



December 20, 2021

Comments to the Federal Trade Commission (FTC)

[Docket ID FTC-2021-0057](#): "Making Competition Work: Promoting Competition in Labor Markets."

On behalf of the Insights Association (IA), the leading nonprofit trade association for the market research and data analytics industry, I am respectfully submitting comments in response to the FTC's workshop on December 6 and 7, 2021: "Making Competition Work: Promoting Competition in Labor Markets."

IA urges the FTC to oppose the use of noncompete agreements in employment contracts for all but the most senior employees, unless the employees receive compensation or severance commensurate with the time frame the employees are restricted. However, the FTC should not do anything to impede nondisclosure agreements or non-solicitation agreements.

Our more than 7,000 company and individual members are the world's leading producers of intelligence, analytics and insights defining the needs, attitudes and behaviors of consumers, organizations, employees, students and citizens. Insights Association members empower leaders to make intelligent decisions, whether in business or public policy.

Most market research and data analytics professionals, both employers and employees, tend to agree that non-solicit agreements and non-disclosure agreements serve important purposes. Asking a departing employee to temporarily refrain from initiating contact with her/his clients to allow the employer adequate time to transfer client service, is generally reasonable. Similarly, ensuring intellectual and confidential information are protected is a fair and reasonable requirement.

However, what is the rightful place of the non-compete agreement? Is it fair to both employers and employees? Are such agreements ethical? Will they stand the test of time in the courts and law? Those remain important questions.

In challenging times, a bigger question arises: If someone gets laid-off, can a non-compete provision now be enforced by former employer? That was the issue facing the insights industry early in the COVID-19 crisis: As we were gripped by economic crisis and many staff were being laid off, would noncompete agreements prevent them from being able to find work elsewhere?

The Insights Association took the position¹ that noncompete agreements are often unenforceable and, particularly during a crisis, should not be enforced for staff involuntarily separated from their

¹ Non-Compete Agreements in the Insights Industry. April 7, 2020. <https://www.insightsassociation.org/article/non-compete-agreements-insights-industry>

companies/organizations without full compensation. This in no way precludes an employer from maintaining all rights, including legal action, against an employee who misappropriates trade secrets or other confidential or proprietary information. IA still supports the use of non-solicit and non-disclosure agreements, as employers must maintain the ability to service their existing client base and ensure protection of intellectual and confidential information.

The Insights Association urged our members that they would be better off devoting their “time and resources” to “keeping employees satisfied and motivated to fulfill their potential within this growing industry” than to enforce uncompensated noncompete agreements.

The insights industry needs our workforce working, not on the sidelines or spending their resources to fight non-compete agreements in court. This remains valid, even with the COVID-19 crisis in the rear-view mirror.

Research suggests that the prevalence of noncompete agreements limits the mobility of American workers, upward and otherwise, and impedes competition between companies/organizations.

- Per a 2019 study in the Journal of Law and Economics, *“Approximately 18 percent of labor force participants are bound by noncompetes, with 38 percent having agreed to at least one in the past. Noncompetes are more likely to be found in high-skill, high-paying jobs, but they are also common in low-skill, low-paying jobs and in states where noncompetes are unenforceable. ... wages are relatively lower where noncompetes are easier to enforce.”*²
- According to a 2018 study in Organization Science, *“enforceable noncompetes increase frictions in the labor market by increasing uncertainty and recruitment costs, and by curtailing entrepreneurship. We find that in state-industry combinations with a higher incidence and enforceability of noncompetes, workers – including those unconstrained by noncompetes – receive relatively fewer job offers, have reduced mobility, and experience lower wages.”*³
- A 2020 study in the Journal of Human Resources found that a Hawaii ban on noncompete agreements “for technology workers” discovered that it “increased mobility by 11% and new-hire wages by 4%. We supplement the Hawaii evaluation with a cross-state analysis using matched employer-employee data. We find that eight years after starting a job in an average-enforceability state, technology workers have about 8% fewer jobs and 4.6% lower cumulative earnings relative to equivalent workers starting in a non-enforcing state.”⁴

² Starr, Evan, James J. Prescott, and Norman Bishara. “Noncompetes in the US labor force.” U of Michigan Law & Econ Research Paper 18-013 (2019) <https://www.journals.uchicago.edu/doi/10.1086/712206>

³ Starr, Evan, Frake Justin, and Agarwal, Rajshree “Mobility Constraint Externalities.” Organization Science (2019) https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3027715

⁴ “Locked In? The Enforceability of Covenants Not to Compete and the Careers of High-Tech Workers.” Natarajan Balasubramanian, Jin Woo Chang, Mariko Sakakibara, Jagadeesh Sivadasan and Evan Starr. Journal of Human Resources. May 12, 2020. 1218-9931R1 <http://jhr.uwpress.org/content/early/2020/05/04/jhr.monopsony.1218-9931R1.abstract>

- A 2020 report from the American Enterprise Institute (AEI) found that noncompetes “hinder the mobility of roughly 20 percent of the American workforce and reduce overall dynamism in the economy.”⁵

As the legal regime for noncompete agreements is full of conflicts at the state level, the Insights Association urges a federal approach that sets fair standards on the use and enforceability of noncompete agreements, in the best interests of both employers and employees.

We are seeing some movement in that direction:

- President Joe Biden, recognizing the negative impact, asked the FTC to exercise its rulemaking authority “to curtail the unfair use of non-compete clauses.”⁶
- In Congress, Sens. Chris Murphy (D-CT) and Todd Young (R-IN), and Rep. Scott Peters (D-CA-52) introduced the Workforce Mobility Act (S.483, H.R.1367) and Sen. Marco Rubio (R-FL) introduced the Freedom to Compete Act (S. 2375), bills that would restrict most uses of noncompete agreements.

To respond to that interest, and issues raised during the recent FTC workshop, **the Insights Association strongly urges the FTC to act against the use of noncompete agreements in employment contracts for all but the most senior employees, unless the employees receive compensation or severance commensurate with the time frame the employees are restricted. However, we also urge the FTC not to impede the use of nondisclosure agreements or non-solicitation agreements.**

At this time of labor market tumult, when there are almost 3 million more job openings than unemployed people, the FTC can help make sure that such workers are not unfairly locked out of the labor market, unable to earn a living in their line of work and support themselves and their loved ones.

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⁵ "A better bargain: How noncompete reform can benefit workers and boost economic dynamism." John W. Lettieri. American Enterprise Institute. December 2020. <https://www.aei.org/research-products/report/a-better-bargain-how-noncompete-reform-can-benefit-workers-and-boost-economic-dynamism/>

⁶ According to “Executive Order on Promoting Competition in the American Economy,” issued on July 9, 2021, “Consolidation has increased the power of corporate employers, making it harder for workers to bargain for higher wages and better work conditions. Powerful companies require workers to sign non-compete agreements that restrict their ability to change jobs.” The Order called upon the FTC to “exercise the FTC’s statutory rulemaking authority under the Federal Trade Commission Act to curtail the unfair use of non-compete clauses and other clauses or agreements that may unfairly limit worker mobility.” -- <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/07/09/executive-order-on-promoting-competition-in-the-american-economy/>