



UNITED STATES OF AMERICA  
FEDERAL TRADE COMMISSION  
WASHINGTON, D.C. 20580

Office of Policy Planning

March 8, 2023

**MEMORANDUM**

**FROM: Shannon Lane**

**TO: April Tabor**

**SUBJECT: Summary of Elizabeth Wilkins' Speaking Engagement with Harvard Law School Employment Law Students**

**EXECUTIVE SUMMARY:**

On March 2, 2023, Elizabeth Wilkins, Director of the Office of Policy Planning and Chief of Staff to the Chair, spoke to an Employment Law class at Harvard Law School about the Federal Trade Commission's ("FTC") proposed Non-Complete Clause Rule, 88 Fed. Reg. 3482 (Jan. 19, 2023) ("Proposed Rule").<sup>1</sup> The class was led by Professor Sharon Block, Professor of Practice and Executive Director of the Center for Labor and a Just Economy. Ms. Wilkins spoke about the Proposed Rule, and students then had the opportunity to ask questions.<sup>2</sup> This memorandum is to be placed on the public record pursuant to 16 C.F.R. § 1.26(b)(5) and the Notice of Proposed Rulemaking, under which summaries or transcripts of oral communications respecting the merits of the proposed rulemaking from any outside party to any Commissioner or Commissioner advisor are to be placed in the public record. This executive summary does not summarize the entire presentation, but rather focuses on information concerning the Proposed Rule that is not already included in the rulemaking record.

Ms. Wilkins discussed the Proposed Rule's requirement for employers to affirmatively tell workers that the non-compete has been rescinded. The FTC is concerned about worker mobility and its economy-wide effects, and Ms. Wilkins explained that the Proposed Rule will have limited effect if workers do not know that their contracts are unenforceable. She also explained that the broad definition of worker was included in part due to evidence that employers do not distinguish between types of employees in their non-compete clauses.

One student asked how the FTC would enforce the Proposed Rule. Ms. Wilkins explained that the FTC's enforcement powers were limited. The Proposed Rule does not provide a private right of action, and the FTC has limited resources. The FTC will need to determine the most effective way of ensuring compliance. Later, another student asked what the remedy is if employers violate the notice requirement. Ms. Wilkins stated that remedies are limited. There is no private right of action or immediate damages or penalties. The FTC can sue and go through its administrative process to obtain a cease and desist order. Only if the cease and desist order is violated can the FTC get penalties. While consequences for regulated businesses are limited, one of the reasons the FTC wanted to do a rulemaking is to improve clarity and administrability. Clean, clear, easily administrable rules have power, and they make wrongdoing public and empower workers to informally police conduct.

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<sup>1</sup> Shannon Lane from the Office of Policy Planning was also present.

<sup>2</sup> The class requested that their questions be recorded as anonymous.

Another student asked whether the functional definition of non-competes in the Proposed Rule made non-competes difficult to study, and asked how the FTC would draw the boundaries of that definition. Ms. Wilkins responded that the evidence the FTC has concerns the effects of agreements that prevent workers from switching jobs. Economic literature is, by its nature, functional. Economy-wide, preventing workers from switching jobs has these wage and other effects. If the clause in question has the same effect as a non-compete, it will have the same effects that the FTC is concerned about. In addition, the functional definition is very important to prevent employers from circumventing the rule with creative drafting. From a policy perspective, it is too dangerous to limit the definition to the magic words “non-compete.” However, administrability is also an important question for this provision, including how clear it is for workers and employers. Ms. Wilkins emphasized that the FTC is seeking comments on this definition, including suggestions on balancing anti-circumvention goals with administrability.

A student asked about the scope of the rule and whether it applies to all employers and employees. Ms. Wilkins outlined the provisions in the Proposed Rule, and explained that while there are different rationales for different types of workers, the full evidence supports a ban on non-competes. She also noted that the FTC is traditionally focused on competition, not labor and employment law, and typically looks at restraints of trade and asks if there are legitimate justifications. Here, the common justifications such as training and protection of IP do not exist for low wage workers, so the FTC considers those non-competes naked restraints on competition. Those justifications might exist for other workers, but there are less restrictive means of protecting those investments. The Proposed Rule does not endorse other types of agreements, it just states that they exist and that the Proposed Rule does not ban them. Ms. Wilkins further explained that there are greater harms to product markets when higher wage or knowledge workers are subject to non-competes since they may have a greater effect on innovation and business dynamism and formation. Ms. Wilkins also noted that the Proposed Rule does not have a carveout for small businesses, as small businesses would not need non-competes more or less than other businesses. She stated that in her view, the most important alternative to non-competes is to create a better workplace. The Proposed Rule distinguishes between unfair competition, which binds workers to the workplace, versus competition for workers on the merits. In the labor market, that means better pay and benefits, safer workplaces, flexible schedules, and other things workers may value.

Another student asked about training repayment agreements (TRAs) and how the FTC would respond to critics who say that the Proposed Rule would decrease training opportunities and employers paying for trade school or on the job training. Ms. Wilkins first said that TRAs may be limited under the functional definition of non-competes, but they are not otherwise covered under the Proposed Rule. She noted that many concerns have been raised about TRAs, but one reason the Proposed Rule is limited to non-competes is the amount of evidence on the effects of non-competes. The evidence is not quite ready yet on other types of agreements. On training more broadly, Ms. Wilkins noted that this is a common justification for non-competes and there is some literature to that effect. However, the FTC finds that 1) there are other means to protect those investments and 2) if other options are insufficient, the harms of non-competes outweigh their benefits even if there is some loss in training. Non-competes take away workers’ leverage against their employer because they have no exit option. While there may be some concerns about training, banning non-competes has significant benefits in giving workers leverage for better pay and working conditions.