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Sent: Wednesday, April 19, 2023 4:38 PM
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Subject: Non-recruitment Agreements

We write to urge the FTC to expand its definition of non-compete agreements to unambiguously include non-recruitment agreements (also known as no-hire or employee non-solicitation agreements). Currently such agreements could potentially but unclearly be considered de facto non-compete agreements according to the definition in the proposed rule. There is ample precedent, justification and public policy interest in support of such a change.

We were planning to write more, but in the course of our research we found this paper, written by Charles T Graves [2], a well known litigator and trade secrets law professor, and recently published in the Loyola Law Review which was cited in the footnotes of the Balasubramanian paper. Mr. Graves makes the argument against non-recruitment agreements far better than we will ever be able to: https://digitalcommons.lmu.edu/cgi/viewcontent.cgi?article=3148&context=llr

Very briefly, it has been the policy of this agency to eliminate the use of no-poach agreements. A non-recruitment agreement is, in essence, a no-poach agreement between an employer and an employee. Non-recruitment agreements are pervasive, and frequently accompany non-compete agreements. Data in the Balasubramanian research cited throughout the commission's rulemaking note shows that a non-recruitment agreement accompanies a non-compete agreement roughly 75% of the time. Pervasive use of non-recruitment agreements shares the same problems as no-poach agreements in terms of wage suppression, and raises monopolistic concerns by making it harder to form competing businesses. Additionally, these agreements are often worded so broadly that co-workers are often afraid to discuss job dissatisfaction or higher wages options at competitors with their colleagues because such discussion might be in violation of a non-recruit agreement – banning such agreements would be a win for workers and collective bargaining, and consistent with the policy goals of the FTC and NLRB's recent MOU on interagency coordination. Finally, since 2018 there is a growing body of legal precedent in California state (which served as one of the models for this proposed rule) that non-recruitment agreements are considered unfair restraints on competition [1].

Thank you for your consideration
(also submitted to the federal register)

[1] https://www.skadden.com/-/media/files/publications/2021/02/califhighcourtmustclarifyemployeenonsolicitationpo.pdf
[2] Mr Graves has no affiliation, in fact we have never communicated with him, we have cc'd him to give credit where credit is due and in case he has anything to add. We do not know if he supports this proposal but assume he would given his paper