

Don't Compete with the FTC

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Introduction

In January of 2023, the U.S. Federal Trade Commission (“FTC”) released a proposed regulation which would ban non-compete clauses imposed between employers and employees.¹ This proposed rule would make it illegal for an employer to both enter into and represent the applicability of a non-compete agreement with an employee, also requiring employers to rescind any existing non-competes and notify workers that they are no longer in effect.² The announcement of the proposed rule comes only days after the Commission announced the filing of multiple lawsuits concerning the regulation of non-competes, and months after the FTC’s November 2022 Policy Statement explaining an increased focus on anticompetitive behavior.³

The announcement of the FTC’s proposed rule has been met with much discourse as employers, both for- and non-profit, determine if the proposed rule would apply to their organizations, and if so, how to best navigate the retroactive application of the rule. This note begins with a brief account of the FTC’s regulation of non-compete agreements, will discuss details of the proposed rule, and will evaluate arguments for and against the passing of the

¹ See FED. TRADE COMM’N, *Non-Compete Clause Rulemaking* (Jan. 05, 2023) <https://www.ftc.gov/legal-library/browse/federal-register-notices/non-compete-clause-rulemaking>.

² *Id.*; see also CONG. RSCH. SERV. LEGAL SIDEBAR, *The FTC’s Proposed Non-Compete Rule* (Jan. 23, 2023) <https://crsreports.congress.gov/product/pdf/LSB/LSB10905>.

³ *Global Non-Compete Resource Center (NCRC)*, WHITE & CASE (Mar. 02, 2023) <https://www.whitecase.com/insight-tool/white-case-global-non-compete-resource-center-ncrc>; see also FED. TRADE COMM’N, *Policy Statement Regarding the Scope of Unfair Methods of Competition Under Section 5 of the Federal Trade Commission Act* (Nov. 10, 2022), <https://events.whitecase.com/pdfs/link-7-nov-2022-policy-statement.pdf>.

proposed rule in light of the expected impact on workers in healthcare, low-wage jobs, and manufacturing industries. Lastly, this note will briefly discuss concerns of anticompetitive behavior and possible antitrust liability for employers as a result of the passing of the rule.

I. Background of FTC's Regulation of Non-Competes

The FTC defines non-compete clauses to include contractual terms between employer and worker which block the worker from working for a competitor, or from starting a competing business.⁴ Non-compete clauses have been shown to negatively affect competition and reduce overall wages, thereby constituting an “unfair method of competition” by the FTC.⁵ Prior to this Notice of Proposed Rulemaking, the FTC did not historically regulate non-compete agreements where state law would typically govern.⁶ States often require that the geographic scope, duration, and restrictions on activity be reasonable. Non-compete clauses and other restraints on competitive behavior may be subject to challenge under antitrust law, though “those efforts have had minimal impact”, and states continued to adopt statutes to deem the clauses either fully or partially void.⁷

Prior to the proposed rulemaking, in January 2023 the FTC announced the filing of suit against three large organizations to halt the use of unlawful non-compete restrictions which would bar the workers’ acceptance of work from a competing employer or, alternatively, workers’ ability to operate a similar business after leaving the organization.⁸ This action by the

⁴ See Non-Compete Clause Rule, 88 Fed. Reg. 3482 (proposed Jan. 05, 2023) (to be codified at 16 C.F.R. pt. 910) (Jan. 05, 2023) https://www.ftc.gov/system/files/ftc_gov/pdf/p201000non-competenprm.pdf [hereinafter NPRM].

⁵ *Id.*

⁶ Wendy K. Arends et al., *FTC Proposes Nationwide Ban on Non-Compete Agreements*, HUCSH BLACKWELL (Jan. 09, 2023), <https://www.huschblackwell.com/newsandinsights/ftc-proposes-nationwide-ban-on-non-compete-agreements>.

⁷ *Id.*

⁸ Press Release, FED. TRADE COMM'N, *FTC Cracks Down on Companies That Impose Harmful Non-compete Restrictions on Thousands of Workers* (Jan. 04, 2023), <https://www.ftc.gov/news-events/news/press-releases/2023/01/ftc-cracks-down-companies-impose-harmful-non-compete-restrictions-thousands-workers>.

Commission is unprecedented - this is the first time the FTC has sued to halt non-compete restrictions, premised on Section 5 of the FTC Act and the recent decision to rescind previous policy statements.⁹ The rescinded policy - a 2015 Statement of Enforcement Principles - constrained the Commission's ability to use Section 5 of the FTC Act alone to counter the anticompetitive business tactics of organizations. Under the 2015 policy, the FTC did not have the authority to use *only* Section 5 to allege and enforce against these practices; the FTC would have needed to similarly claim violation of either the Sherman or Clayton Acts.¹⁰ In rescinding this 2015 Statement, the FTC adopts a broader approach to challenge anticompetitive conduct that would fall outside of the bounds of the Sherman and Clayton Acts, no longer required a "rule of reason" balancing analysis for claims of tying, bundling, rebates, or similar anticompetitive harms.¹¹

The 2023 complaints against Prudential Security, Inc. and two manufacturers of glass food and beverage containers (O-I Glass Inc. and Ardagh Group) show the Commission's increased focus on the prohibition of arrangements that may hurt wages and reduce worker mobility.¹² Similarly, the U.S. Department of Justice's antitrust division has brought many

⁹ *Four Takeaways from The FTC's Unprecedented Crackdown On Non-compete Agreements*, WHITE & CASE (Jan. 06, 2023) <https://www.whitecase.com/insight-alert/four-takeaways-ftcs-unprecedented-crackdown-non-compete-agreements>; see also Press Release, FED. TRADE COMM'N, *FTC Rescinds 2015 Policy that Limited Its Enforcement Ability Under the FTC Act* (July 01, 2021), <https://www.ftc.gov/news-events/news/press-releases/2021/07/ftc-rescinds-2015-policy-limited-its-enforcement-ability-under-ftc-act>.

¹⁰ See Press Release, FED. TRADE COMM'N, *FTC Issues Statement of Principles Regarding Enforcement of FTC Act a Competition Statute* (Aug. 13, 2015), <https://www.ftc.gov/news-events/news/press-releases/2015/08/ftc-issues-statement-principles-regarding-enforcement-ftc-act-competition-statute> (describing FTC's assessment of using Section 5 as a stand-alone challenge to unfair methods of competition).

¹¹ Joseph M. Rancour et al., *FTC Claims Broader Section 5 Powers in New Policy Statement; Provides Limited Practical Guidance*, SKADDEN (Dec. 01, 2022), <https://www.skadden.com/insights/publications/2022/12/ftc-claims-broader-section-5-powers>. Of note, Commissioner Wilson indicated in her dissenting statement that this repudiation of economic analysis standards may create a new presumptive standard for conduct deemed to be "facially unfair" as captured under this expanded scope of Section 5 conduct. See FED. TRADE COMM'N, *Dissenting Statement of Commissioner Christine S. Wilson*, Comm'n File No. P221202 (Nov. 10, 2022), https://www.ftc.gov/system/files/ftc_gov/pdf/P221202Section5PolicyWilsonDissentStmt.pdf [hereinafter *Dissenting Statement*].

¹² See Complaint and Decision and Order, Prudential Security, Inc., FTC Docket No. C-4787 (Feb. 23, 2023)

criminal no-poach cases over the years, though these cases have mixed results.¹³ In each of these recent complaints, decisions, and consent orders, the Commission found the companies and related individuals to have illegally imposed restrictions on workers that effectively barred them from pursuing similar work after they left the organizations. Commission Chair Lina Khan noted that these cases show how non-competes prevent workers from obtaining higher wages and can further impact a business' ability to properly compete.¹⁴ In light of the competition agencies' increased focus on expanding the scope of enforcement against anticompetitive action and the FTC's initiation of suit against three large organizations to combat the negative effects of non-compete agreements and clauses, the Commission's 2023 Notice of Proposed Rulemaking comes as no surprise though it has been met with both approbation and criticism.

II. The Federal Trade Commission's 2023 Proposed Rule

Under the authority granted to the Commission by 15 USC §§ 45 and 46(g), the FTC announced a Proposed Rule, adding a new subchapter J, and part 910, to chapter I in title 16 to prevent future execution of non-compete clauses and to rescind existing clauses.¹⁵ Ultimately, the FTC has concluded that this action could increase workers' earnings up to \$296 billion per year, as roughly 30 million people are currently bound by a non-compete clause and are unfairly restricted in their ability to pursue better or more beneficial employment opportunities as a result

(consent order), https://www.ftc.gov/system/files/ftc_gov/pdf/c47872210026prudentialsecurityfinalconsent.pdf; *see also* Decision and Order, O-I Glass, Inc., FTC Docket No. C-4786 (Feb. 21, 2023) (consent order), https://www.ftc.gov/system/files/ftc_gov/pdf/2110182_c4786-o-i-glass-inc-decision-and-order.pdf; *see also* Decision and Order, Ardagh Group, FTC Docket No. C-4785 (Feb. 21, 2023) (consent order), https://www.ftc.gov/system/files/ftc_gov/pdf/2110182-c4785-ardagh-decision-and-order.pdf.

¹³ Dan Papsuncun, *FTC Finds Three Firms Engaged in Illegal Non-compete Agreements*, BLOOMBERG L. (Jan. 04, 2023, 12:26 PM) <https://news.bloomberglaw.com/antitrust/ftc-finds-three-firms-engaged-in-illegal-non-compete-agreements>.

¹⁴ Press Release, FED. TRADE COMM'N, *FTC Cracks Down on Companies That Impose Harmful Non-compete Restrictions on Thousands of Workers* (Jan. 04, 2023), <https://www.ftc.gov/news-events/news/press-releases/2023/01/ftc-cracks-down-companies-impose-harmful-non-compete-restrictions-thousands-workers>.

¹⁵ Notice, FED. TRADE COMM'N, *Non-Compete Clause Rulemaking* (Jan. 05, 2023), <https://www.ftc.gov/legal-library/browse/federal-register-notices/non-compete-clause-rulemaking>.

of those agreements.¹⁶ The proposed rule seeks to reduce unfair limitations to worker mobility, expanding upon a 2021 Presidential Executive Order which simultaneously established a White House Competition Council to coordinate and promote “efforts to address overconcentration, monopolization, and unfair competition”.¹⁷ Even prior to the FTC’s proposed rule, the 2021 Executive Order acknowledges that workers face difficulties in bargaining for better work conditions or higher wages as a result of existing restraints imposed by non-compete clauses, though the Order did not yet explicitly deem non-compete agreements or clauses illegal.¹⁸ The 2021 Executive Order further supports the FTC’s current proposed rule to bar all non-compete clauses and agreements and retroactively rescind any existing non-compete clauses that are currently in effect.

In the proposed rule itself, the Commission defines a non-compete clause as a “contractual term between an employer and a worker that prevents 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”.¹⁹ This definition, seemingly straightforward, also captures any provision that becomes a *de facto* non-compete clause due to the impact of the clause on fully or partially prohibiting an employee (or ‘worker’, within the proposed rule) from further employment opportunity following the conclusion of their work with the employer. De facto clauses may include those that are 1) written in an overly broad manner to preclude work in the same field and 2) those that require the worker to pay training costs upon termination within

¹⁶ *Id.*

¹⁷ Newsletter, *An Overview of President Biden's Executive Order on Non-Competes*, QUARLES (June 30, 2021), <https://www.quarles.com/newsroom/publications/an-overview-of-president-bidens-executive-order-on-non-competes>.

¹⁸ See Exec. Order. No. 14036, 86 Fed. Reg. 36987 (July 09, 2021) (stating that robust competition is necessary for the preservation of the American economy, yet racial, income, and wealth inequality continues to increase as industries consolidate); *see also id.*

¹⁹ See FTC Notice, *Non-Compete Clause Rulemaking supra* note 14.

a certain time period if not reasonably related to the costs the employer incurred.²⁰ Due to the overly broad nature of the definition of both non-compete and de facto non-compete clauses, this may implicate other types of agreements such as non-disclosure agreements and provisions dealing with repayment for training of employees, outside of the language typically contained in a non-compete.²¹

Additionally, if finalized as is, the rule would not apply to employers that are nonprofit entities, including many employers in the medical and healthcare field as well as manufacturing and low-wage industries. A question remains as to what extent the proposed rule would impact non-profit healthcare institutions, or those recognized as tax-exempt under the Internal Revenue Code (*e.g.*, 501(c)(3) status).²² In the proposed Rule, subsection I(c) of Section V indicates that the rule would only apply to clauses between *employers and workers* (emphasis added), which may reach non-profit or Section 501(c)(3) organizations. The FTC, however, has specified that organizations which are not organized to carry on business for its own profit (or the profit of its members) will not be subject to the rule.²³ A Section 501(c)(3) organization, though they may receive profit from their ventures, is required to utilize those funds for exempt purposes. Thus, any net earnings by a non-profit healthcare institution used for exempt purposes (under the IRC) would not be considered a result of carrying on business for profit, and the organization would not be considered an employer under the rule.²⁴

²⁰ *Id.*

²¹ See generally Clifford R. Atlas et al., *A Deeper Dive Into FTC's Proposed Non-Compete Rule*, JACKSONLEWIS (Jan. 10, 2023), <https://www.jacksonlewis.com/publication/deeper-dive-ftc-s-proposed-non-compete-rule>.

²² Charles M. Honart, *FTC Proposed Non-Compete Ban: Impact on Nonprofit Hospitals and Nonprofit Affiliates*, STEVENS & LEE (Jan. 12, 2023), <https://www.stevenslee.com/health-law-observer-blog/ftc-proposed-non-compete-ban-impact-on-nonprofit-hospitals-and-nonprofit-affiliates/>.

²³ See Non-Compete Clause Rule, 88 Fed. Reg. 3482, 3510 (proposed Jan. 05, 2023) (to be codified at 16 C.F.R. pt. 910) https://www.ftc.gov/system/files/ftc_gov/pdf/p201000non-competenprm.pdf.

²⁴ See Honart, *supra* note 21.

The inapplicability of the proposed rule on non-profit entities is clear from a reading of the text, yet studies have found that the ban on non-competes would not impact all types of workers equally.²⁵ Additionally, the enforcement of non-compete clauses or agreements has the potential to increase gender and racial earning gaps while also giving monopsony power to firms to further price discrimination among workers.²⁶ The FTC acknowledges that the proposed rule may not apply to all groups equally, noting that industries excepted from FTC Act Section 5 would not be subject to the proposed rule, including the industries of banking, savings and loan institutions, credit unions, common carriers, air carriers, and business subject to the Packers and Stockyard Act including stockyard owners, market agencies, dealers, packers, etc.²⁷ Because the reach of the proposed rule specifically excludes many low-wage workers and non-profit entities (almost in their entirety) from the scope of the prohibition on non-competes, the impact of this rule and positive economic effects remain up for debate.

A. Commissioner Wilson’s Objections to the Proposed Rule

As noted by dissenting Commissioner Christine Wilson, who later resigned from her position as Commissioner in March 2023, the Commission may not have proper authority to issue this rule.²⁸ The dissenting Commissioner discussed the “numerous, and meritorious, legal challenges that undoubtedly will be launched” against the proposed rule. Commissioner Wilson’s dissent articulates that the FTC does not have substantive competition rulemaking authority as

²⁵ See Dissenting Statement, *supra* note 10, at 7; see also Matthew S. Johnson et al., *The Labor Market Effects of Legal Restrictions on Worker Mobility* (2020), <https://dx.doi.org/10.2139/ssrn.3455381>.

²⁶ See Johnson et al., *supra* note 24, at 4 (finding that stricter enforcement of non-competes can reduce earnings for non-white or female workers “by twice as much as for white male workers.”).

²⁷ See Atlas et al., *supra* note 19.

²⁸ See Dissenting Statement, *supra* note 10, at 9-10. As the only Republican commissioner of the FTC, Commissioner Wilson’s resignation in March 2023 follows months of Wilson’s criticism of current Chair Lina Khan for alleged abuses of power. In the Letter of Resignation, Commissioner Wilson notes rampant dissatisfaction among Commission staff, the slowing of merger challenges and enforcement actions, and a lack of “return to normalcy” as reasons for her resignation. See Commissioner Christine S. Wilson, *Letter of Resignation* (Mar. 02, 2023) https://www.ftc.gov/system/files/ftc_gov/pdf/p180200wilsonresignationletter.pdf.

seen in decades of legislative history.²⁹ Further, whereas state contract law establishes the analyses used in reviewing non-compete clauses, the FTC’s proposed rule would introduce another level of functional analysis for use by the Commission in determining how, specifically, non-compete or de facto non-compete provisions operate.³⁰

Notably, and as discussed previously, state law typically defines the scope of non-compete clauses or arrangements with a high degree of variability between states.³¹ The FTC Rulemaking would negate decades of precedent and states’ approaches to address non-compete agreements, a change deemed “premature” by Commissioner Wilson.³² By using the approach as defined in the Section 5 Policy Statement to “condemn conduct it finds distasteful, the Commission...proposes a rule that prohibits conduct that 47 state legislators have chosen to allow”.³³ Beyond the Policy Statement, Commissioner Wilson also questions the Commission’s authority in light of the non-delegation doctrine, the principle that Congress cannot delegate its own power to legislate to other branches of the government, including agencies such as the FTC. Ultimately, the proposed rule relies on questionable authority due to states’ usual influence over non-compete clauses, and the FTC may face accusations of regulatory overreach.³⁴

III. Arguments for the FTC’s Proposed Rule

In the beginning, non-compete clauses were allowed with the intention that businesses would use them in order to protect their trade secrets and the work they put in to help grow their business.³⁵ This, however, was an incorrect assumption as cases against these clauses have piled

²⁹ See Dissenting Statement, *supra* note 10, at 9-10.

³⁰ Aaron M. Levine & Matt. A. Todd, *The FTC’s Proposed Ban on Non-Compete Agreements and Conflict with the Defend Trade Secrets Act*, POLSINELLI (Feb. 06, 2023), <https://www.polsinelli.com/publications/the-ftcs-proposed-ban-on-non-compete-agreements-and-conflict-with-the-defend-trade-secrets-act>.

³¹ See QUARLES *supra* note 16.

³² See Dissenting Statement, *supra* note 10, at 3.

³³ *Id.*

³⁴ See Arends et al., *supra* note 5.

³⁵ See NPRM, *supra* note 4, at 12.

up in recent years due to its abuse.³⁶ Non-compete clauses have been constantly used to restrict employees from being able to secure a new job, start their own business, innovate, and secure higher wages.³⁷ The FTC has announced that their proposed rule against non-compete clauses will open many opportunities to those who were largely affected by these restrictions.³⁸

In their report, the FTC has stated how investigations on the effects of non-compete clauses on competition have “shed new light” on innovation and productivity.³⁹ The FTC first began by addressing its impact on the labor market and how researchers were shocked to find out that non-compete clauses were also being enforced against low-income workers.⁴⁰ The labor market allows individuals to get access and the chance to apply for a role that they believe is best suited for them.⁴¹ Furthermore, individuals may feel like entering the labor market to secure a more enjoyable or higher paying job.⁴²

Employers who have a vacant position in their business then compete with other employers to obtain the best employees from the labor market that would best fit in their organization.⁴³ This dynamic shows the competitive relationship between the labor market, employers, and employees as employers enter the labor market and give their best proposals to persuade employees to join them.⁴⁴ “Through these processes – employers competing for workers, workers competing for jobs, and employers and workers matching with one another –

³⁶ *Id.*

³⁷ *Id.*

³⁸ <https://www.ftc.gov/news-events/news/press-releases/2023/01/ftc-proposes-rule-ban-noncompete-clauses-which-hurt-workers-harm-competition>

³⁹ See NPRM, *supra* note 4, at 12-13.

⁴⁰ *Id.* at 13.

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.*

competition in the labor market leads to higher earnings for workers, greater productivity for employers, and better economic conditions.”⁴⁵

In an ideal system, workers are given the chance to switch to another job that they believe will be able to provide more for them, whether it be for wages, or quality of life.⁴⁶ Nevertheless, this is far from reality.⁴⁷ Non-compete clauses play a large role in restricting employees the access to the labor market and from signing with other employers that they would prefer.⁴⁸ Non-compete clauses tend to work by denying employees access to the labor market in a certain geographic location or in the same field of work.⁴⁹ In turn, this results in preventing employers from competing against each other to acquire employees and limits potential job opportunities.⁵⁰ The FTC states how workers may feel like not entering the labor market at all or end up taking jobs from the labor market that are “less productive” and “outside their field”.⁵¹ As a result, as non-compete clauses continue to grow, the productivity and output of the nation steadily declines.⁵²

Due to its restrictions on the labor movement in the market, non-compete clauses significantly impact the potential earnings that workers can earn.⁵³ The FTC reported a study made by Mathew Johnson, Kurt Lavetti, and Michael Lipsitz.⁵⁴ The study “finds that decreasing non-compete clause enforceability from the approximate enforceability level of the fifth-strictest state to that of the fifth-most-lax state would increase workers’ earnings by 3-4%.”⁵⁵ Johnson,

⁴⁵ *Id.* at 14.

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.* at 15.

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.* at 19.

⁵⁴ *Id.*

⁵⁵ *Id.* at 20.

Lavetti, and Lipsitz also estimate that a nationwide ban on non-compete clauses would increase average earnings by 3.3- 13.9%.⁵⁶ This shows how non-compete clauses have done nothing but hinder the economy and the benefits of a strong labor market.⁵⁷ Moreover, workers in the market impacted by these non-compete clauses struggle finding the leverage needed to secure a higher earning job.⁵⁸ “When non-compete clauses are more enforceable, workers’ earnings are less responsive to low unemployment rates (which workers may typically leverage to negotiate pay raises).”⁵⁹

Another study performed by Johnson, Lavetti, and Lipsitz shows “that if a state that does not enforce non-compete clauses shifted its policy to that of the state with an average level of enforceability, earnings would fall by about 4%.”⁶⁰ The FTC reports many other studies performed by several researchers in different geographical locations and how non-compete clauses have been nothing but detrimental to the potential earnings in the labor market.⁶¹ Although these studies show the dark side of non-compete clauses, there are more factors that may be considered when determining the outlook of these clauses.⁶² The FTC demonstrates an example; “It may be the case, for example, that employers who rely most on trade secrets both pay more and use non-compete clauses at a high rate (which would not necessarily be captured by the control variables observed in studies of non-compete clause use).⁶³ This means these studies do not necessarily inform how restricting the use of non-compete clauses through a rule would impact earnings.”⁶⁴

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Id.* at 20-21.

⁶² *Id.* at 23.

⁶³ *Id.*

⁶⁴ *Id.*

Another topic the FTC tackles is the negative impact non-compete clauses have on the products and services markets. The FTC found that reduced labor mobility as a result of non-compete clauses is a key factor as to why products and services in the markets decline.⁶⁵ Due to non-compete clauses, employees are forbidden from moving into a new job which then prevents job openings and even makes it difficult for those who are not subjected to non-compete clauses from finding a new job.⁶⁶ The FTC cites a variety of research to bolster their argument.⁶⁷ One researcher, Ronald Gilson, found how high-tech clusters in California have experienced an increase in labor mobility due to the fact that non-compete clauses are unenforceable in the state.⁶⁸ Furthermore, this pattern or relationship between labor mobility and unenforceable non-compete clauses have been found to be applicable in several other industries ranging from literature to technology.⁶⁹ A recent study done by Johnson, Lavetti, and Lipsitz revealed that “moving from the enforceability level of the fifth strictest state to that of the fifth most lax state causes a 6% increase in job-to-job mobility in industries that constantly use non-compete clauses.”⁷⁰ These studies demonstrate the inverse relationship between enforcing non-compete clauses and the concept of labor mobility.⁷¹

The FTC also tackles the negative impact that non-compete clauses have on consumer prices.⁷² Industries such as the health care sector are harshly impacted by non-compete clauses.⁷³ Non-compete clauses impede on the entrepreneurial ventures by disallowing individuals to

⁶⁵ *Id.* at 29.

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Id.* at 30.

⁶⁹ *Id.*

⁷⁰ *Id.* at 33.

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Id.*

engage in any business that goes against their employers.⁷⁴ This causes a severe limitation on the potential goods and services that could enter the market as businesses shut down any access to talented workers.⁷⁵ Once again, the FTC relies on studies done to prove their claims. One study referenced was done by Naomi Hausman and Kurt Lavetti.⁷⁶ They found that “increased concentration, as measured by the Herfindahl-Hirschman Index (HHI), at the firm level and increased final goods prices as the enforceability of non-compete clauses increases.”⁷⁷ Here, Hausman and Lavetti claim that there is a link between high enforceability of non-compete clauses and an increase in concentration and higher consumer prices.⁷⁸ However, the FTC addresses how this study was the only study that they were able to find that shows some connection between consumer prices and non-compete clauses.⁷⁹

The FTC further looks into how non-compete clauses affect competitor’s ability to access talent in the labor market.⁸⁰ Here, the FTC addresses how there is evidence showing that non-compete clauses negatively affect employers as they are forced to buy out non-compete contracts in order to acquire the talent that they want.⁸¹ This is known to be inefficient as these payments can be high “which leads to deadweight economic loss, or forego the payment – and, consequently, the access to the talent the firm seeks.”⁸² This makes it hard for businesses to survive in highly enforceable non-compete clause industries as there is a lack of available talent in the labor market due to this paywall-like structure.⁸³

⁷⁴ *Id.*

⁷⁵ *Id.* at 34.

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *Id.* at 36.

⁸¹ *Id.*

⁸² *Id.*

⁸³ *Id.*

Lastly, the FTC also addresses innovation and how it decreases as a result of enforceable non-compete clauses.⁸⁴ Innovation is a key factor when it comes to increasing product quality, decreasing prices, and promoting healthy competition.⁸⁵ However, innovation begins to decline as non-compete clauses begin to grow.⁸⁶ The FTC states how non-compete clauses decrease the amount of knowledge flow that gets transferred between firms because talents are forced to stick with their current employers or look for a job in another industry.⁸⁷ Multiple studies are cited to demonstrate the negative impact non-compete clauses have in firms and the value of their patents.⁸⁸ Although the FTC clarifies that these studies on patents do not indicate their exact relationship with non-compete clauses, they still hold this as considerable evidence that there is some sort of negative effect.⁸⁹

IV. Conclusion

As the FTC begins to crackdown on non-compete clauses, they have also started to create some life-changing waves. On February 1, 2023, a group of U.S. Senators have decided to follow the FTC's footsteps and advocate to ban non-compete clauses nationwide through Congress.⁹⁰ Although there might be considerable pushback on this idea, the Commission has been able to create the foundation for many to rely on. This is just the beginning, as society is ready to break down the doors that have entrapped them and allow the economy and their ideas come to life.

⁸⁴ *Id.* at 41.

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.* at 42.

⁸⁸ *Id.*

⁸⁹ *Id.* at 43.

⁹⁰ M. Scott LeBlanc et al., *Following FTC's Lead, Senators Renew Efforts to Ban Non-Compete Agreements*, HUSCHBLACKWELL (Feb. 15, 2023), <https://www.huschblackwell.com/newsandinsights/following-ftcs-lead-senators-renew-efforts-to-ban-non-compete-agreements>.