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Office of Commissioner
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"Moving Forward: Protecting Workers from Anticompetitive Noncompete Agreements"
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Thanks to Logan for that great introduction. And thanks very much to Chairman Ferguson and Kelse Moen for convening this workshop, on a very important issue: noncompetes 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 anticompetitive 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 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 noncompetes today.

In the simplest terms: noncompetes—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 noncompetes. 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 noncompetes 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 noncompete clause left her driving over an hour away, across state lines, to a hospital far away from her family.[1]

Then there was Deborah, a bartender who filed a complaint with the Commission not long ago about just this issue. Deborah's noncompete banned her from working at a competitor within 50 miles for 2 years. When she changed jobs, her old employer tried to sue her for $30,000.[2] 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 noncompetes—but in some cases, *interns*.[3]

Today, at least 30 million Americans are impacted by noncompete clauses. Many of these noncompetes, to be clear, would likely be unenforceable in court. As such, they are 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. It 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, noncompetes make little sense. The workers' skill sets 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 noncompete 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 skill set.

As I see it, noncompetes can violate Sections 1 and 2 of the Sherman Act and Section 5 of the FTC Act. And where that happens, the Commission should vigorously enforce the law. Because when noncompetes 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.

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[1] https://archive.ph/P5qGk#selection-2227.217-2227.289

[2] *Id.*

[3] https://www.wsj.com/articles/interns-job-prospects-constrained-by-noncompete-agreements-11561800600?mod=article_inline

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 noncompetes calls for case-by-case analysis—instead of a catch-all rule that paints with too broad a brush. At the end of the day, all noncompete agreements *aren't* created equal.

As I recently wrote in a Commission statement, noncompete agreements can—in the right narrow contexts—protect legitimate investments in training, encourage intra-firm collaboration, and safeguard proprietary and confidential information. These are cases where we're talking about uniquely sophisticated parties with very niche skill sets. 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. Otherwise, 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 noncompete 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 noncompetes have anticompetitive effects, before moving to a possible legal framework.

To begin with, we should consider *employee wage and skill level*. Noncompetes are less appropriate when workers lack extensive training, have limited access to nonpublic information, and are not performing specialized functions. As I've said, the use of noncompete agreements in this context is likely to harm worker mobility, keeping them from effectively competing for better wages and worker conditions by taking their labor to different jobs. In this context, noncompetes often don't make much sense. Conversely, where workers *are* paid higher wages, and where they have access to specialized training or information, noncompetes 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 noncompete agreement—even where a specialized employee is concerned—don't remain indefinitely static.

Deployment in a distribution network matters, too. Noncompetes across a distribution network, such as in the franchise context, can be anticompetitive, to the extent they prevent independent operators from competing for employees.

Finally, when we're considering noncompete 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 the contextual factors that should govern how we think about competitive effects in the noncompete 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:

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 noncompete 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 a Guinness. But that is not proprietary knowledge of the sort that makes a noncompete appropriate in the bartending context.

Availability of less restrictive alternatives. Is a noncompete reasonably necessary to prevent harm? Are there other means, such as nondisclosure agreements, that might address the problem without restricting the worker's mobility? Oftentimes there are. So, employers pushing for noncompetes should be able to explain why a noncompete is the only way to protect their interests.

Scope and duration of the noncompete in question. As I've said, individual cases matter. But I think in general, noncompetes 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 anticompetitive.

Market power. Where a firm has greater market power, a noncompete raises greater competitive concerns. If there are only a handful of buyers for an employee's labor, a noncompete has a much more pronounced effect.

Finally, *evidence of economic effects*. Is there widespread use of noncompetes across a whole sector? Is there potentially a horizontal agreement among competitors, like a no-poach agreement? Do employees affected by noncompetes have an opportunity to challenge them by demonstrating procompetitive 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 noncompete agreements violate the law. We don't need a unilateral, top-down, regulatory policy decision. Instead, we need to exercise sound legal judgment that looks 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, just to bring things full circle: when we tackle a big issue like "affordability" we need to be thinking about this in a holistic way. That means looking at both supply issues and demand issues.

The wrong kind of noncompetes, 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 contexts in which noncompetes do make sense. Striking that balance is what responsible enforcement looks like here.

Thank you.