

FAQ on Non-Compete Agreements

How Non-Competes Stifle Worker Power and Disproportionately Impede Women and Workers of Color

By Najah Farley*

This fact sheet addresses the following frequently asked questions about non-compete agreements in employment contracts and how employers are using them in abusive ways to lock workers into low-wage jobs:

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Why Do We Need to Ban Non-Competes?

Non-compete agreements are harmful to workers. Originally meant to protect a business’s trade secrets and other confidential information, non-competes are increasingly being used by companies in low-wage industries to block workers from changing jobs—effectively limiting workers’ economic opportunity and suppressing their incomes. Workers in underpaid industries often make more money by moving to another job, so non-competes prevent these workers from improving their wages and working conditions.

Non-competes are disproportionately harmful to women and people of color and have a history linked to racial injustice. Protecting corporations and businesses from potential violations of trade secrets is no reason to limit worker mobility, particularly when those concerns have remedies at law.

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What Are Non-Compete Agreements?

Non-compete agreements are clauses in employment contracts that prevent workers from working for “competitor” companies during or after their current employment.¹ These contracts typically restrict workers through time, industry, and/or geography.² A time restriction prevents someone from working for a competitor for a defined period of time after leaving a position; a geographic restriction may restrict someone from accepting work in entire regions of the United States;³ and an industry restriction can prevent a worker from working for a particular type of company.⁴ Sometimes, non-competes prevent workers from starting their own competitor companies.⁵

More than 30 million workers—at least 18 percent of the U.S. workforce—are required to sign non-competes as a condition to accepting a job.^{6,7} These include a wide range of workers, from financial services executives to janitors and dog walkers. This is because employers will often present non-competes as a “take it or leave it” contract, forcing workers either to sign it or forego employment.⁸ Consequently, less than 10 percent of workers negotiate these clauses, and 93 percent of them read and sign them anyway.⁹ In addition, 30 to 40 percent of workers are asked to sign non-competes *after* they have already accepted the position.¹⁰

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How Do Non-Competes Relate to Other Problematic Contractual Provisions Between Workers and Employers?

Non-competes are only one type of clause in an employment contract that can restrict worker mobility. Other limiting clauses include coworker non-poaching agreements; customer non-solicitation agreements; customer non-dealing agreements; non-disclosure

¹ Mark A. Lemley & Orly Lobel, *Banning Noncompete Agreements to Create Competitive Job Markets* (Jan. 26, 2021), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3773893.

² Testimony of Najah Farley, *In Support of Proposed B23-494, Ban on Non-Compete Agreements Amendment Act of 2019, Before the D.C. Council Comm. on Lab. & Workforce*, (Dec. 6, 2019), <https://s27147.pcdn.co/wp-content/uploads/NELP-Testimony-DC-Council-Non-Compete-bill.pdf>.

³ *Id.*

⁴ Legal Nature, *Is My Non-Compete Agreement Enforceable?* (accessed Nov. 1, 2020), <https://www.legalnature.com/guides/is-my-non-compete-agreement-enforceable#industry-restrictions>.

⁵ Matt Marx, *Employee Non-Compete Agreement, Gender, and Entrepreneurship*, 27 (May 4, 2020), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3173831.

⁶ White House, *Fact Sheet: Executive Order on Promoting Competition in the American Economy* (July 9, 2021), <https://www.whitehouse.gov/briefing-room/statements-releases/2021/07/09/fact-sheet-executive-order-on-promoting-competition-in-the-american-economy/>.

⁷ Additionally, up to 40 percent of workers have signed a non-compete at some time during their career. U.S. Department of the Treasury, Office of Economic Policy, *Non-compete Contracts: Economic Effects and Policy Implications*, March 2016, at 3, 7.

⁸ Najah Farley, *Non-Compete Provisions in Context: Why NELP Supports Calls For Reform*, National Employment Law Project (Sept. 27, 2018), <https://www.nelp.org/blog/non-compete-provisions-context-nelp-supports-calls-reform/>.

⁹ Evan Starr, *The Use, Abuse, & Enforceability of Non-Compete and Non-Poach Agreements*, Economic Innovation Group (accessed Oct. 18, 2021), <https://eig.org/noncompetesbrief>.

¹⁰ *Id.*

agreements; non-disparaging clauses; and pre-invention assignment clauses.¹¹ Mandatory arbitration agreements bar workers from bringing claims for workers' rights violations in state or federal courts. These agreements have reduced the amount of anti-discrimination litigation in courts.¹² Alongside these can be a series of procedural clauses related to choice of forum, choice of law, anti-aggregation of claims, severability, reformation, or liquidated damages.¹³ Contracts that contain several of these generic copy-and-paste clauses are sometimes called "boilerplate contracts," and cover 80 percent of private sector workers.¹⁴ Courts, when adjudicating a case, typically begin with examining whether the combination of restrictive covenants in a boilerplate contract makes it unconscionable, and thus, unenforceable.

Why Are Non-Competes So Problematic for Workers, Particularly Underpaid Workers?

Non-competes were originally created to protect trade secrets and other confidential information. While they remain prevalent for well-paid and highly educated workers, these agreements are increasingly more common in underpaid industries, irrespective of job duties or access to confidential information.¹⁵ Currently, almost 30 percent of non-competes cover workers who make below \$13 per hour.¹⁶

Almost 30 percent of non-competes cover workers who make below \$13 per hour. **Difficult to Challenge:** Legally, they are almost impossible for workers to challenge unless they are clearly unconscionable. Even where they are clearly unconscionable or inappropriate, however, many underpaid workers do not have the time, money, or access to counsel to challenge them.¹⁷

Restricts Job Mobility: Signing non-competes also makes it more difficult for workers to leave for better and higher-paying jobs.¹⁸ Changing a job is one of the most common ways workers receive higher pay.¹⁹ "Job hopping," especially early in

¹¹ Orly Lobel, *Boilerplate Collusion: Clause Aggregation, Antitrust Law & Contract Governance*, MINN. L. REV (forthcoming 2021) (manuscript, at 18), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3810250.

¹² Cynthia Estlund, The Black Hole of Mandatory Arbitration, 96 N.C. L. Rev. 679 (2018). Available at: <http://scholarship.law.unc.edu/nclr/vol96/iss3/3>

¹³ *Id.*

¹⁴ *Id.* at 3.

¹⁵ Response of Patrick Hulin, *An Act Concerning Non-Compete Agreements SB-906*: Labor and Public Employees Committee Joint Favorable Report (March 23, 2021), <https://www.cga.ct.gov/2021/JFR/S/PDF/2021SB-00906-R00LAB-JFR.PDF>.

¹⁶ National Public Radio, *Biden Moves to Restrict Noncompete Agreements, Saying They're Bad For Workers* (July 9, 2021), <https://www.npr.org/2021/07/09/1014366577/biden-moves-to-restrict-non-compete-agreements-saying-theyre-bad-for-workers>.

¹⁷ Mark Lemley & Orly Lobel, *Supporting Talent Mobility and Enhancing Human Capital: Banning Noncompete Agreements to Create Competitive Job Markets*, Day One Project, 10 (Jan. 2021), https://9381c384-0c59-41d7-bbdf-62bbf54449a6.filesusr.com/ugd/14d834_5a463eb009844f37a1e952025642c748.pdf;

Response of Najah Farley, *An Act Concerning Non-Compete Agreements SB-906*: Labor and Public Employees Committee Joint Favorable Report (March 23, 2021), <https://www.cga.ct.gov/2021/JFR/S/PDF/2021SB-00906-R00LAB-JFR.PDF>; see also *infra* at "What Mechanisms are Available to Enforce Non-Competes."

¹⁸ White House Fact Sheet *supra* note 6.

¹⁹ Alexander J.S. Colvin & Heidi Shierholz, *Noncompete Agreements*, Economic Policy Institute

one's career, is correlated to stronger lifetime earnings.²⁰ By limiting where people can work, non-competes decrease competition between industries, consequently reducing overall wages.²¹ With limited employers to compete for, workers have less of an opportunity to bargain for a higher wage and demand a better workplace.²²

Disproportionately Affects Women and People of Color: Banning non-competes would help alleviate racial and gender wage gaps because the underpaid workers who are most affected are disproportionality women and people of color. In fact, the use of non-competes can be traced back to the Reconstruction Era, when former owners of enslaved people used non-competes to keep freed Black workers working for them and maintain the master-slave relationship.²³

Some reasons why non-competes can have a stronger impact on women and people of color are because they decrease entrepreneurship; reduce outside work due to limited ability and willingness to commute; produce fewer wage gains; and provide firms more power to discriminate.²⁴

Studies have shown that women are also less willing to violate the terms of non-competes.²⁵ Women in states with stricter non-compete enforcement are less likely than men to leave their jobs or start rival companies if they are subject to a non-compete.²⁶

Women and workers of color also are less likely to negotiate than their white counterparts, which may result in more restrictive agreements for them.²⁷ Further, the earnings of women and workers of color are reduced by twice as much as white male workers when there is stricter non-compete enforcement.²⁸

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Economic Policy Institute (Dec. 10, 2019), <https://www.epi.org/publication/noncompete-agreements/>.

²⁰ John W. Lettieri, *Noncompete Agreements and American Workers—Testimony before the Senate Committee on Small Business*, Economic Innovation Group (Nov. 14, 2019), <https://eig.org/news/testimony-before-the-senate-committee-on-small-business-noncompete-agreements-and-american-workers>.

²¹ Colvin *supra* note 19.

²² White House Fact Sheet *supra* note 6.

²³ Ayesha Bell Hardaway, *The Paradox of the Right to Contract: Noncompete Agreements as Thirteenth Amendment Violations*, [The Paradox of the Right to Contract: Noncompete Agreements as Thirteenth Amendment Violations](#), 39 SEATTLE U. L. REV. 957, 959 (2016).

²⁴ *Id.* at 10-11.

²⁵ *Id.* at 4.

²⁶ Marx *supra* note 5 at 3, 27.

²⁷ *Id.* at 11.

²⁸ Matthew Johnson, Kurt Lavetti, & Michael Lipsitz, *The Labor Market Effects of Legal Restrictions on Worker Mobility* (June 6, 2020), 4, <https://ssrn.com/abstract=3455381>.

Are Non-Competes Necessary to Protect Business Interests?

Those who support non-competes argue they protect trade secrets, intellectual property, confidential or sensitive information, client lists, customer lists, pricing lists, and investment in worker training.²⁹

There are many other mechanisms in place, however, to protect employers against these breaches of confidentiality. For example, federal laws such as the Uniform Trade Secrets Act and the Economic Espionage Act protect companies from unauthorized usage or misappropriation of protected trade secrets.³⁰ There are also state regulations governing similar issues,³¹ and workers are bound by state common law fiduciary duties and duties of loyalty. These statutory and common law protections of company information can fill any void that employers may fear come with banning non-competes.³²

Non-competes also harm employers and the economy. These clauses reduce the number of available workers, making it harder for businesses to grow.³³ Job mobility helps to stimulate the economy because it encourages innovation when information is shared; entrepreneurship when workers leave their job to start new businesses; and regional industry development because companies can share workers with experience in the field.³⁴ Non-competes contribute to negative trends in the economy by reducing economic dynamism and impeding labor market competition, thus contributing to wage stagnation.³⁵ Companies are raising prices while simultaneously lowering their wages with non-competes, costing the average U.S. household \$5,000 per year.³⁶

How Are Non-Competes Enforced?

Historically, common law has governed non-competes.³⁷ Generally, courts will uphold a non-compete if there is a protectable interest and the clause is reasonable. A variety of factors are analyzed to determine reasonableness.³⁸ Although governed by individual state laws, common factors include whether the employer has a legitimate interest to protect; whether the geographic scope prevents the worker from making a living; the length of restriction;

²⁹ Karla Walter, *The Freedom to Leave*, Center for American Progress (Jan 9, 2019), <https://www.americanprogress.org/issues/economy/reports/2019/01/09/464831/the-freedom-to-leave/>.

³⁰ See e.g., [Uniform Trade Secrets Act](#) (making a uniform definition of trade secrets and creating claims that can be brought in federal court when there is a misappropriation of trade secrets. 47 states, including the District of Columbia have adopted the Uniform Trade Secrets Act); Economic Espionage Act, 18 U.S.C § 1831-1839 (making it a federal crime to receive, purchase, or possess a misappropriated trade secret).

³¹ See Brian Yeh, *Protection of Trade Secrets: Overview of Current Law and Legislation*, Congressional Research Service (April 22, 2016), available at: <https://fas.org/sgp/crs/secretcy/R43714.pdf>.

³² Scott V. Heck, *Employee's Duty of Loyalty May Fill Non-Compete Void*, Scarinci Hollenbeck Attorneys at Law (Jan. 25, 2019), <https://scarincihollenbeck.com/law-firm-insights/labor-employment/duty-of-loyalty-nj-non-compete>.

³³ Lettieri *supra* note 20.

³⁴ Walter *supra* note 29.

³⁵ *Id.*

³⁶ White House Fact Sheet *supra* note 6.

³⁷ Walter *supra* note 29.

³⁸ Workplace Fairness, *Your Rights: Non-Compete Agreements*, Workplace Fairness (last visited Nov. 1, 2021), <https://www.workplacefairness.org/non-compete-agreements#4>.

whether the agreement prevents workers from doing different work from what they are doing; and whether the employer provides additional compensation or benefits in exchange for the worker signing the non-compete.³⁹ Applying this test requires a case-by-case analysis, which leads to unpredictable results.⁴⁰ Consequently, there has been a call for reform and a movement to ban these clauses altogether.

What Are the Current Proposals to Change the Enforcement Scheme?

No federal ban on non-compete agreements exists. However, on July 5, 2021, President Biden issued an Executive Order on Promoting Competition in the American Economy that *encourages* the Federal Trade Commission to ban or limit the use of non-competes.⁴¹ In addition, the bipartisan Workforce Mobility Act and Freedom to Compete Act were introduced in 2021 to prevent the enforcement and creation of non-competes.⁴²

There is a growing movement to ban non-competes on the state level.

There is also a growing movement to ban non-competes on the state level. State laws that ban non-competes generally fall into one of three categories: (1) laws to eliminate non-competes for everyone; (2) laws to eliminate non-competes for some, based on occupation or income level; and (3) laws to codify stricter requirements in enforcing them.⁴³ Some examples of states that have passed progressive bans on non-competes include California, Connecticut, Illinois, Maine, Maryland, Massachusetts, New Hampshire, Oregon, and Washington.⁴⁴ However, even in states that have non-compete bans, some workers are still required to sign them. In California, for example, non-competes have been unenforceable for over 100 years, but research showed that 19 percent of workers had signed unenforceable non-competes.⁴⁵ In 2017, the California Labor Code was amended to prohibit non-competes that use a choice of law provision to get around the state prohibition.⁴⁶

How Has the Pandemic Impacted Non-Competes?

During the pandemic, many workers have been filing cases to challenge the enforceability of non-competes. Although courts continue to enforce these clauses, some have increased the

³⁹ *Id.*

⁴⁰ Lemley *supra* note 17 at 5.

⁴¹ White House Fact Sheet *supra* note 6.

⁴² The Workforce Mobility Act, S. 483/H.R. 1367 (117th Cong. 2021); Freedom to Compete Act, S. 2375 (117th Cong. 2021).

⁴³ Charles A. Sullivan, *Non-Competes in a Downsizing World*, 8 SAN DIEGO L. REV. 677, 681 (2021).

⁴⁴ See e.g., CAL. BUS. & PROF. CODE § 16600; CT ST 42-110b (2019); Illinois Freedom to Work Act, 820 ILCS 90/10 (2017); Maine, 26 M.R.S.A. § 599-A (2019); MD CODE, LAB & EMP., § 3-716 2019 (2019); Massachusetts Noncompetition Agreement Act, MA ST 149 S 24L; NH ST § 275:70 (2019); OR. ST. 653.295 (2020); WASH ST. 49.62.020 (2020); see also, Testimony of Najah Farley, *In Support of Proposed B23-494, Ban on Non-Compete Agreements Amendment Act of 2019: Hearing Before the Council of the District of Columbia*, (Dec. 6, 2019), <https://s27147.pcdn.co/wp-content/uploads/NELP-Testimony-DC-Council-Non-Compete-bill.pdf>.

⁴⁵ Department of the Treasury, Office of Economic Policy, *Non-compete Contracts: Economic Effects and Policy Implications*, March 2016, at 4; [Cal. Bus. & Prof. Code § 16600](#).

⁴⁶ California Code, Labor Code - LAB § 925.

level of scrutiny used to analyze them and have expanded their inquiry.⁴⁷ For example, a court considered the growing number of businesses that have adopted teleworking practices during the pandemic in determining whether a geographic restriction was reasonable.⁴⁸

Some businesses have argued that non-competes are even more important during the pandemic, claiming that trade secrets are harder to protect when people are working from home with less supervision.⁴⁹ However, some researchers have seen a decrease in the usage of non-competes since the pandemic, due to the labor shortage. Changing the laws now is imperative to keep the labor market moving and protect workers from being bound by these agreements as the labor shortage subsides.

Another issue workers are facing during the pandemic is determining whether their employer can still enforce their non-compete if they have been furloughed. In these cases, courts, reluctant to keep people out of work, have generally found the non-competes unenforceable.⁵⁰ Relatedly, while the legislative movement to eliminate non-competes predates the pandemic, some jurisdictions are creating pandemic-specific protections related to non-compete enforcement. For example, Illinois recently banned employers from entering into a non-compete agreement with a worker who has been terminated or furloughed because of the pandemic.⁵¹ ©

⁴⁷ Lisa Nagele-Piazza, *Are Noncompetes Enforceable During the Pandemic*, SHRM (Oct. 1, 2020), <https://www.shrm.org/resourcesandtools/legal-and-compliance/state-and-local-updates/pages/are-noncompetes-enforceable-during-the-covid-19-pandemic.aspx>.

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ Nagele-Piazza *supra* note 47; see also Mark P. Carey, *Covid-19 and Noncompetition Agreements: 4 Situations Where they Are Not Enforceable*, Carey & Associates, P.C. (March 30, 2020), <https://caplaw.com/covid-19-and-noncompetition-agreements-4-situations-where-they-are-not-enforceable/>.

⁵¹ Illinois Freedom to Work Act, 820 ILCS 90/10(c) (2021).