



*Submitted Electronically via Regulations.gov*

April 19, 2023

Honorable Lina M. Khan, Chair  
Federal Trade Commission  
c/o Office of the Secretary  
600 Pennsylvania Avenue, NW  
Washington, D.C. 20580

Re: Non-Compete Clause Rulemaking, Matter No. P201200 (FTC-2023-0007)

Dear Chair Khan:

On behalf of our members and partners including mission-driven organizations representing the entire field of aging services, LeadingAge appreciates the opportunity to submit comments relating to the Federal Trade Commission's ("Commission" or "FTC") proposed rule that would prohibit an employer from entering into or attempting to enter into a non-compete clause with a worker; maintaining with a worker a non-compete clause; or, in certain circumstances, representing to a worker that the worker is subject to a non-compete clause. If the Commission proceeds to issue a final rule, we ask that it consider the following recommendations.

**The FTC should confirm that the proposed rule does not apply to nonprofits.**

Based on the Commission's explanation in the section of the proposed rule addressing the definition of "employer" (88 Fed. Reg. 3482, 3510), it is our understanding that nonprofit organizations would be exempt from coverage under this rule. The preamble notes that where an employer is exempt from coverage under the Federal Trade Commission Act, the employer would not be subject to the rule, and it gives as an example an entity that is not "organized to carry on business for its own profit or that of its members" (citing to the FTC Act's definition of "corporation" at 15 U.S.C. 44). If the FTC proceeds to issue a final rule, we ask that it include language affirming what it has noted in the current preamble and expressly stating that nonprofit entities are exempt, in order to provide clarity and certainty around this issue.

**The FTC should consider limiting the scope of the proposed rule, rather than taking a one-size fits all approach.**

In its current form the proposed rule would categorically ban employers in the United States from entering into or maintaining a non-compete clause with a worker (88 Fed. Reg. at 3512). As reflected in comments submitted to the docket by interested stakeholders, however, many businesses enter into non-compete agreements with workers on a reasonable, limited basis, for a

variety of reasons, and consistent with existing state laws. If the Commission proceeds to finalize a rule, we recommend that it reconsider its proposed one-size-fits-all approach.

First, for example, the proposed rule would apply uniformly to *all workers* (88 Fed. Reg. at 3518). Employers covered by the rule would be prohibited from using a non-compete clause with a worker, except in limited scenarios where the clause is between the seller and buyer of a business.

The Commission does, however, invite comments on whether certain alternatives to a categorical ban should be considered and adopted. The proposal notes, for example, that the Commission could adopt a categorical ban on non-compete clauses for workers in general, but then apply either an exemption, or a rebuttable presumption of unlawfulness, for certain workers based on job functions, earnings, some other factor, or some combination of factors.

We support the Commission's exploration of these alternatives. The issues and circumstances surrounding a non-compete between an employer and a senior executive, for example, may be very different than one with another category of employee, who does not have the same ability to bargain with the employer. Further, if a final rule did create an exemption, for example, a non-compete established between an employer and an exempt individual would continue to be subject to applicable state laws and legal precedent.

Second, in addition to establishing a categorical ban that applies uniformly to all workers, the proposed rule would apply to *all non-compete clauses*, including those that are already in place. As an alternative, the FTC could consider omitting or in some way modifying proposed § 910.2(b)(1), which would require employers to rescind all existing non-compete clauses no later than the compliance date of a final rule.

We recognize the valid concerns the FTC has articulated about some non-competes and the circumstances of their formation, but we wish to note that a unilateral invalidation of all existing non-competes would disrupt huge numbers of contracts that were appropriately negotiated and lawfully created, including where employers have already satisfied their obligations to hire a given worker and provided consideration, in contractual terms, for the employee's agreement not to compete.

In short, we recommend that the Commission take a more tailored approach to regulating non-compete agreements if it proceeds to promulgate a final rule.

Thank you for your consideration of our comments, and please contact me if I can provide additional information.

Sincerely,

*/s/ Jonathan Lips*

Jonathan Lips  
Vice President, Legal Affairs