

United States Senate

WASHINGTON, DC 20510

September 21, 2023

The Honorable Lina Khan
Chair
Federal Trade Commission
600 Pennsylvania Ave, NW Washington, D.C. 20580

Dear Chair Khan:

We write in regards to the Federal Trade Commission's (FTC) proposed rulemaking to restrict the use of non-compete agreements that hurt consumers and small businesses. Specifically, we wish to commend the FTC for leveraging its authority under the FTC Act to combat the widespread misuse of non-compete agreements (NCA), which cause significant economic harm to employees and employers alike.

The use of NCAs has exploded in recent years, with an estimated 30 million Americans currently subject to a non-compete clause as a condition of their employment.¹ They are used in a wide variety of industries, and are not restricted to highly educated employees or those with technical backgrounds. One recent study found one-third of workers making less than \$60,000 have signed NCAs.² The FTC estimates that almost half of all corporate firms in the U.S. are using NCAs.³ Simply put, NCAs are everywhere. And yet there are real concerns that they stifle fair and open competition, impede new business growth, disproportionately impact low-wage workers, and significantly depress wages nationwide.

We are particularly concerned about the fact that NCAs pose a barrier to individuals who are looking to start a business in their chosen field particularly at a time when new business formation is trending downward.⁴

Over the past several decades, new business formation has declined across virtually all regions and sectors of the economy,⁵ and data indicates that new businesses and startups are less likely to form in areas where NCAs are strictly enforced by employers.⁶ Our economy thrives when we have new businesses to drive economic growth and create jobs, yet greater enforceability of NCAs reduces new business formation by 18 percent.⁷ On the other side, there is evidence that prohibiting the use of NCA's can stimulate economic growth. For example, when Hawaii took steps to ban NCAs for technology workers, the state saw a 10.2 percent increase in the establishment of new technology firms.⁸ The body of evidence suggests new businesses are more willing to form and enter markets if there are skilled workers who are not subject to NCAs.⁹

NCAs not only harm new small businesses and potential entrepreneurs, they limit workers' opportunities and stifle their wage growth. Early career wage growth is highly dependent on

¹ <https://www.ftc.gov/legal-library/browse/federal-register-notices/non-compete-clause-rulemaking>

² "Noncompetes in the U.S. Labor Force." U of Michigan Law & Econ Research Paper No. 24831, 2018.

³ <https://www.govinfo.gov/content/pkg/FR-2023-01-19/pdf/2023-00414.pdf>

⁴ Cong. Budget Off., Federal Policies in Response to Declining Entrepreneurship (December 2020).

⁵ <https://eig.org/scsbe-on-small-business-and-the-american-worker/>

⁶ Id.

⁷ <https://eig.org/non-compete-brief/>

⁸ <https://eig.org/wp-content/uploads/2023/03/Noncompete-Reform-Research-Note.pdf>

⁹ <https://www.federalregister.gov/documents/2023/01/19/2023-00414/non-compete-clause-rule>

smooth transitions between jobs¹⁰, and individuals who move between companies experience higher wage growth than those who do not¹¹. When workers cannot freely move between businesses, their wages suffer. In fact, increased enforceability of NCAs are associated with a 3-4% decrease in the average worker's earnings. .¹²

Curtailling the use of NCAs will allow our economy and labor markets to operate more efficiently. Litigation, or threat of litigation, is the primary enforcement mechanism for NCAs and is often abused. This is simply another form of red tape that reduces productivity and stunts, rather than facilitates, commerce. The presence of looming lawsuits from larger companies with the financial resources to engage in legal battles prevents the creation of new firms.¹³ And while high-powered law firms are happy to do business litigating NCAs in other fields, their own industry recognizes the damage they do: the American Bar Association prohibits the use of non-competition clauses in partnership, member, shareholder, or employment agreements among attorneys.

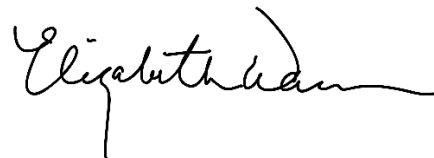
As you review public comments and draft the final rule, I/we urge you to keep certain principles in mind:

- Input: Seek comments from state governments that have already taken action to prohibit NCAs and can offer valuable perspective on the challenges and benefits of implementing restrictions on the use of NCAs.
- Alternatives: Consider how non-disclosure, non-piracy, or non-solicitation agreements operate as alternatives to NCAs.
- Keep the unique needs of small businesses and start-ups in mind.

The free movement of individuals in and out of jobs is a crucial component of an entrepreneur-driven economy.¹⁴ Yet NCAs are anti-competitive and the kind of corporatism that frustrates hard working Americans. Workers should be free to seek better jobs in a competitive market place free without fear of retribution from their employer. Limiting NCAs will benefit workers and businesses everywhere, spurring innovation and job creation allowing our economy to achieve its full potential. We urge the Commission to quickly promulgate a rule to prevent the misuse of NCAs and allow workers in all sectors to freely drive our economy forward.



John Hickenlooper
United States Senator



Elizabeth Warren
United States Senator

¹⁰ <https://eig.org/scsbe-on-small-business-and-the-american-worker/>

¹¹ <https://www.atlantafed.org/chcs/wage-growth-tracker.aspx>

¹² Matthew S. Johnson, Kurt Lavetti, & Michael Lipsitz, The Labor Market Effects of Legal Restrictions on Worker Mobility 2 (2020), [https:// papers.ssrn.com/sol3/papers.cfm?abstract_ id=3455381](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3455381).

¹³ https://www.kauffman.org/wp-content/uploads/2019/12/entrepreneurship_policy_digest_july_2014_rethinking_non_competes.pdf

¹⁴ [Entrepreneurship through Employee Mobility, Innovation, and Growth \(atlantafed.org\)](https://www.atlantafed.org/entrepreneurship-through-employee-mobility-innovation-and-growth)