towards justice
for economic equity and worker power

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Chair
Federal Trade Commission
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Washington, D.C. 20580
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Rebecca Kelly Slaughter
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Alvaro Bedoya
Commissioner
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600 Pennsylvania Avenue, N.W.
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Re: Non-Compete Clause Rulemaking, Matter No. P201200

Dear Chair Khan and Commissioners,

Towards Justice is a workers' rights organization that advocates and litigates on behalf of workers harmed by abuses of corporate power. We have frequently litigated cases involving employers' efforts to restrain worker mobility and strip them of the bargaining power that derives from the ability to find employment elsewhere. Very often, this litigation has concerned restraints that operate just like non-compete provisions even though they may not look like traditional non-competes. In 2017, we brought the first contemporary case to challenge the use of no-poach and no-hire provisions in fast-food franchise agreements. We also filed an FTC complaint on behalf of SEIU 32BJ challenging a fissured workplace no-hire agreement affecting low-wage building services workers. And recently, we have litigated several cases involving employer-driven debt in the form of coercive stay-or-pay contracts that keep nurses, PetSmart workers, software engineers, pilots, and others trapped in their jobs.

We appreciate the Commission's work in promulgating this proposed rule against non-compete clauses in worker contracts. Employers have an easy way to retain workers without non-competes: They can treat them fairly, provide competitive wages and benefits, and ensure decent working conditions. That's fair competition. Non-competes and similar contracts allow employers to circumvent the normal demands of fair competition and keep workers stuck in toxic, dangerous, and underpaid jobs for fear of suffering potential lifelong financial consequences if they exercise their right to seek better employment.

But while the proposed rule is an important start, we are concerned that it leaves several gaps that employers could easily exploit to strip workers of their bargaining power and accomplish all of the employers' goals in using a non-compete agreement without defying the rule. The FTC should clarify its rule to plug those gaps.

First, while we appreciate that the rule prohibits *de facto* non-compete clauses, the examples that it provides of such clauses risk painting too narrow a picture and leaving out terms that would otherwise fall within the "functional test for whether a contractual term is a non-compete clause."[1] Focusing exclusively on TRAPs, for example, risks suggesting that employers may impose other kinds of debts on workers as a threat for leaving their jobs. But TRAPs are merely one variety of an increasingly common form of *de facto* non-compete called "stay-or-pay" contracts. The key characteristic of a stay-or-pay contract is that it binds a worker to a particular employer by threatening financial harm if they leave before a certain period of time. Towards Justice urges the agency to clarify that the rules cover the range of stay-or-pay contracts that employers use to restrict employee mobility and restrain the labor market. In its work on these issues, Towards Justice has seen stay-or-pay contracts that include, among others:

- **TRAPs**, where employers provide workers with loans that are purportedly tied to the cost of training;[2]
- **Equipment loans**, where employers provide employees with a loan to purchase equipment that the worker needs in order to perform their job;[3]
- **Damages provisions**, including either *liquidated damages provisions* (where employers prospectively assign a specific dollar amount to the alleged harm)[4] or *unspecified damages provisions* (which are open-ended)[5] for costs alleged to be related to the employee's departure, including things like the cost of hiring and training replacements or vague harms such as reputational damages and "loss of goodwill" or even "lost profits"; and

[1] Proposed Rule, § 910.1(b)(2).

[2] *See, e.g.*, Complaint, ECF No. 1, *Scally v. PetSmart, LLC*, Case No. 22-cv-6210 (N.D. Cal., Oct. 19, 2022) (pet supply chain with $5,000 TRAP); Complaint, ECF No. 1, *Fredericks v. Ameriflight, LLC*, Case No. 23-cv-1042 (D.P.R., Jan. 30, 2023) (cargo airline with $20,000 TRAP); Complaint, ECF No. 1, *O'Brien v. Smoothstack, Inc.*, Case No. 23-cv-491 (E.D. Va., April 13, 2023) (IT staffing agency with $24,000 TRAP).

[3] *See, e.g.*, *PetSmart*, *supra* n.2 (pet supply chain provided groomers with $500 loan to purchase necessary grooming supplies).

[4] *See, e.g.*, Third Amended Complaint, ECF No. 43, *Carmen v. Health Carousel, LLC*, Case No. 20-cv-313 (S.D. Ohio, Dec. 17, 2021) (healthcare staffing agency with $20-50,000 liquidated damages provision).

[5] *See, e.g.*, *Vidal v. Advanced Care Staffing, LLC*, Case No. 22-CV-5535, 2023 WL 2783251 (E.D.N.Y., Apr. 4, 2023) (healthcare staffing agency with uncapped damages provision based on "lost profits," among other things).

- **Debt collection and dispute resolution costs**, where employers include arbitration provisions or dispute resolution terms in their employment contracts that allow them to pursue debt collection cases against workers who leave their contracts before the end of a purported commitment period and to recover the costs of their attorneys' fees or the costs of arbitration if they prevail.[6]

Other agencies, including the United States Department of Labor, have signaled their concern with stay-or-pay contracts, whether or not those contracts seek to recover the costs of training—*i.e.*, whether or not they may be described as a TRAP.[7] And courts have clarified that a damages provision can restrain worker mobility whether the damages are "liquidated" or uncapped.[8] It is critical that the FTC rule reaches all forms of stay-or-pay-contracts, and makes clear that the threat of owing damages or a financial penalty to an employer just because you decide to leave your job is a non-compete provision that violates the rule if, based on objective considerations, it has the "effect of prohibiting the worker from seeking or accepting employment with a person or operating a business after the conclusion of the worker's employment with the employer."[9]

Second, the proposed rule's discussion of TRAPs focuses on the wrong considerations in deciding whether such a contract amounts to a non-compete and risks confusing the analysis of whether other stay-or-pay contracts amount to non-compete agreements. The proposed rule prohibits employers from seeking to collect on training debts "not reasonably related to the costs the employer incurred for training the worker." While it is true that many TRAPs contain inflated and unjustified charges, it is relatively easy for employers to provide a purported basis for these costs. For example, when asked to justify its $20,000 liquidated damages provision, Ohio-based healthcare staffing agency Health Carousel included such vague costs of doing business as "back office administrative support fees."[10] Furthermore, the inherently fact-intensive nature of this inquiry means that any worker seeking to challenge a TRAP on this basis would likely have to incur significant fees in court or arbitration in order to have the debt be invalidated, meaning that most workers—especially low-wage workers—would have little recourse at all.

In addition, many employers use TRAPs to charge employees for training that is primarily for the employer's benefit, such as standard on-the-job training or supervised work for

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[6] *See, e.g.*, *Vidal*, *supra* n.5 at *14.

[7] *See, e.g.*, Complaint, *Su v. Advanced Care Staffing*, No. 23-cv-2119 (E.D.N.Y., March 20, 2023) (Department of Labor suit alleging that provision levying unspecified damages for future lost profits if an employee leaves within three years of hire is an unlawful kickback against wages).

[8] *Vidal*, *supra* n.5 at *14.

[9] Proposed Rule, § 910.1(b)(2); *cf.* 18 U.S.C. § 1589(d) (defining test for coercion in forced labor statute as whether a harm is sufficient to "compel a reasonable person of the same background and in the same circumstances to perform or to continue performing labor or services in order to avoid incurring that harm").

[10] *Health Carousel*, *supra* n.4 at 29.

paying customers.[11] Charging employees for such "training" runs afoul of federal employment laws, as well as the most basic precept of employment relationships: Workers earn money to work, they do not pay money to work. In many cases, employers may be able to justify the costs of such training as reasonable expenses under the FTC rule, but those costs would nonetheless have the "effect of prohibiting the worker from seeking or accepting employment."[12]

We recommend that the rule focus the inquiry as to whether a stay-or-pay contract amounts to a *de facto* non-compete on the key consideration of whether the debt would have the effect of impeding worker mobility. That should be an objective consideration that could take into account a range of factors. Failing to broadly prohibit such provisions risks allowing employers to easily avoid the non-compete rule by shifting to stay-or-pay contracts that have the same effect as non-compete agreements.

If the FTC is concerned that this standard would be too ambiguous or difficult to apply, it could broadly prohibit stay-or-pay contracts of any kind, but provide an exception in narrow circumstances in which a contract satisfies certain requirements. Such considerations must include, at the very least:

- Any amount owed must be tied to reasonable, documented employer expenses.
- The stay-or-pay term must be part of a written agreement with the employer and not presented in a manner that would suggest to a reasonable worker that it was a condition of obtaining or retaining employment.
- The term of employment required for debt forgiveness must be no longer than 18 months.
- The subject of the financial obligation must comply with relevant state and federal law.
- The subject of the financial obligation must be primarily for the employee's benefit. (Examples of financial obligations incurred primarily for the employee's benefit may include, depending on the circumstances, relocation costs, costs of education at an accredited third-party educational institution, and costs associated with preparing for or taking state or federal licensing exams.)
- Under no circumstances can an employee be required to pay for or repay the employer's costs of doing business, including employee training or orientation that does not provide the employee with an industry-recognized degree, license, or certification, or that is legally required of the employer for the employer to operate.
- An employer cannot require an employee to pay or repay any financial obligation otherwise permissible if the employee is terminated by the employer without just cause.

Third, the rule's exclusion of no-hire and no-poach agreements creates a gaping hole in its protections that is not sufficiently filled by the antitrust laws. No-hire and no-poach contracts

[11] *See, e.g.*, *PetSmart*, *Ameriflight*, and *Smoothstack*, *supra* n.2.
[12] Proposed Rule, § 910.1(b)(2).

have the same consequences as non-compete provisions, but they can be even more harmful to workers because they are entered into between employers and therefore often entirely invisible to workers. In some cases, it could be relatively easy for workers to protect themselves from such restraints through the antitrust laws—in particular, in cases involving clear naked and horizontal non-compete agreements. But especially in the fissured workplace context, when firms rely on labor market intermediaries to directly employ their workers, employers may be able to justify no-poach and no-hire agreements by arguing that they are reasonable vertical restraints or ancillary to other contractual arrangements. In these cases, it could be difficult and costly to enforce the antitrust laws.

Recognizing that contracts that restrain worker mobility have the same effect whether or not a worker is party to the agreement, many state laws treat no-hire and no-poach agreements the same as non-compete agreements.[13] As the Wisconsin Supreme Court has explained, employers "are not allowed to circumvent the protections under [state law regarding non-compete agreements] by restricting the employment opportunities of its employees through contracts with other employers."[14]

The FTC should follow the lead of these states and prohibit every agreement that restrains worker mobility, whether or not a worker is party to the agreement. At the very least, the FTC should expressly clarify that many state laws prohibit these arrangements as non-compete agreements, which is reasonable and should not be affected by the FTC's decision not to.

Fourth, while we appreciate the rule's efforts to cover all workers, regardless of employment status, the FTC's express exclusion of "franchisees" creates another loophole that can be easily exploited by employers. Firms frequently label workers as franchisees to avoid accountability under the labor and employment laws or evade the antitrust laws. For example, Towards Justice has litigated cases on behalf of low-wage cleaning workers treated as franchisees.[15] In order to avoid ambiguity, the FTC should remove its blanket exemption for

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[13] *See, e.g.*, Wash. Rev. Code § 49.62.010(4) (defining "noncompetition covenant" to include "every written or oral covenant, agreement, or contract by which an employee or independent contractor is prohibited or restrained from engaging in a lawful profession, trade, or business of any kind"); Cal Bus. & Prof. Code § 16600 ("every contract by which anyone is restrained from engaging in lawful profession, trade or business of any kind is to that extent void"); *Pittsburgh Logistics Sys., Inc. v. Beemack Trucking, LLC*, 249 A.3d 918, 920-21 (Penn. 2021) (holding no-hire provision was "unreasonably in restraint of trade and therefore unenforceable"); *Heyde Cos., Inc. v. Dove Healthcare*, 654 N.W.2d 830, 834 (Wis. 2002) (applying Wis. Stat. § 103.465 to find that a no-hire provision was "unenforceable because it is harsh and oppressive to the employees, is against public policy, and goes beyond what is necessary for [the defendant] to protect its legitimate interest").

[14] *Heyde Cos.*, *supra* n.13 at 836.

[15] As an example of a similar case, see, e.g., *Roman v. Jan-Pro Franchising Int'l, Inc.*, 342 F.R.D. 274 (N.D. Cal. 2022).

franchisees, and should expressly adopt an "ABC test" for employment status. The ABC test provides that a worker is an employee unless all three of the following conditions are met:

> A: The worker is free from the control and direction of the hiring entity in connection with the performance of the work;
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> B: The worker performs work that is outside the usual course of the hiring entity's business; and
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> C: The worker is customarily engaged in an independently established trade, occupation, or business of the same nature as that involved in the work performed.

* * *

Thank you for your attention to this important issue. This is an exceptionally important rule, and the FTC should clarify it to ensure that it is not easily evaded by employers hoping to restrain worker mobility by contract without running afoul of the rule.

Sincerely,

Towards Justice