



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

Office of Policy Planning

June 14, 2024

**VIA ELECTRONIC MAIL**

The Honorable Terry A. Johnson, D.O.  
Senator  
The Ohio Senate

The Honorable Vernon Sykes  
Senator  
The Ohio Senate

Re: S.B. 126

Dear Senator Johnson and Senator Sykes:

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 Ohio legislature is considering S.B. 126 (“the Bill”) that, among other things, would limit nonprofit hospitals’ use of noncompetes in their contracts with certain health care professional employees. On April 23, 2024, the Commission approved a final rule under the FTC Act banning noncompete clauses.<sup>1</sup> The rule and other materials that you may find helpful—including a summary, fact sheet, and compliance guide—are posted on the FTC website.<sup>2</sup>

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 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 the federal rule.<sup>3</sup>

*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.<sup>4</sup> Many workers described how noncompetes blocked them from taking a better job, negotiating better pay, or starting a business. Many entrepreneurs and small businesses also described how noncompetes prevented them from starting a business or hiring qualified workers.<sup>5</sup> Many of the comments were from workers, businesses, and others in Ohio—including many health

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<sup>1</sup> 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>.

<sup>2</sup> FTC, Noncompete Rule, <https://www.ftc.gov/legal-library/browse/rules/noncompete-rule>.

<sup>3</sup> 89 Fed. Reg. at 38454.

<sup>4</sup> *Id.* at 38344.

<sup>5</sup> *Id.* at 38344-45, 38389-94.

care practitioners. You can find such comments on the FTC’s public docket at Regulations.gov.<sup>6</sup>

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.<sup>7</sup> 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.<sup>8</sup> Another analysis of the same data found that 53% of workers covered by noncompetes are hourly workers.<sup>9</sup>

Noncompetes are pervasive in health care. One study found that 45% of physicians worked under a noncompete.<sup>10</sup> A study of noncompetes in physician markets found that such clauses lead to greater concentration and higher prices for consumers.<sup>11</sup> The Commission specifically found that noncompetes increase healthcare costs,<sup>12</sup> and that the rule will reduce health care costs by \$74-\$194 billion over the next decade in reduced spending on physician services.<sup>13</sup>

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.<sup>14</sup>

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.<sup>15</sup> 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.<sup>16</sup> The Commission estimates that its rule will increase workers’ earnings by \$400-\$488 billion over the next decade, and that in Ohio an average worker will earn \$540 more per year.<sup>17</sup>

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.<sup>18</sup> The Commission estimates that its rule will increase new

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<sup>6</sup> The comments are available and searchable by state at Regulations.gov, <https://www.regulations.gov/document/FTC-2023-0007-0001/comment>.

<sup>7</sup> 89 Fed. Reg. at 38343, 38346.

<sup>8</sup> *Id.* at 38346.

<sup>9</sup> *Id.*

<sup>10</sup> *Id.* (citing Kurt Lavetti, Carol Simon, & William D. White, *The Impacts of Restricting Mobility of Skilled Service Workers Evidence from Physicians*, 55 J. HUM. RES. 1025, 1042 (2020)).

<sup>11</sup> 89 Fed. Reg. at 38398 (citing Naomi Hausman & Kurt Lavetti, *Physician Practice Organization and Negotiated Prices: Evidence from State Law Changes*, 13 AM. ECON. J. APPLIED ECON. 278 (2021)).

<sup>12</sup> 89 Fed. Reg. at 38447.

<sup>13</sup> *Id.* at 38470, 38478.

<sup>14</sup> *Id.* at 38374-79.

<sup>15</sup> 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).

<sup>16</sup> *See id.* at 38382-87.

<sup>17</sup> *Id.* at 38469-70, 38474, 38505-06 (App., Table A1).

<sup>18</sup> *See id.* at 38388-402.

business formation by 2.7%, creating over 8,500 new businesses each year.<sup>19</sup> Innovation will also increase, leading to about 17,000-29,000 new patents each year on average.<sup>20</sup> Through increased competition and innovation, consumers will have access to better products and lower prices.<sup>21</sup>

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.<sup>22</sup> The Commission found that employers can use trade secret law and reasonable non-disclosure agreements to protect legitimate intellectual property interests.<sup>23</sup> Roughly 95 percent of workers with non-competes are already subject to non-disclosure agreements.<sup>24</sup> The Commission also found that employers can protect their investments in worker human capital, including training, by entering into fixed duration employment contracts.<sup>25</sup> They can also compete on the merits to retain workers by offering higher wages and better jobs.<sup>26</sup>

### *State Laws Can Be a Potent Supplement to the Rule*

The final rule sets forth its relation to state laws and its preservation of state authority in detail in Section VI.<sup>27</sup> As the Commission explains in the final rule, states can continue to play a critical role in restricting the use of noncompetes.

State restrictions are especially important with regard to employers or activities that are outside the FTC's jurisdiction—including, among others, certain healthcare non-profits.<sup>28</sup> Thus, state laws can fill gaps with respect to noncompetes that are beyond the FTC's jurisdiction.<sup>29</sup>

Moreover, states' noncompete laws, unlike the FTC Act, may provide for a private right of action and/or monetary penalties.<sup>30</sup> State penalties can be substantial and may be particularly important as a deterrent, as can parallel enforcement of state laws.<sup>31</sup>

As the Commission explains in the final rule, the rule does 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.<sup>32</sup> That is, state laws cannot authorize noncompetes that are prohibited by the rule, but states may, for example, continue to pursue enforcement actions

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<sup>19</sup> See *id.* at 38433, 38485; FTC, Noncompete Rule, <https://www.ftc.gov/legal-library/browse/rules/noncompete-rule>.

<sup>20</sup> 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.

<sup>21</sup> *Id.* at 38380, 38408.

<sup>22</sup> See *id.* at 38421-34.

<sup>23</sup> *Id.* at 38424-26.

<sup>24</sup> 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](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3814403)).

<sup>25</sup> 89 Fed. Reg. at 38426.

<sup>26</sup> *Id.*

<sup>27</sup> 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).

<sup>28</sup> 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](https://www.ftc.gov/system/files/ftc_gov/pdf/Business-and-Small-Entity-Compliance-Guide-updated.pdf).

<sup>29</sup> 89 Fed. Reg. at 38453-55; see also *id.* at 38449.

<sup>30</sup> *Id.* at 38452-54.

<sup>31</sup> *Id.* at 38454.

<sup>32</sup> *Id.* at 38452-54.

under their laws prohibiting noncompetes even if the state law prohibits a narrower subset of noncompetes than the FTC's rule.<sup>33</sup>

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. 126. Please do not hesitate to reach out if my office can be of further assistance.

Sincerely,

*Hannah Garden-Monheit*

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Hannah Garden-Monheit  
Director  
Office of Policy Planning

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<sup>33</sup> *Id.* at 38453-55.