May 23, 2023

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Re: Written Testimony of National Employment Lawyers Association and National Institute for Workers' Rights on S.3100, Amendments to New York's Labor Law Prohibiting Non-Compete Agreements and Certain Restrictive Covenants.

The National Employment Lawyers Association (NELA) and the National Institute for Workers' Rights ("Institute") submit this testimony in support of S.3100, an Act to amend New York's Labor Law to prohibit non-compete agreements and certain restrictive covenants ("S.3100" or "the Amendment").[1]

NELA is a national professional membership organization of and for lawyers who represent employees in all aspects of employment law. The largest organization of its kind in the country, NELA, together with its 69 circuit, state, and local affiliates, has more than 4000 members nationwide who variously represent employees in discrimination, whistleblower, wage and hour, health and safety, and contract disputes and who advise employees, partners, and independent contractors on employment-related agreements. NELA's mission is to serve lawyers who represent employees, advance employee rights, and advocate for equality and justice in the workplace. NELA has filed numerous amici curiae briefs before the United States Supreme Court and other federal appellate courts on a wide range of employment law issues as well as comments on relevant Notices of Proposed Rulemaking.

The mission of the National Institute for Workers' Rights is to advance workers' rights through research, thought leadership, and education for policymakers, advocates, and the public.

[1] This testimony is adapted from comments submitted on April 19, 2023 by NELA and the Institute in support of the Federal Trade Commission's January 5, 2023 Notice of Proposed Rule-Making entitled, Non-Compete Clause Rule ("FTC's Proposed Rule" or "Non-Compete Clause Rule"), 16 C.F.R. Part 910, RIN 3084-AB74, which proposes federal regulations banning non-compete clauses and de facto non-compete clauses, except in connection with sales of a business exceeding certain thresholds.

As the nation's employee rights advocacy think tank, the Institute influences the broad, macro conversations that shape employment law.

NELA members are the lawyers who represent employees with respect to the non-compete and de facto non-compete clauses covered by the Amendment. Because our members variously represent clients in these matters across industries, functions, and economic levels, from hourly-paid workers to high-level executives, NELA has deep experience with non-compete clauses and a panoramic view of the ongoing harmful anti-competitive effects they impose on workers, the public, and markets. Based on our members' vast experience with non-compete disputes and clauses as unfair methods of competition, NELA and the Institute urge New York State to enact the Amendment, as drafted, with certain modifications, and to reject the fallacy likely to be cited by opponents of the Amendment that non-compete clauses are necessary to protect trade secrets and other legitimate employer interests.

I. NON-COMPETE CLAUSES ARE UNFAIR METHODS OF COMPETITION THAT HARM WORKERS AND THE PUBLIC.

A. How Non-Competes Unfairly Limit Competition, Harming Workers and Consumers.

NELA supports the Amendment because, as the Federal Trade Commission sets forth in the FTC's Proposed Rule, non-compete clauses are unfair methods of competition because they negatively impact mobility in the labor market and are often coercively imposed. Non-compete clauses unfairly tether employees to their jobs and restrain competition by preventing employees from leaving their employment for better or even comparable opportunities within their relevant field of experience or industry. Employees who do leave are forced to sit out from their field for prolonged periods of time, something few workers can afford to do. This leaves the vast majority of workers with no choice but to stay in jobs that may be stagnant and/or underpaying at best, and abusive, intolerable, and/or rife with unlawful treatment, at worst.

For employers, this is a win-win. Non-compete clauses provide them with an inexpensive and easy way to retain talent without having to compete for employees with better pay and working conditions. Meanwhile, the costs and risks of this anti-competitive behavior are shifted to workers, consumers, and the public. Employees must forego opportunities for better pay, better working conditions, and/or career advancement in their chosen field. Even more troubling, many of our members have clients who have experienced unlawful harassment, discrimination, and/or retaliation, wage-and-hour violations, and/or unsafe conditions at the hands of an employer but who cannot escape this mistreatment unless they are willing to change fields or move substantially farther away.[2] More generally, as stated in the FTC's Proposed Rule,

[2] The ability to even work in the same field in another geographic area assumes that the non-compete clause has a geographic limitation; employers have imposed non-compete clauses that are national or

non-compete clauses depress wages in the geographical areas where they are used both for the employees who are subject to them and those who are not. Non-Compete Clause Rule, 88 Fed. Reg. 3482, 3488 (proposed Jan. 19, 2023) (to be codified at 16 CFR Part 910).

Moreover, because most employers also insist on employment at-will, they are able to both freeze employees in their jobs and retain the option to terminate employees when they choose. Many of the non-compete agreements encountered by our members make no exception to the non-compete if the employee is terminated without "cause." Although some New York courts may not enforce non-competes against employees terminated without cause,[3] many workers who are terminated without cause do not know that the non-compete may be unenforceable. Those who do often lack the means to risk a lawsuit by the employer, even if the worker will ultimately be successful, just as it is similarly cost-prohibitive for workers who legitimately dispute a purported "cause" termination to challenge enforceability of the non-compete in court. As a result, many workers are constrained by noncompetes even when they have legal grounds to challenge them.

Too often, consumers lose the freedom to choose their professional service providers and other market providers due to non-competes that prohibit the providers from working in the same geographic area after their employment ends. The non-compete clauses deprive or interfere with the public's ability to choose their own professional advisers, because it is usually not feasible for those clients to travel outside the relevant geographic area to maintain the professional relationship during the period of the non-compete. Some states have laws prohibiting or limiting use of non-competes against certain professionals, such as medical professionals, social workers, accountants, and/or broadcasters, but these exclusions are not consistent across state lines. Non-Compete Clause Rule, 88 Fed. Reg. 3482, 3494 (proposed Jan. 19, 2023) (to be codified at 16 CFR Part 910).

Similarly, no-service and no-business clauses function as non-competes by prohibiting employees from servicing or accepting business from clients or customers at future employers, even if the employee has not solicited the client or customer. The clients and customers are therefore prohibited from moving their business to their provider of choice.

As the FTC's Proposed Rule also aptly notes, non-compete clauses also negatively impact the public by restricting innovation. New entrants to the markets are prevented from

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global in scope, further drastically limiting the worker's options. *See Ainslie v. Cantor Fitzgerald, L.P.*, Consol. C.A. No. 9436-VCZ, 2023 WL 106924, *17 (Del. Ch. Jan. 4, 2023) (holding that worldwide geographic scope of non-competition, non-solicitation, and no-business provisions was unreasonable and noting that the absence of a geographical limitation does not render the restrictive covenant unenforceable per se, but such clause must be "'narrowly tailored to serve the employer's interests in the circumstances of the case.'" [internal citations omitted]).

[3] See, e.g., New York, *Kolchins v. Evolution Markets, Inc*., 122 N.Y.S. 3d 288, 290 (1st Dep't 2020); *Buchanan Capital Markets, LLC v. DeLucca*, 41 N.Y.S.3d 229 (1st Dep't. 2016).

recruiting the talent that they need to provide innovative goods and services; and workers subject to non-compete clauses are nearly always prevented from starting competitive businesses, even though they cannot use the employer's trade secrets or confidential information to do so. Rather, they must continue to work for their existing employer or leave the industry for a lengthy period before striking out on their own. This also causes harm to the market and the public by delaying or eliminating the introduction of superior products and services.

The cost of litigation means that these negative impacts on competition exist regardless of whether the non-compete is "reasonable" under state law. This is because, regardless of whether a non-compete is enforceable, its very existence creates a chilling effect on worker mobility.[4] Many workers are afraid to leave a job, let alone one that is unfulfilling, underpaying, or abusive, for fear of being sued. The cost to litigate a claim arising out of a non-compete clause can run into five and six figures, a prohibitive amount for the vast majority of employees, whether an hourly worker, mid-level manager, or even a doctor or engineer. A victory in such a case would be pyrrhic at best and financially ruinous at worst. Faced with this impossible choice, in our members' vast experience, many employees rationally resign themselves to complying with the non-compete, even a patently unenforceable one.

The chilling effect also spills onto competitors and other employers, many of whom are deterred from hiring workers bound by non-competes, no matter how unreasonable or unenforceable that non-compete might be, for fear of being swept up in litigation between the employee and former employer and possibly even sued for tortious interference with contractual relations. Competitors seeking to recruit talent are often faced with the challenging choice to forego a desirable job candidate or to pay the cost of litigation or settlement in order to seek closure on a restriction, even when unenforceable.[5]

In our members' experience, clients' former employers, aware that new employers are reluctant to get involved in a potential non-compete dispute, have wielded non-compete clauses like a cudgel, using the clause to improperly interfere in a former employee's ability to obtain a new job by scaring the new employer off. Some employers are willing to hire an employee with

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[4] This *in terrorem* effect means that:

> "[f]or every covenant that finds its way to court, there are thousands which exercise an *in terrorem* effect on employees who respect their contractual obligations and on competitors who fear legal complications if they employ a covenantor, or who are anxious to maintain gentlemanly relations with their competitors. Thus, the mobility of untold numbers of employees is restricted by the intimidation of restrictions whose severity no court would sanction."

Harlan M. Blake, *Employee Agreements Not To Compete*, 73 HARV. L. REV. 625, 682-83 (Feb. 1960).

[5] *See* Non-Compete Clause Rule, 88 Fed. Reg. 3482, 3501, at Part IV.A.1.a.ii (proposed Jan. 19, 2023) (to be codified at 16 CFR Part 910).

a non-compete, only to fire that employee at the first sign of litigation or the threat of litigation. We have attached a document that collects stories of workers in this and other difficult situations because of non-competes.

Although opponents of the FTC's Proposed Rule and similar state legislation, such as the Amendment, have attempted to minimize these impacts by arguing that non-compete clauses are imposed selectively to protect trade secrets and similar information and then negotiated between parties of comparable bargaining strength, that position is pure fallacy. First, non-competes are unfair methods of competition and impede worker mobility no matter how widely used. Second, our members' experience is that many employers, especially larger ones, reflexively use non-competes as invidious boilerplate, imposing them sweepingly throughout their organizations without regard to function and/or responsibilities, out of a generalized desire to prevent competition and retain employees and not due to any bona fide threat to a legitimate protectible interest.

Non-competes are rarely negotiated as part of an overall bargained-for employment agreement. In fact, employees are often presented with a non-compete agreement as though it were a routine administrative form and told to sign it in order to accept or start a job. Many workers do not know that they can have a lawyer review and explain the often convoluted and vague language of non-compete clauses or, if they are aware, they cannot afford to hire a lawyer to do so. Even when employees try to negotiate the language, which is often overly broad and/or ambiguous, employers often say that the clause is take-it-or-leave it because it is "standard" in the organization.

Very few employees, whether an hourly worker or an executive, have the luxury of walking away from a job. The reality is that many are forced to accept the non-compete in order to be able to work. Thus, in the vast majority of situations, the notion that non-compete clauses are the product of meaningful negotiations between parties of equal bargaining power is simply not true. While we can readily recognize that non-compete clauses are coercively imposed on low-wage and middle-income workers, as described further below, our experience is also that such clauses are coercively imposed with respect to employees at more senior levels of employment as well.

Of course, for an employee to even contemplate negotiation of a non-compete assumes that the employee has been provided with the non-compete clause *before* accepting a job. But, some employers spring non-compete clauses on unsuspecting employees at the start of the employment – after the employee has already resigned from a prior position and possibly turned down alternative offers – or impose a new or more onerous non-compete clauses on employees who are mid-tenure, on tight deadlines, upon risk of termination. As the employees typically cannot obtain alternative employment quickly, they are forced to accept the non-compete to keep his or her job, usually without additional compensation or benefits. Although, as described below, some states require employers to provide new consideration to impose a non-compete on

an existing at-will employee, New York does not; it allows continued employment of an at-will employee to be sufficient consideration for a post-hire non-compete agreement.

B. Non-Competes Are Not Necessary To Protect Employers' Interests.

1. Employers Have Ample Alternative Protections for Trade Secrets and Confidential Information.

Opponents of noncompetes attempt to depict a bleak picture by claiming that the restrictions on such agreements will effectively eliminate their ability to protect their confidential information and trade secrets. These arguments should be rejected. The notion that an employee should pre-emptively be forced to remain tethered to a job or benched from their field because of the potential for disclosure of confidential information and/or trade secrets is a harmful overreach that would allow employers to use unfair methods of competition to protect a much narrower set of already-amply protected interests.

At the outset, such arguments are in part belied by the way many employers, especially larger ones, themselves use non-competes as invidious boilerplate – imposing them reflexively and sweepingly, without relation to an employee's actual responsibilities, place within the organization, and/or receipt of trade secrets or sensitive confidential information, as stated above. In our members' experience, and as examples provided above and shared during the FTC's February 16, 2023, public hearing session demonstrate, employees across the economic spectrum are frequently subjected to non-compete clauses even though they do not receive trade secrets or competitively sensitive confidential information in performing their job.

Moreover, employers have ample ability to protect trade secrets and confidential information. The Uniform Trade Secrets Act, which has been adopted by forty-seven states and the District of Columbia, and the federal Defend Trade Secrets Act of 2016, separately provide for a civil cause of action for trade secret misappropriation. Non-Compete Clause Rule, 88 Fed. Reg. 3482, 3505, at Part IV.B.1. Trade secret theft is also a federal crime under the Economic Espionage Act of 1996. *Id*. Intellectual property law also provides significant legal protections for an employer's trade secrets. *Id.*

Employers also can protect trade secrets, inventions, and confidential information contractually, through non-disclosure, intellectual property, and/or confidentiality agreements. In fact, it has never been easier for employers to protect their confidential information, as they have found ever more ways to electronically track employees' work emails, downloads, and other transactions on work platforms. Moreover, employers can protect client lists through contractual non-solicitation clauses that prohibit an employee from soliciting a client's business after employment with the employer ends.

2. California: Where Business Not Only Survives but Thrives.

We need only look to California's long statutory history and public policy prohibiting non-competes for assurance that prohibitions on non-competes have not caused employer chaos or economic decline.

California Business and Professions Code and relabeled as section 16600 provides: "Except as provided in this chapter, every contract by which anyone is restrained from engaging in a lawful profession, trade, or business of any kind is to that extent void." Cal. Bus. & Prof. Code § 16600; see *Edwards v. Arthur Andersen LLP,* 44 Cal. 4th 937 (2008).[6] California has effectively had a ban on non-competes for over 150 years, yet the California economy—and in particular, its technology sector—has flourished. The California economy is thriving. It has the largest economy in the U.S. and is poised to overtake Germany as the world's 4th largest economy.[7]

Many economists have suggested that its ban on non-competes has played a key role in the development of its technology sector.[8] Many scholars and commentators have posited that the success of Silicon Valley, the heart of California's technology industry, is precisely *because of* California's statutory bar on non-competes.[9] This prohibition has led technology employers to cooperate and compete, generating a "dynamic process leading to Silicon Valley's characteristic career pattern, lack of vertical integration, knowledge spillovers, and business culture."[10] In an influential book, AnnaLee Saxenian compared the technology industries of Silicon Valley in

[6] In 1872, California first codified its prohibitions on non-competition by enacting Section 1673 of its Civil Code, which read: "Every contract by which any one is restrained from exercising a lawful profession, trade, or business of any kind, otherwise than is provided by the next two sections, is to that extent void." Cal. Civ. Code § 1673 (1872). In 1937, this code section was moved to the California Business and Professions Code.

[7] "ICYMI: California Poised to Become World's 4th Biggest Economy," Office of Governor Gavin Newsom, Oct. 24, 2022 https://www.gov.ca.gov/2022/10/24/icymi-california-poised-to-become-worlds-4th-biggest-economy/.

[8] *See, e.g.*, ANNALEE SAXENIAN, REGIONAL ADVANTAGE: CULTURE AND COMPETITION IN SILICON VALLEY AND ROUTE 128 (1994); Ronald J. Gilson, *The Legal Infrastructure of High Technology Industrial Districts: Silicon Valley, Route 128, and Covenants Not to Compete*, 74 N.Y.U. L. REV. 575, 627 (1999).

[9] *See e.g.* Jason S. Wood, *A Comparison of the Enforceability of Covenants Not To Compete and Recent Economic Histories of Four High Technology Regions*, 5 VA. J.L. & TECH. 14 (2000).

[10] Gilson, *supra* note 20, at 609.

California with Route 128 in Massachusetts, crediting California's ban on non-competes as a key factor explaining Silicon Valley's far superior rates of growth and innovation to Route 128.[11]

Economic research has found that technology workers in California move jobs more frequently than in other states, leading to more rapid knowledge diffusion and innovation.[12] Another economic study found that bans on non-competes are associated with increased job mobility and higher employee wages.[13] Numerous studies have found that non-competes stifle the creation of new businesses;[14] startups are more likely to be successful and to grow larger in states like California that ban non-competes.[15] States that ban non-compete clauses tend to show greater innovation, more entrepreneurship, higher job growth, and greater venture capital investment.[16]

Thus, the weight of the empirical evidence unambiguously not only refutes arguments about the illusory parade of horrors that would be caused by a ban on non-competes but also demonstrates that banning noncompete agreements, as exemplified by California's experience, fuels greater innovation, entrepreneurship, higher wages and job mobility, and greater higher economic growth, making a compelling case for their prohibition nationwide.

Although the sentiment runs counter to the current loud protestations from business groups, many employer-side attorneys in California generally agree that the state's ban on non-compete agreements is a good thing. "It's bad for business and bad for morale," reported one in-house attorney, "if you're an employer, you want the people working for you to *want* to work for you." She reasoned that if employees feel trapped, the employer ends up with a very disenchanted and unmotivated workforce. This attorney also previously worked in-house for a national company that used non-compete agreements with its employees in states which allowed them. She reported that the threatened litigation between companies over these agreements created "make-believe work" for legal departments. She also pointed out that employers still

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[11] SAXENIAN, *supra* note 20.
[12] Bruce Fallick, Charles Fleischman, and James Rebitzer, *Job-Hopping in Silicon Valley: Some Evidence Concerning the Microfoundations of a High-Technology Cluster*, 88 REV. ECON. AND STATS. 471 (2006).
[13] Natarajan Balasubramanian, Jin Woo Chang, Mariko Sakakibara, Jagadeesh Sivadasan, and Evan Starr, *Locked In? The Enforceability of Covenants Not to Compete and the Careers of High-Tech Workers*, 57 J. HUMAN RESOURCES 2349 (Apr. 2020).
[14] EVAN STARR, THE USE, ABUSE, AND ENFORCEABILITY OF NON-COMPETE AND NO-POACH AGREEMENTS, ECON. INNOVATION GROUP, Feb. 2019, https://eig.org/wp-content/uploads/2019/02/Non-Competes-2.20.19.pdf.
[15] Evan Starr, Natarajan Balasubramanian, and Mariko Sakakibara, *Screening Spinouts? How Noncompete Enforceability Affects the Creation, Growth, and Survival of New Firms*, 64 MANAGEMENT SCIENCE 552 (2017).
[16] Sampsa Samila and Olav Sorenson, *Noncompete Covenants: Incentives to Innovate or Impediments to Growth*, 57 MANAGEMENT SCIENCE 425 (2011).

have a solid backstop of trade secret protection agreements, which are fully enforceable in California.

Venture capitalist Bijan Sabet has stated that he does not require noncompete agreements from companies he invests in and that he asks other companies to abandon them too, because they do more harm than good.[17] Another Silicon Valley-based investor has cited noncompete agreements as a major impediment to hiring talent to promising new startup ideas. Oftentimes, they identify strong candidates who are interested in the job but do not accept because they are too afraid to take a job because they are bound by a noncompete. This slows down the pace of innovation and hinders the flow of talent to the best ideas.[18]

II. NELA AND THE INSTITUTE SUPPORT THE AMENDMENT BUT RECOMMEND MODIFICATIONS TO STRENGTHEN ITS POWER AGAINST UNFAIR METHODS OF COMPETITION AND HARM TO WORKERS.

A. Definitions of Non-Compete and De Facto Non-Compete in Proposed Labor Law Section 191-d.

The Amendment prohibits employers and other entities from requiring or entering into a "non-compete agreement and defines "non-compete clause" as "any agreement or clause contained in any agreement between an employer and a covered individual that prohibits or restricts such covered individual from obtaining employment, after the conclusion of employment with the employer included as a party to the agreement…." Importantly, the Amendment uses a functional test to determine whether a contractual term is prohibited, as applicability of the ban turns on whether a contractual term "restricts" a person from obtaining employment..."

NELA supports this broad definition and use of a functional test. This aspect of the rule reflects the common principle in employment law that what matters is the reality of the worker's situation, not the words and labels used to describe it. Employers might not always cleanly and clearly label as "non-competes" contractual obligations that have the effect of imposing a non-compete. A rule that permits employers to limit employees' freedom to seek other employment by simply using a different label would eviscerate the purpose and efficacy of the Amendment. The functional test and use of "prohibits or restricts" in the Amendment's definition of a "non-compete agreement" is also consistent with the Restatement (Second) of Contracts § 186(2)(1981), which uses a similarly expansive definition: "A promise is in restraint of trade if

[17] Matt Marshall, *Case closed: Non-competes aren't good*, VENTURE BEAT, 2007, https://venturebeat.com/business/case-closed-non-competes-arent-good/.
[18] Timothy Lee, *A little-known California law is Silicon Valley's secret weapon*, VOX, Feb. 13, 2017, https://www.vox.com/new-money/2017/2/13/14580874/google-self-driving-noncompetes.

its performance would limit competition in any business or restrict the promisor in the exercise of a gainful occupation." Likewise, the Uniform Restrictive Employment Agreement Act (UREAA) drafted by the National Conference of Commissioners on Uniform State Laws, utilizes a broader, more generalized protective focus: "Even if an agreement does not meet the definition of a non- solicitation agreement, confidentiality agreement or other named agreement, however, it is a restrictive employment agreement if it prohibits, *limits, or sets conditions* on working elsewhere after the work relationship ends or a sale of business is consummated." UREAA at 14 (Feb. 14, 2023), available at https://www.uniformlaws.org/committees/community-home?communitykey=f870a839-27cd-4150-ad5f-51d8214f1cd2 (emphasis added).

B. The Senate Should Strengthen the Ban by Expressly Including Non-Competes with Unfair Enforcement Remedies and Providing Examples of Non-Compete Clauses.

While NELA applauds the inclusion of a broad definition of "non-compete agreements" in the Amendment, we do believe that greater clarity by way of examples of prohibited clauses would assure uniformity, avoid the *in terrorem* effect of any uncertainty, and preempt creative contract writing that would undermine the intent of the Amendment. More specifically, NELA requests that the Amendment make clear that the following types of clauses are prohibited by the Amendment because they are explicitly or functionally non-compete clauses.

1. <u>Forfeiture-for-Competition Clauses</u>: Forfeiture-for-competition clauses provide that an employee who violates a non-competition obligation forfeits compensation, rather than being subjected to injunctive relief. While many jurisdictions scrutinize these provisions under the same reasonableness standards as applied to other non-competes, s*ee, e.g., Deming v. Nationwide Mut. Ins. Co*., 279 Conn. 745, 763, 905 A.2d 623, 635 (2006), New York does not, reasoning that the employee is not prohibited from working because he or she has the "choice" of competing or accepting compensation and that such scrutiny is unnecessary.

In reality, such choice is illusory. Often, the employee risks forfeiting meaningful compensation for work performed, while the employer stands to receive a liquidated remedy that may bear little, if any, relation to the damages actually incurred as a result of the alleged breach. *See, e.g., Ainslie*, Consol. C.A. No. 9436-VCZ, 2023 WL 106924, *17, 22-24 (analogizing the forfeiture for competition clauses at issue to liquidated damages provisions and noting that such provisions create the same "undue chilling effect on employment and upward mobility as a restrictive covenant" where the liquidated damages have no relation to actual harm suffered). Thus, forfeiture for competition clauses deter competition and worker mobility just like other non-compete clauses; they simply provide the employer with a pre-determined economic remedy. The Amendment should explicitly clarify that forfeiture-for-competition clauses are non-compete clauses prohibited by the Amendment.

2. Liquidated Damages Clauses: Like forfeiture-for-competition clauses, restrictive covenants with liquidated damages provisions are enforced through payment of a fixed amount of damages rather than through injunctive relief. Such clauses restrain competition and limit mobility like other non-competes; they simply allow the employer to avail itself of a preset amount of damages that may bear no relation to the damages actually incurred as a result of an alleged breach. *See generally Ainslie*, Consol. C.A. No. 9436-VCZ, 2023 WL 106924, *22-24.

As with forfeiture-for-competition clauses, however, some states hold that liquidated damages provisions are not restraints of trade. In *Eastern Carolina Internal Medicine, P. A. v. Faidas*, 149 N.C. App. 940, 564 S.E.2d 53 (2002), for instance, the court ruled that a physician's contract that required payment of liquidated damages in the amount of $109,000 in the event the physician worked for another healthcare provider within a three-county territory, was not a non-compete and thus not "subject to strict scrutiny as to reasonableness and public policy required with a covenant not to compete," because the clause did not forbid competition but instead required payment of a fee. *Id.* at 945, 56. New York should, with clarity, debunk and invalidate this type of reasoning and confirm that liquidated damages provisions are prohibited under the Amendment.

3. No-Service/No-Business Agreements: Often misnamed "non-solicitation" clauses, no-service/no-business agreements prohibit former employees from servicing or accepting business from customers or clients of their former employer after employment ends, even when the employee does not solicit the business. These clauses have the same impact as a non-compete clause, especially as to salespersons and licensed professionals, as they eliminate consumers' market choice and impede worker mobility, particularly where such clauses are drafted so broadly as to apply to clients with whom the employee had no direct contact and/or contain no exception for an employee's pre-existing clients. Courts have rejected attempts to pass off as "mere…non-solicitation provision[s]" covenants that prevent former employees from engaging in business with customers and recognized that such clauses constitute non-compete clauses. *Dent Wizard Int'l Corp. v. Andrzejewski*, 2021 IL App (2d) 200574-U, ¶ 35, 2021 Ill. Ap. Unpub. LEXIS 687, *18 (IL App. April 23, 2021) (citing *Zabaneh Franchises, LLC v. Walker*, 2012 IL. App (4th) 110215, P21, 972 N.E.2d 344, 361 Ill. Dec. 859 (2012)).

Accordingly, NELA proposes that no-service/no-business agreements be included as examples of non-competes prohibited by the Amendment. This addition would be particularly helpful in order to distinguish these no-service agreements from actual non-solicitation agreements, which are not prohibited by the Amendment

4. No-Shop/ "Forward" Contracts. No-shop or "forward contract" clauses prohibit employees from accepting an offer for future employment while still employed by the current employer. By putting employees in this professionally and economically untenable

position, i.e., requiring an employee to be unemployed before accepting a new position, these clauses restrain employee mobility and decrease the employee's bargaining position with a new employer for wages and other benefits. NELA thus requests that no-shop/forward contract clauses be included as examples of de facto non-competes.

5. Non-Disparagement Clauses. Broad non-disparagement clauses can function as non-competes insofar as they prohibit a former employee from making otherwise lawful statements in the normal course of competition on behalf of a future employer or engagement. We request that the Commission include as an example of a de facto non-compete an agreement prohibiting a former employee from making otherwise lawful statements in furtherance of lawful competition.

C. Definition of Employer.

The Amendment defines "non-compete agreement" to mean "any agreement, or clause contained in any agreement, between an employer and a covered individual that prohibits or restricts…." Section 190(3) of New York Labor Law defines "employer" to mean "any person, corporation, limited liability company, or association employing any individual in any occupation, industry, trade, business or service…."

We recommend that the Amendment should define non-compete agreements to mean "any agreement, or clause contained in any agreement between **an employer and/or any parent, subsidiary, agent, officer, partner, and/or affiliate of an employer …."** to ensure that no worker falls through the cracks as a result of complex arrangements by which a worker is subject to control by multiple entities or employed by one entity while subject to a non-compete clause through a compensation or equity agreement with a different entity, such as a parent, affiliate, or subsidiary of the employer. Non-competes are deployed to the detriment of workers and fair competition not just by traditional employers but across an array of opaque relationships whereby multiple entities act variously or in concert to constrict worker freedom. Thus, we propose that the definition of employer apply to an employer's affiliates, parents, subsidiaries, persons or entities under common control, and joint employers.

A broad definition would better ensure that employers do not escape the statute's proscriptions through various affiliated or shell entities not arguably otherwise covered by the Amendment's definition of employer. Such an approach is in keeping with a broad definition of "covered person" to mean workers classified as independent contractors, as well as externs, interns, volunteers, apprentices, or sole proprietors providing service to a client or customer.

D. The Amendment Should Require Retroactive Application and Rescission Are Critical to Curtail the Harms Imposed by Non-Competes.

Section 3 of Labor Law Section 191-d declares noncompetes to be void. As a matter of

logic and policy, that declaration would cover all existing noncompetes. But Section 5 of S.3100 provides that the new law applies only "to contracted entered into or modified on or after" the effective date. We urge the Senate to modify the Amendment to expressly apply to all non-compete agreements already in existence as of the effective date. The economic and market-based harms that result from the use and abuse of non-compete provisions continue at least through the life of the contract and the term of the non-compete period and, in some cases, longer. The depression of wages, limits on career progression, and lack of market choice for consumers caused by non-competes can be reasonably be viewed as cumulative and extending beyond the term of the non-compete clause.

A ban on only future non-compete clauses leaves these existing harms and their *sequella* in place and unchecked. Employees who have already entered into non-competes would still be prevented from switching jobs. Entrants into the job market would still be precluded from positions filled by dissatisfied workers whose mobility is limited by non-competes. Consumers would still lose their ability to choose. Innovation would continue to be stymied to the extent would-be entrepreneurs are subject to non-competes.

A law that applies only on a going-forward basis has at least two more detrimental effects. It creates a perverse incentive for employers to enter into non-compete provisions with employees before the Amendment's effective date and creates two classes of workers arbitrarily: those who are subject to a non-compete provision and those who are not. This would result in depressing employee mobility – and, as a result, earnings potential – for the more senior members of the labor market, with a disparate impact on our nation's oldest workers. While we already see hiring preferences for younger workers, we would undoubtedly see more of this preferential treatment where employers view younger job candidates as being presumptively more mobile and thus attractive, given that they would be less likely to be subject to restrictive non-competes.

In addition, a change in enforceability is not self-enforcing: it requires the parties to each individual contract to understand the change and to conduct themselves accordingly. Based on the experiences of our members as representatives of employees, many workers who are subject to unenforceable non-competes are not aware of their unenforceability.[19] As stated above, whether and to what extent a contractual provision is enforceable has become increasingly challenging for a layperson to understand.[20] Moreover, most workers lack the means to seek legal counsel as to the enforceability of a non-compete and, if determined to be unenforceable, to

[19] *See also* J.J. PRESCOTT AND EVAN STARR, SUBJECTIVE BELIEFS ABOUT CONTRACT ENFORCEABILITY 2 (2022) (finding that "70% of employees with unenforceable non-competes mistakenly believe their non-competes are enforceable").

[20] *See generally* Non-Compete Clause Rule, 88 Fed. Reg. 3482, 3494 at Part II.C.1 (proposed Jan. 19, 2023) (outlining the landscape of state law governing non-competes, including recent legislative changes).

mount a costly legal challenge to declare the non-compete unenforceable or to defend a suit against enforcement of such a restriction.[21]

In this regard, like the FTC's Proposed Rule, the Amendment should provide for rescission of existing non-compete agreements; and employees would be provided an individual, written notice that any restrictions are no longer in effect. This written rescission would make employees more aware of their rights and therefore increase employee mobility within the labor market.[22] Further, the ability to provide a prospective employer with a written rescission of a non-compete provision would give job-seekers the ability to assuage any concerns of litigation risk held by a prospective employer.

III. NELA STRONGLY OPPOSES ANY PROPOSED ALTERNATIVES BASED ON TITLES, INCOME LEVELS, OR REBUTTABLE PRESUMPTIONS.

Some opponents of a ban on non-compete agreements have argued that, if a ban is to be imposed, there should be carve-outs for "senior executives" or based on income levels. Opponents have alternatively argued for a rebuttable presumption rather than a total ban. NELA strongly opposes these potential alternatives to a complete ban because the alternatives would unjustifiably leave the economic and market-based harms caused by non-compete agreements intact, create uncertainty, and allow for easy evasion.

A. NELA Opposes Exceptions and Separate Rules for Senior Executives.

To the extent that opponents of the Amendment argue that "senior executives" should be subject to different rules or carved-out from the non-compete ban, that argument should be rejected. At the outset, as the FTC noted in its Proposed Rule, there is no agreed-upon definition of "senior executive." 88 Fed. Reg. 3482, 3520 at Part IV.C (proposed Jan. 19, 2023). It is an amorphous category that can expand and contract depending on usage and context and is not an appropriate basis on which to determine eligibility for workplace protections. Creating exceptions or separate rules for senior executives would invite arbitrary distinctions that are unrelated to any legitimate protectible employer interest, be ripe for abuse, and perpetuate the unfair competition targeted by the Amendment.

A carve-out or separate rule for senior executives would still deprive competitors, consumers, and the public of the ability to fairly compete for the executive's talent or benefit

[21] *Id.* at 3489 (noting that employees who believe their non-competes are unenforceable are still less likely to breach their terms, seemingly to avoid the specter of a lawsuit or risk the reputational harm associated with breaching a contract).

[22] PRESCOTT AND STARR, *supra* note 21, at 26 (concluding that information campaigns, such as individualized notice to workers, regarding the unenforceability of a non-compete will likely improve an employee's ability to take a competitive job).

from their innovation. Moreover, that someone is a senior executive or highly compensated does not insulate him or her from the untenable choices that other workers who are subject to non-competes face; they too need to earn a livelihood and pursue their careers. Moreover, most high earners and/or senior executives do not have the bargaining power to avoid a non-compete.

More generally, the fact that an employee was highly paid or advanced in their career to hold a senior position for the work they performed for a former employer is simply not a legitimate protectible reason to force them to remain tethered to a job or to force them to sit out of their career after the employment ends. As stated above, to the extent that employers need to protect trade secrets and the like, they have ample alternative options for protecting those interests.

In fact, given that senior employees tend to be older than junior employees, saddling only senior executives with non-compete agreements can make them less attractive to potential employers in favor of younger and more junior employees, and forcing senior executives to sit-out of their fields can deprive them of their livelihoods during critical earning years. Compounding this problem is that the number of available comparable jobs decreases as employees become more senior, making it that much more difficult for a high-level employee to find a comparable job after being forced to sit-out from their field.

B. NELA Opposes Exceptions and Separate Rules Based on Income Thresholds.

To the extent that opponents of the Amendment argue for exceptions and separate rules based on income levels, NELA strongly opposes such arguments. As with separation rules for senior executives, distinctions based on income levels are arbitrary, are unrelated to any legitimate protectible interest, would be ripe for abuse, and would perpetuate the anti-competitive harms identified by the proposed rule, while there are viable alternatives for employers to protect trade secrets, confidential information, and client lists. The anti-competitive effects of non-competes occur at all wage levels – the market, consumers, and the public are still deprived of the ability to compete for the innovation and talent of high earners who can contribute to new and existing market entrants. As with senior executives, most high wage earners do not have the bargaining power to avoid a non-compete. In any event, the fact that someone earned a high wage for performance of their job is not a legitimate basis to limit such employees' mobility post-employment.

Using salary or wages as a metric is also inapt and unfair because doing so ignores the compensation and opportunities that can reasonably be expected to be lost during the non-compete period. An employee who earns a salary of $100,000 per year but who is required to sit out from his or her career or field for one year after employment may need to stretch his prior earnings to cover a lack of comparable pay during the non-compete period or may have lost better-paying opportunities at the result of the non-compete. Once those costs are factored in, the employee may well have earned less than $100,000 per year for one or more years of his or her

prior job but still would be deprived of the protections of a rule that only banned non-compete clauses for those paid salaries of less than $100,000 per year. The non-competes themselves would make any eligibility test based on salaries and wages inherently inaccurate and deprive intended beneficiaries of the protections of the Proposed Rule.

In addition, any threshold amount that would apply to all locations would be difficult to find. What would be high wages in some parts of the country, would not be in others. Any attempt at equalizing for cost of living would increase uncertainty and impede the goal of providing a clear rule. Further, an employer would not necessarily have to pay a worker the threshold amount for any set amount of time. At-will employees can be terminated at any time, with little, if any severance pay. Employers seeking to evade the rule could simply raise an employee's salary to meet the threshold and terminate them after they sign the non-compete.

C. NELA Opposes a Rebuttable Presumption Would Leave Intact the Harms Addressed by the Amendment

To the extent that opponents of the Amendment argue for a rebuttable presumption instead of a total ban, NELA opposes any such alternative. For the reasons described in Part I of our comments, a rule that would require employees to both know the contours of the law and also when it is being overstepped has a chilling effect on both an employee's desire to consider new job prospects and a prospective employer's desire to hire a restricted candidate.

We need look no further than existing state laws to see that statutes with a rebuttable presumption of enforceability can still have a detrimental impact on employee mobility and, consequently, labor markets. Florida, which has a statute that sets forth presumptive enforceability standards,[23] is considered the state with the highest enforceability of non-competes and, consequently, a more depressed labor market in terms of wages for even the most senior employees.[24]

[23] FLA STAT. § 542.335.
[24] *See* Non-Compete Clause Rule, 88 Fed. Reg. 3482, 3524 at Part VII.B.1.a.iv (proposed Jan. 19, 2023).

D. Blue- and Purple-Penciling to Salvage Non-Compete Agreements Should Be Prohibited.

If the Commission ultimately permits any exceptions, however, the problem of reformation of overbroad restrictions will certainly arise. The Commission has noted that states apply a variety of approaches towards reformation of overly broad restrictive covenants:

> • Some states, like Wyoming, will not enforce or reform overbroad restrictions (red-penciling);
> • Other states, like North Carolina, permit a court to strike overly broad provisions, but do not permit the court to otherwise modify the terms (blue-penciling);
> • Other states, like Texas, allow the Court to reform or re-write overly broad provisions so the restrictions can be enforced, and sometimes only where the contract authorizes court revisions (purple-penciling).

Non-compete agreements frequently contain reformation or blue pencil clauses which state that the contracting parties agree to seek reformation or permit the court to make an otherwise unenforceable contract clause enforceable.

The Amendment should also provide that contracts cannot require reformation of overbroad non-compete provisions. Contract reformation is equitable in nature. Contract re-writing is largely not countenanced in other areas of contract law. *Penn v. Standard Life Ins. Co.*, 76 S.E. 262, 263 (N.C. 1912) ("Courts are not at liberty to rewrite contracts for the parties. We are not their guardians, but the interpreters of their words."). Indeed, why should the Court invoke its equitable powers to enforce a provision disfavored under the common law, when the drafter has overstepped its bounds? They should not, particularly given the *in terrorem* effect of overly broad non-competes. That is, for each non-compete salvaged by a court's reformation, thousands more workers will be penalized by adhering to overly broad provisions, believing them to be legal, or at least not worth challenging.

As the Wyoming Supreme Court recently recognized, it does not make sense to heap these judicial benefits on an overreaching employer:

> When challenged, the employer gets the benefit of the court redrafting the agreement to make it reasonable. *Golden Rd. Motor Inn*, 376 P.3d at 158; Pivateau, 86 Neb. L. Rev. at 689-90. The employer receives what "amounts to a free ride on a contractual provision that the employer is . . . aware would never be enforced." Pivateau, 86 Neb. L. Rev. at 689-90. "'[T]his smacks of having one's employee's cake[] and eating it too.'" *Richard P. Rita Pers. Servs. Int'l, Inc. v. Kot*, 229 Ga. 314, 191 S.E.2d 79, 81 (Ga. 1972) (quoting Harlan M. Blake, Employee Agreements Not to Compete, 73 Harv. L. Rev. 625, 683 (1960)

> [hereinafter referred to as Blake]). *See also Reddy*, 298 S.E.2d at 914-15 (in rejecting the liberal blue pencil rule, the West Virginia Supreme Court reasoned it "will necessarily encourage employers to draft overly broad agreements in the belief that . . . if they [are challenged], the terms will simply be judicially narrowed").

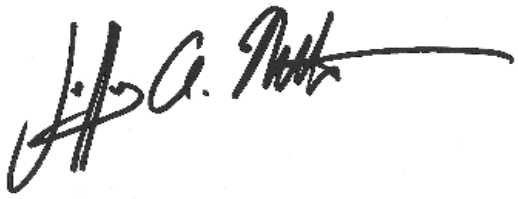
Hassler v. Circle C Res., 505 P.3d 169, 177 (Wyo. 2022). We agree with the sound reasoning of the Wyoming court and urge that the Amendment should forbid employers from obtaining reformation, or blue-penciling, of prohibited provisions.

VI. CONCLUSION

For the reasons set forth above, NELA and the Institute urge enactment of the Amendment as drafted, with the modifications requested above, thereby broadly prohibiting the use of non-compete agreements.

If you have questions regarding these comments, or difficulty opening the attachment, please contact Jeffrey A. Mittman, Executive Director, jmittman@nelahq.org.

Sincerely,



Jeffrey A. Mittman
Executive Director

Attachment: Stories of Workers Harmed by Non-Compete Clauses

APPENDIX

Stories of Workers Harmed by Non-Compete Clauses

Following are examples of the untenable choices and Kafka-esque circumstances that some of our members' clients have faced when they were forced to choose between their dignity, rights, and need to work, and compliance with a non-compete agreement.

• An LGBTQ+ traffic flagger for a traffic safety company in Ohio was required to sign a non-compete agreement when she was promoted to trainer. The non-compete agreement prohibited her from working for similar companies for 12-months within 100-miles of her employer. When co-workers started spreading rumors that she was in a relationship with a fellow LGBTQ co-worker, she complained about harassment. The employer then transferred her to a new work location, which was further from her home. Believing that the transfer was retaliatory, she resigned and filed a charge of discrimination with the EEOC. She moved to Texas in order to start a new job that was well outside the 100-mile radius of the non-compete agreement -- and her former employer sued her for violating the non-compete anyway. Her new employer laid her off because of the litigation. She was required to defend the lawsuit in Pennsylvania, where she neither lived nor worked, because of the choice of venue clause in the non-compete agreement. The Time's Up Legal Defense Fund ultimately subsidized her litigation costs, and the case eventually settled.

• A salesman with twenty years of experience in steel sales, brought a large book of business with him to his employer. He signed a non-compete that prohibited from working for competitors for 2 years "within the geographic area [employer] solicits," an area that included approximately half of the United States, and a non-solicitation agreement, which prevented him from soliciting the business's clients after leaving. Because the employer's president was abusive, the salesman decided to resign but, because of the non-compete agreement, he had to accept a job in Arizona, take a large pay cut, and rebuild his business from clients on the west coast from scratch. When he had to work from Indiana remotely during the pandemic, the former employer sued him for violating the non-compete agreement, and, after a year of litigation and more than $25,000 in (heavily discounted) attorneys' fees, the case resolved through settlement.

• A bar in a university town in Georgia required all of its managers and bartenders to sign non-compete agreements preventing them from working for any bars within two miles of the bar for two years, even though the bartenders had no specialized training or trade secrets from the bar. Those who violated the non-compete clause were required to pay a penalty of $5,000 to the bar, disguised as reimbursement for "training costs." The non-compete functionally prevented the bartenders and managers from working for any other bar in the town, yet the bar also failed to pay employees for all their hours of work. When one employee quit and went to work for another bar in the town because she was not being paid properly, the employer threatened to seek

a temporary restraining order against her. She had to take an advance of salary from her new employer in order to pay her former employer and end the risk of protracted litigation.

• A children's gymnastic coach at a local gym, was subject to a non-compete prohibiting her from working as for *any* gymnastics, dance, tumbling, or movement education organization within 30 miles of the gym for a year after her employment ended. Because the gym owners were disrespectful and abusive to her and the students, she quit and took a job as an assistant coach at another gym several miles away. The former employer sued her, seeking a temporary restraining order blocking her employment at the new gym and seeking damages.

• Two women worked for a small housekeeping business in Utah, cleaning approximately ten houses per week, were laid off after less than one year of tenure. They had signed non-compete agreements prohibiting them from working for a competing business for one year in the county where the business operating *plus a neighboring county where the business did not conduct any work.* When they were laid off, the former employer threatened them with a lawsuit and withheld their final pay based on a "liquidated damages" clause in the contract (even though they had not violated the non-compete). The women were afraid to continue working in the area covered by the non-compete, even though the business had not even operated in one of those counties.

• A project manager for a construction company in Utah had a non-compete agreement that prohibited him from working on any construction projects *in five states for two years* post-employment, even though the company did not work at all in two of the five states (and was not even licensed to work in those states) and never took jobs below a certain dollar value in Utah. After the project manager was fired, he took on some small construction jobs in Utah – jobs that were too small for his former employer to take. The former employer sued the project manager for violation of the non-compete. The litigation costs forced him out of business and put him on the brink of bankruptcy.

• A salesperson for a large national construction supply company, was subject to a non-compete preventing him from working for a competitor *within 100 miles for two years* post-employment, even though his sales territory was smaller than the area covered by the 100-mile radius. When the salesperson was hired by a small competing company within the 100-mile radius (but outside his former sales territory), the former employer sued. Although the salesperson was able to continue working for his new employer, he was forced to engage in expensive litigation to challenge the overly broad non-compete.

• An online content writer in New Jersey for an online medical website had a non-compete agreement prohibiting her from working for a competitor of the website and its parent for one-year post-employment. The non-compete clause effected prevented the writer from working for *any medical publishing company*, even though she was not involved in strategic decision-making for the website in any way. She had the opportunity to move to a much better

paying job with more potential advancement with a large company, which wanted to hire her, but the company would not proceed with her offer unless she obtained a waiver of the non-compete clause from her employer. The employer refused. Only after she filed a lawsuit seeking a declaratory judgment and preliminary junction to invalidate the non-compete did her former employer agree to negotiate the non-compete clause, and she was ultimately able to join the company, but only after retaining counsel and incurring litigation costs.

• An audio and video technologist for a company that ran large concerts and corporate events. His non-compete agreement barred him from working in the audio-visual industry for *three* years anywhere in *the Midwest*, which basically meant that he would either need to move across the company or leave the field after his employment ended. After the company furloughed him during the pandemic, he was hired by a competitor. When the former employer accused him of violating the non-compete agreement, he found yet another job, but the former employer again accused him of violating the non-compete agreement. After the technologist sued for a declaratory judgment to invalidate the non-compete agreement, the employer counter-sued to extend the non-compete agreement and recover attorneys' fees and costs. The litigation is ongoing.