobility, which is consistent with his earlier work and the work of others. And he said, "Without adding any additional protection for trade secrets relative to a basic contract with a non-disclosure agreement."

Now, the people who end up going to Firm B, at about 4% of them blow through both the... Well, they blew through the non-compete agreement and they blew through the NDA. And they do a lot of sort of stuff to figure out what the causal effect of these things are. But the one thing that's sort of missing from these field experiments, and that's the unfortunate thing, it's probably that the IRB didn't let you do it, is you didn't get to refer all the people who went to Firm B and basically just used Firm A's resumes. You changed them a bit to see if they copied or if they were new and sue them.

And so the mechanism really is people who didn't really believe that they would be enforced, but there was no mechanism to actually change those priors. And so it's an interesting field experiment. It would be more interesting if you could exogenously change their priors about the probability of enforcement. Because that's the way in which you, as everybody has said, you keep the trade secrets or confidential business information from going over there in the first place, and that's sort of missing from the field experiment. And Evan, you can jump in if I'm saying anything inaccurate.

Evan Starr:

I'll just say, Bruce, real quick, you're right that per the IRB, we were not able to actually threaten to sue people and no information about who violated their non-compete or their NDA was shared back with the first company, and the first company was okay with that. But to your point in the experiment, we did have a reminder where the first company reminds people of their obligations, which is a proxy for whether they might enforce it, even though we couldn't actually enforce it.

Bruce Kobayashi:

The other thing that I've been reading, I saw Reinmuth and Rockall at CLES, Georgetown, and there are, I think, four papers that use causal designs. Evan talked about causal versus associational designs, and they use diff diff and stacked or some other kind of causal mechanism, stacked regression. And there's

Jeffers, there's Hay, Johnson, Lipsitz and Pei, and Rockall and Reinmuth. And the one thing that always struck me, and Evan and I and Brad have just talked about this a bit, is that they all focus on a measure of patents as the measure of innovative output, and they use forward and backward weighting citation weighted patents. And it really seems that the story that you hear when you talk to firms that really support robust use of NCAs for people with trade secrets is that it's a trade secret, it's not the patenting that should be the measure. And that's sort of one reason for the paper on trade secret litigation, although that really wasn't getting at what happens to trade secrets. And it's really hard to figure that out why because they're secret. And so I think one of the things that you might want to do, and Reinmuth and Rockall do it to some extent, they basically see if most of the reduction in patenting that they find after an increase in enforcement, if you believe it's sort of this switching from patent to trade secrets or vice versa, you'd see it with process patents, and they basically don't find that the reduction is disproportionately centered on process patents.

And Johnson, Lipsitz, and Pei, in I think the most recent version, they've obviously had referees tell them to do stuff, but they basically look at a paper, use a measure of trade secret use by Jeffers, which we do also. And they say, "Well, it's positive, but it's not pretty small. It doesn't seem to be important enough to outweigh the reduction in innovation." But there's a lot of difference in difference type of studies which are based on the staggered adoption of the Uniform Trade Secret Act over a 20-year period. And they find that when a state adopts the UTSA, which strengthens enforcement, including strengthens the remedies available for trade secret misappropriation, Ping finds that patenting drops and it does seem to be that there is, if you believe that evidence, a lot of marginal substitution between patents and trade secrets. Castellana uses the same variation when states adopt the Uniform Trade Secrets Act, and she finds that it sort of increases VC funding.

All of the papers except Reinmuth and Rockall, so Jeffers, Johnson, Lipsitz, and Pei, and Hay, look at whether investment increases, and I think Evan talked about that. And what you end up seeing is a mix. I mean, Jeffers finds that capital investment goes up, but not R&D. Hay finds that it doesn't matter what happens, R&D goes up, but capital investment doesn't. And Johnson, Lipsitz, and Pei find that R&D goes up. And then because patenting goes down, they said people become less productive. It would be, I think, a bit premature to say that we know a lot about what happens to innovation. I think we're missing a big chunk of what I would think would be the primary effect, and that would be the effect on trade secrets. That's one area I would want to look at.

The other thing that sort of struck me from watching this program from Chairman Ferguson and Commissioner Meador's remarks, as well as the panels on victims, is that it seems like a big problem is that it's really hard, even if you have a statute, and Anthony's work has done some of this, even if they have a statute that makes the non-compete unenforceable, or there is in the common law of the state a lot of judicial decisions saying that enforceable NCAs have to have notice and consideration, narrow definition of legitimate employer interests, which are trade secrets, confidential business information, and customer relations, reasonable geographic and duration limits. And you see these cases like the Prudential case or the pet cremation case, and they just do it in a blanket setting. And there are some states, Evans home state of Maryland is one of them where they empower class action lawyers to sue firms who impose or make people sign unenforceable non-competition agreements.

And I think this is why the low wage thresholds are so important because there there's no, you don't have to get into, was it a reasonable NCA, is there some legitimate employer interest and stuff? Those things are per se unenforceable under... In Virginia, they just raised it. It was, I think, around $64,000. They just passed a bill to raise it to the median wage in the state. But there, you have a pretty good idea of what you're doing. And a lot of the problems seem to be enforcement and the ability of people to practically enforce the limits on these. And one thing, I'm going to think back to my first time at the FTC, which was in 1992, and I worked in a part of the FTC called DEPA, which was the Division of Economic

Policy Analysis. It was like the greatest government job I ever had, way better than being bureau director, by the way.

But we just did studies and did interventions, and then we would go and send the states or other state agencies the studies, and tried to get states to improve enforcement. And one of the things that I think is low-hanging fruit here is that there is a model statute. I think Evan helped the Uniform Law Commission with this, but Stuart Schwab was the reporter, really, really smart guy. And it basically has, I think, a pretty good approach to both sides, limiting. It has a low wage ban, it has a narrow definition of legitimate employer interest, it has geographic and duration limits, it allows civil fines for trying to enforce a non-enforceable agreement.

And so one of the ways I think the FTC could, and they've done this in the past, they had the Economic Freedom Task Forces, try to get states to improve their laws, improve their enforcement. And that might be a way to sort of... As Dave Balan said, "There's two things. There's whether these things are bad for employers and whether they're an antitrust violation for things that are just not antitrust violation, there's no monopsony power, there's no raising rival costs or input foreclosure that seems plausible." One way to get this is to try and get the states to improve their statutes, and once they improve their statutes to improve their enforcement.

David Balan:

Well, just to clarify something, I am saying that the kind of non-compete where the worker is the victim is an antitrust violation. The other kind, the glass containers kind is obviously an antitrust violation. My whole thing is that this kind is an antitrust violation as well, but probably one not rooted in an monopsony power, but rooted in something else.

Bruce Kobayashi:

Well, and then as you know from being there, the FTC is a fairly small agency with limited resources. And so you have to pick and choose. And as Chairman Ferguson said, I mean, what they're going to focus on are things with monopsony or as you suggested, some kind of input foreclosure. And under the antitrust laws, if you want to go and say, well, if it's hold up, maybe you could do that as devest and you could do that on the consumer protection side. But I think when these things are so ubiquitous and if you're not going to outlaw them on their face, you have to go back and try to improve the way in which these things are screened out and enforced at the states. And the FTC has traditionally had a large role in getting that type of information to decision makers in the states.

David Balan:

Can I just make one remark in response to Bruce? I'll be very short.

Miriam Larson-Koester:

All right, great.

David Balan:

One thing that I do think is noteworthy is that there are the less ambiguous cases, very restrictive non-competes for sandwich makers, and then there are the ones where it's more debatable. But I do think it's relevant. The fact that firms impose non-competes when they are very clearly bad, unjustified, is relevant to the evaluation in the more ambiguous cases that does color the appropriate evaluation of the more ambiguous cases in a way that I think are used for crediting those arguments less.

Miriam Larson-Koester:

Great. And this is actually a really an interesting discussion that you guys have brought up to set up the next question for Devesh, which is if non-competes are often raising significant issues, how do you think the FTC can have the most impact deterring them? What are particular targets that might be best for our resources?

Devesh Raval:

Sure, Miriam. That's a great question, although I think a pretty hard question, but I might take a step back because we've been talking a lot about different theory papers, empirical papers done in the past 5 or 10 years. And I thought I'd start with a story, which is why Silicon Valley is called Silicon Valley. This starts with Bill Shockley, who was a genius, Nobel Prize winner originally at Bell Labs for inventing the semiconductor. And he decided after inventing the semiconductor, he would move to California to a small college town named Palo Alto, surrounded by fruit orchards and create a semiconductor company. And he had a bunch of brilliant engineers to go out there with him to start building semiconductors.

And it turns out that Shockley, while being a brilliant genius, was not a very good manager. He's the kind of person that put all of his employees salaries on a bulletin board so they could all see what each other's salaries were. He asked them to all rate each other. At one point, things weren't going fast enough, so he accused one of his employees of sabotage and tried to get them to do a polygraph test. You can imagine the employees were not too happy with this and eight of them, which turned out to be later called the Traitorous Eight, walked out of Shockley Semiconductor and created Fairchild Semiconductor, led by Robert Noyce. A year or two later, Fairchild Semiconductor created the first practical integrated circuit or microchip and soon became the biggest producer of such microchips.

Now you might ask who's buying these microchips in the 1960s. The answer is NASA for the Apollo program, that's a big reason why the U.S. was the first to get to the moon fulfilling Kennedy's dream and why we beat the Soviet Union to get there. And now Fairchild Semiconductor you haven't heard of now, that's because it founded a lot of other companies when people, engineers left and created other things, including AMD and Intel, which is the first to create the commercially available microprocessor. It's really the fact that there were no non-competes allowed a lot of spinoffs that ended up creating the tech industry in Silicon Valley.

I get to all of this to answer your question about where the impacts would be. And I think there's a trade-off here. I think when it comes to low wage workers, it's probably the easiest case to make where it's hard to argue the pro competitive justifications, but the impacts are going to be limited to worker wages in those markets, and they're probably low relative to some of the markets where workers have less options.

And so if you're a PhD engineer, expert in semiconductors, there may be only a couple of companies for you to go to, whereas for low wage workers, there may be more options. But I think if you think about the overall benefits, the two places I would look would be number one, innovative high-tech industries. Evan's work finds that a little bit more than a third of engineers and math, computer science professionals are on non-competes. And there you could imagine huge benefits from innovation, new products, things like that. And then second would be healthcare where there may be effects on downstream product markets, so more competition and lower prices, it can lower healthcare costs. I think ultimately there's a trade-off here. Low-wage workers, it's probably an easier case to make, but some of these innovative markets or healthcare markets, there may be much larger benefits from innovation or from lower prices.

Miriam Larson-Koester:

Thanks, Devesh. And we're coming up on the hour here. We only have seven minutes left. With that in mind, I'm going to turn it back to Dave in terms of thinking about based on the econ literature, are there bright lines we can draw? But Bruce, if you want to weigh in as well, I know you talked last, I want to give you the chance to get a last word in as well, but keeping in mind that we stop at five.

Bruce Kobayashi:

Okay. I just want to say that there's a lot more work for Evan because I looked at the Reed, Beck, & Wright website this morning, and there have been seven bans on healthcare alone in 2025. And so I think it's a great time to sort of look at, I mean, that's a couple years from now, maybe you've got some good grad students, but yeah, I think the thing that ought to happen is replication. I don't mean digging through Evan's data and his data programs, but yeah, just do a lot of stuff on all these new statutes that are popped up that aren't in the current literature. I mean, all of the innovation studies stop before all the bans. Reinmuth stops at 2016, but she said we are not going to include Oregon, at least that part of the variation because it's partial ban. And so nobody's looked at the ban. Did you already do Minnesota?

Evan Starr:

No, let me just echo, Bruce. I think you're right. There's kind of a stream of research that kind of stopped in 2014 or so looking at those policy shocks. And now over the last decade, there've been a bunch of bans, Minnesota, of course, with a complete ban across the state. And I think there's a time lag that you need to have to study these things. Certainly in healthcare, a study that looks at these bans and how they impact healthcare prices and quality of care and patient outcomes is a very natural thing to take on. And we certainly think all of the studies that we've done with maybe less good policy variation, maybe we can revisit down the road. And I say we in the broad sense because I invite the broader community of people to keep working on this stuff.

Bruce Kobayashi:

I think I'm always a big proponent of know what you're doing before you do something. Actually, when I went to George Mason, there was a guy named James Buchanan there. He won the Nobel Prize while at George Mason. And he looked at me, he said, "Where'd you come from?" I said, "Oh, I was at the FTC." And he goes, "You know what I tell government, people who work in government, don't just do something, stand there." And I mean, I knew what he was talking about. And I think if you're looking at the bright side of the abandonment of the FTC rule is that I think the states are gearing up again. I think Rusty Beck said there's 74 bills that have been in the states. And so maybe not for social welfare, but for the welfare of Evan Starr and his co-authors, I think that's going to be a bonanza and we're going to learn a lot.

Miriam Larson-Koester:

That's great. Dave-

David Balan:

I have one more thing to say, but if anybody, especially Evan, who didn't talk that much but has done the most, I will happily seed my time if somebody else wants it. Otherwise, I'll make my one quick point.

Evan Starr:

Go ahead, Dave. Make your point.

David Balan:

All right. Up until now, it's been things that I hopefully have some claim for some kind of expertise in. This is going to be a little bit more in the category of friendly advice. As people have noted, there's tens of millions of non-competes. If you're not going to have a rule, how are you going to put any kind of dent in this, as Bruce was just talking about? Well, so hopefully a lot of people want to obey the law. If the FTC acts, then maybe people will obey the law. And I wonder about whether this might be an appropriate avenue for some FTC guidance for people who want to obey the law, that might seem like it would have a big impact relative to its size. But insofar as you're going to do this for law enforcement, insofar as you're going to do it to bring cases, in order to put any kind of dent in it, you've got to find...

And yes, the hope is that state AGs and maybe private litigation or whatever will do most of the heavy lifting, but insofar as FTC enforcement is going to do anything, you need to find some category of cases, whatever you think the most egregious ones are, and be prepared to go to court and argue for some kind of low standard, some sort of quick look standard or burden shifting where they have to show the justification or whatever. You have to have credible threats, and because of the FTC's very low resources, that credible threat has to be not only can we sue you and win, we can sue you without breaking a sweat. I would counsel the FTC to find whatever it thinks the worst ones are, maybe it is the low wage ones, and argue for and see if you can win. We'll see what happens, whether you win or not, a very, very quick look type standard and then bring those. That's it for me.

Miriam Larson-Koester:

That was great, Dave, you're in under time, and I think I'm going to call it now and say this has been a fantastic discussion and I really appreciate you all coming here and participating. I'm going to turn it back now to Kelse Moen, who will say a few closing words for the workshop.

Kelse Moen:

All right. And thank you, Miriam. This concludes today's event. We thank everyone for coming. Thank you to all our panelists, once again, for a fascinating discussion across all three panels. Thank you to Chairman Ferguson and Commissioner Meador for their thoughts too, and thank you to everyone who's tuned in. I hope that this was an interesting and informative day for everyone, so thank you, and that's it for today.