United States Senate

December 16, 2021

The Honorable Lina M. Khan
Chair
Federal Trade Commission
600 Pennsylvania Avenue, N.W.
Washington, D.C. 20580

The Honorable Noah Joshua Phillips
Commissioner
Federal Trade Commission
600 Pennsylvania Avenue, N.W.
Washington, D.C. 20580

The Honorable Rebecca Kelly Slaughter
Commissioner
Federal Trade Commission
600 Pennsylvania Avenue, N.W.
Washington, D.C. 20580

The Honorable Christine S. Wilson
Commissioner
Federal Trade Commission
600 Pennsylvania Avenue, N.W.
Washington, D.C. 20580

The Honorable Jonathan Kanter
Assistant Attorney General
Antitrust Division
United States Department of Justice
950 Pennsylvania Avenue, N.W.
Washington, DC 20530

Dear Commissioners and Assistant Attorney General Kanter,

Thank you for the opportunity to comment on the Federal Trade Commission (FTC) and Department of Justice Antitrust Division's role in restricting the use of non-compete clauses in conjunction with your joint workshop, "Making Competition Work: Promoting Competition in Labor Markets." We write in support of FTC and DOJ Antitrust action that restricts the use of non-compete clauses in employment contracts and promotes competitive labor markets and worker mobility.

The American workforce has experienced significantly reduced job mobility, tepid wage growth, and declining rates of entrepreneurship in recent decades. At the same time, non-compete clauses have become more prevalent.

At their core, non-competes inherently manipulate competitive labor market forces by narrowing the available employment options for workers. This manipulation is bad for both employees and employers. For employers, non-competes limit the available supply of qualified workers to fill their workforce needs. This is especially true at a time of low unemployment and recovery. For employees, the harmful effects of non-competes are more acute, as their use clearly leads to suppressed wages, lower initial wages, and reduced upward economic mobility.

Non-compete clauses also hinder entrepreneurship, as research shows that the use of non-competes leads to fewer startups, and firms that start in states that enforce non-compete clauses are more likely to fail.

As recent economic and labor market data has exhibited, many workers are realizing their potential for economic mobility by switching jobs and beginning new careers at staggering rates. And yet, despite the ongoing COVID-19 pandemic, other workers who lost their job by no fault of their own still have to abide by non-compete clauses that restrict their job options, closing pathways to career growth in their chosen industry and community.[1]

In short, non-compete clauses stifle entrepreneurship by preventing employee spinoffs and take away workers' leverage to grow their careers and enjoy economic mobility by switching firms or bargaining for higher wages.

We therefore believe that the FTC and DOJ Antitrust should act to limit the use of non-compete clauses. Reducing the use of non-competes would allow workers to get better jobs, boost wages, increase entrepreneurship, spur innovation, and allow for a more robust recovery out of the COVID-19 pandemic.

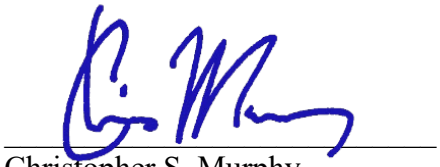
There are several actions the agencies could take to limit the use of non-competes. First, the permissible use of non-compete clauses should be limited to only the most necessary circumstances, such as the sale of a business or dissolution of a partnership, and only to the most senior executives. Second, FTC and DOJ should act to increase the transparency of the use of non-compete clauses by employers. Studies show that 30 to 40 percent of workers required to sign a non-compete clause do so after the prospective employee has already accepted the job offer. As such, these clauses are often entered into under unfair and deceptive circumstances. Therefore, employers should be required to disclose to the prospective employee that they will be bound to a non-compete clause should they accept the job, and that non-compete agreements entered into after the employee accepts the job should be unenforceable and illegal.

Limiting the use of non-compete clauses is a bipartisan issue in the United States Senate, with Senators strongly discouraging the abusive and anti-competitive use of non-compete agreements through public statements, in Committee hearings, and through legislation, including the *Workforce Mobility Act*.

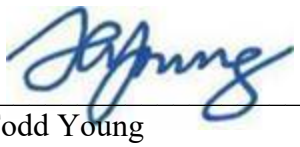
The FTC and DOJ Antitrust Division have a duty and the authority to significantly restrain the use of non-compete clauses. We believe that the use of non-compete clauses in the American economy is anti-competitive. We appreciate that the Commission and DOJ are seriously examining non-compete clauses, and ask you ultimately to take actions that would limit their use across the labor market.

Sincerely,

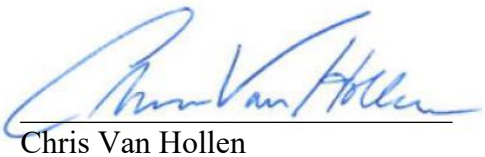
[1] *GFA Int'l, Inc., v. Eric Trillas, et al.*, 3D21-619, 2021 WL 3889283, at *1 (Fla. 3d DCA Sept. 1, 2021).



Christopher S. Murphy
United States Senator



Todd Young
United States Senator



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