



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

Office of Policy Planning

January 14, 2025

VIA ELECTRONIC MAIL

The Honorable Richard H. Stuart
Senator
Senate of Virginia

Re: S.B. 1218

Dear Senator Stuart:

I write this letter as the Director of the Federal Trade Commission’s (“FTC”) Office of Policy Planning, the FTC office that provides advocacies and submits filings supporting competition and consumer protection principles to state legislatures, regulatory boards, and officials.

I understand that the Virginia legislature is considering S.B. 1218 (“the Bill”) that, among other things, would generally expand Virginia’s prohibition on noncompetes to include all employees regardless of wage level, subject to certain exceptions. On April 23, 2024, the Commission approved a final rule under the FTC Act banning noncompete clauses.¹ The rule has not come into effect at this time, because a Texas district court issued an order stopping the FTC from enforcing the rule. The FTC has appealed that decision.²

I write to highlight a number of the Commission’s evidentiary findings that you may find informative as you consider the Bill. This letter also explains that, consistent with the Commission’s long history of working in concert with states and encouraging concurrent enforcement of state laws to pursue common goals, state-based enforcement against noncompetes can be a potent force that supplements a federal rule.³ The rule and other materials that you may find helpful—including a summary, fact sheet, and compliance guide—are posted on the FTC website.⁴

Evidence of the Harmful Effects of Noncompetes

Many Americans are affected by noncompetes and support banning them. After the Commission proposed to ban noncompetes, the Commission received more than 26,000 comments. Of those, approximately 25,000 favored a categorical ban.⁵ Many workers described how noncompetes blocked them from taking a better job, negotiating better pay,

¹ Non-Compete Clause Rule, 89 Fed. Reg. 38342 (May 7, 2024) (to be codified at 16 C.F.R. part 910), <https://www.federalregister.gov/documents/2024/05/07/2024-09171/non-compete-clause-rule>.

² The district court’s decision does not prevent the FTC from addressing noncompetes through case-by-case enforcement actions.

³ 89 Fed. Reg. at 38454.

⁴ FTC, Noncompete Rule, <https://www.ftc.gov/legal-library/browse/rules/noncompete-rule>.

⁵ *Id.* at 38344.

or starting a business. Many entrepreneurs and small businesses also described how noncompetes prevented them from starting a business or hiring qualified workers.⁶ Many of the comments were from workers, businesses, and others in Virginia. You can find such comments on the FTC’s public docket at Regulations.gov.⁷

The evidence shows that noncompetes are used extensively, including even for low-wage workers. The Commission found that nationwide, approximately one in five workers—or thirty million Americans—are bound by noncompetes.⁸ One survey found that 35% of workers without a bachelor’s degree and 33% of workers earning less than \$40,000 per year have worked under a noncompete at some point in their lives.⁹ Another analysis of the same data found that 53% of workers covered by noncompetes are hourly workers.¹⁰

Noncompetes restrict workers’ fundamental freedom to leave for a better job or to start their own business. Based on empirical research and public comments, the Commission found that noncompetes are exploitative and coercive for all workers except for senior executives. For almost all workers, non-competes are unilaterally imposed, typically without negotiation or compensation, and force workers to remain in jobs and bear significant harms and costs.¹¹

Based on the extensive empirical evidence, the Commission found that noncompetes tend to negatively affect competitive conditions in both labor and product and service markets.¹² The Commission found that because noncompetes decrease mobility and competition in the labor market, they suppress wages not only for the workers subject to them, but also for workers who are not subject to them.¹³ The Commission estimates that its rule would increase workers’ earnings by \$400-\$488 billion over the next decade, and an average worker will earn \$524 more per year and that in Virginia an average worker will earn \$630 more per year.¹⁴

The Commission further found that noncompetes negatively affect competitive conditions in markets for products and services, inhibiting new business formation, decreasing innovation, and raising prices.¹⁵ The Commission estimates that its rule would increase new business formation by 2.7%, creating over 8,500 new businesses each year.¹⁶ Innovation would also increase, leading to about 17,000-29,000 new patents each year on average.¹⁷ Through increased competition and innovation, consumers would have access to better products and lower prices.¹⁸ For example, the Commission estimates that the rule

⁶ *Id.* at 38344-45, 38389-94.

⁷ The comments are available and searchable by state at Regulations.gov, <https://www.regulations.gov/document/FTC-2023-0007-0001/comment>.

⁸ 89 Fed. Reg. at 38343, 38346.

⁹ *Id.* at 38346.

¹⁰ *Id.*

¹¹ *Id.* at 38374-79.

¹² The Commission assessed the numerous empirical studies that have been conducted on noncompetes and explained the weight it gave to each study. *See id.* at 38374-424; *see also id.* at 38372-74 (explaining the Commission’s analytical framework for assessing the empirical evidence).

¹³ *See id.* at 38382-87.

¹⁴ *Id.* at 38469-70, 38474, 38505-06 (App., Table A1).

¹⁵ *See id.* at 38388-402.

¹⁶ *See id.* at 38433, 38485; FTC, Noncompete Rule, <https://www.ftc.gov/legal-library/browse/rules/noncompete-rule>.

¹⁷ This reflects an estimated increase of about 3,000 to 5,000 new patents in the first year noncompetes are banned, rising to about 30,000-53,000 in the tenth year. *See* 89 Fed. Reg. 38476.

¹⁸ *Id.* at 38380, 38408.

would reduce health care costs by \$74-\$194 billion over the next decade in reduced spending on physician services.¹⁹

In adopting the rule, the Commission assessed employers' claimed justifications for noncompetes and found that employers have several viable alternatives that do not impose the same burdens on competition.²⁰ The Commission found that employers can use trade secret law and reasonable non-disclosure agreements to protect legitimate intellectual property interests.²¹ Roughly 95% of workers with noncompetes are already subject to non-disclosure agreements.²² The Commission also found that employers can protect their investments in worker human capital, including training, by entering into fixed duration employment contracts.²³ They can also compete on the merits to retain workers by offering higher wages and better jobs.²⁴

State Laws Can Be a Potent Supplement to a Federal Rule

The final rule sets forth its relation to state laws and its preservation of state authority in detail in Section VI.²⁵ As the Commission explains in the final rule, states can continue to play a critical role in restricting the use of noncompetes, even if the FTC's rule comes into effect.

State restrictions are especially important with regard to employers or activities that are outside the FTC's jurisdiction, such as banks, savings and loan institutions, federal credit unions, common carriers, air carriers, persons subject to the Packers and Stockyards Act of 1921, and certain non-profits—including, among others, certain healthcare non-profits.²⁶ Thus, state laws can fill gaps with respect to noncompetes that are beyond the FTC's jurisdiction.²⁷

Moreover, states' noncompete laws, unlike the FTC Act, may provide for a private right of action and/or monetary penalties.²⁸ State penalties can be substantial and may be particularly important as a deterrent, as can parallel enforcement of state laws.²⁹

As the Commission explains in the final rule, the rule would not preempt state laws that restrict noncompetes and do not conflict with it, including both broader state prohibitions and state prohibitions that are narrower in scope.³⁰ That is, state laws cannot authorize noncompetes that are prohibited by the rule, but states may, for example, continue to pursue enforcement actions under their laws prohibiting noncompetes even if the state law prohibits a

¹⁹ *Id.* at 38470, 38478.

²⁰ *See id.* at 38421-34.

²¹ *Id.* at 38424-26.

²² *See id.* at 38426 (citing Natarajan Balasubramanian, Evan Starr, & Shotaro Yamaguchi, *Employment Restrictions on Resource Transferability and Value Appropriation from Employees* (Jan. 18, 2024), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3814403).

²³ 89 Fed. Reg. at 38426.

²⁴ *Id.*

²⁵ *See id.* at 38452-55. *See also id.* at 38504-505 (Relation to State Laws and Preservation of State Authority and Private Rights of Action, to be codified at 16 C.F.R. § 910.4).

²⁶ *See id.* at 38355-58; 38454; FTC, Noncompete Clause Rule: Business and Small Entity Compliance Guide 2, https://www.ftc.gov/system/files/ftc_gov/pdf/Business-and-Small-Entity-Compliance-Guide-updated.pdf.

²⁷ 89 Fed. Reg. at 38453-55; *see also id.* at 38449.

²⁸ *Id.* at 38452-54.

²⁹ *Id.* at 38454.

³⁰ *Id.* at 38452-54.

narrower subset of noncompetes than the FTC's rule.³¹

In short, the FTC's rule does not negate the value of state laws that restrict noncompetes. Rather, such laws can play an important role in the battle against harmful noncompetes.

I hope that the Commission's research, analysis, and findings concerning noncompetes are valuable to you as you consider S.B. 1218. Please do not hesitate to reach out if my office can be of further assistance.

Sincerely,

Hannah Garden-Monheit

Hannah Garden-Monheit
Director
Office of Policy Planning

³¹ *Id.* at 38453-55.