



Testimony of Najah Farley

National Employment Law Project

In Support of Proposed S.3100 An Act to amend the labor law, in relation to prohibiting non-compete agreements and certain restrictive covenants (2023)

Hearing before the New York State Senate

Senate Standing Committee on Labor

Senate Standing Committee on Commerce, Economic Development and Small Business

May 23, 2023

Najah Farley
Senior Staff Attorney

National Employment Law Project

90 Broad St., Suite 1100

New York, NY 10004

(646) 693-8225

nfarley@nelp.org

Thank you, Senator Ramos, Senator Ryan, and members of the Labor Committee and the Committee on Commerce, Economic Development and Small Business. My name is Najah Farley. I am a senior staff attorney at the National Employment Law Project (NELP). The National Employment Law Project is a non-profit, non-partisan research and advocacy organization specializing in employment policy. Together with local, state, and national partners, NELP advances its mission through transformative legal and policy solutions, research, capacity-building, and communications. NELP regularly partners with federal, state, and local lawmakers on a wide range of issues to promote workers' rights and labor standards enforcement, including opposition to noncompete clauses, non-disclosure agreements, non-solicitation agreements, and forced arbitration. NELP has testified about how workers in low- and middle-wage industries are unable to earn a living when hampered by these abusive contracts.

I testify today in support of S.3100, which would significantly limit the use of noncompete covenants for employees and independent contractors in New York State. I first came to this issue when I was an Assistant Attorney General at the New York State Office of the Attorney General, where multiple usages of these agreements were uncovered and investigated across many industries and throughout the state, including complaints from phlebotomists, IT professionals, security guards, bike messengers, and school cafeteria workers, amongst others. Since joining NELP, I have continued advocating against the proliferation of these agreements, having seen firsthand their deleterious effect on workers.

Non-competition agreements are imposed by employers on employees, often as a condition of getting a job or receiving a promotion. They bar an employee or independent contractor from going to a competing employer or related business for a period following the end of an employment relationship or contract. Sometimes they are bound by either industry or geography, but some are very broad, implicating entire regions of the United States. Some may even list rival specific competitor companies that employees may not join after leaving their previous employer. Research suggests that nearly one in five workers in the United States is currently bound by a noncompete.¹ Employers' stated reasons for using noncompetes are typically to protect trade secrets, screen for employees that intend to stay with the company, and protect investment in employee trainings.²

Noncompete provisions are usually presented by employers in a "take it or leave it" fashion, and most employees and independent contractors do not have the power to change them or negotiate their implementation. Workers are forced to sign or forego the job opportunity, contract, or

¹ Starr, Evan and Prescott, J.J. and Bishara, Norman, *Noncompetes in the U.S. Labor Force* (December 24, 2017), <https://ssrn.com/abstract=2625714>.

² U.S. Department of Treasury Office of Economic Policy, *Non-compete Contracts: Economic Effects and Policy Implications* (2016), https://home.treasury.gov/system/files/226/Non_Compete_Contracts_Economic_Effects_and_Policy_Implications_MAR2016.pdf

promotion. Studies have shown that workers rarely negotiate on the issue of noncompetes, largely because many receive the noncompete as a condition of a job offer or after accepting the job offer and lack the power to do so.³ Of those who received the noncompete before the job offer, only 10 percent bargained over the noncompete.⁴ For these reasons, NELP often refers to noncompetes as “coercive waivers” as they are not negotiated and workers do not have the power to meaningfully change the terms of the agreements or to refuse to take the job.

We support S.3100 because it would stop the usage of these agreements for the majority of workers in New York State, limiting them to the sale of a business and other clearly defined instances. This law is key to disrupting the coercive nature of the noncompetes as they are currently used.

Many employers apply these agreements across all workers in their businesses to protect trade secrets and proprietary information, whether or not workers actually have access to this information. However, this rationale does not apply to most workers because employers have access to other causes of action to protect confidential and proprietary information and practices and trade secrets under federal law.⁵

In the wake of the pandemic, passing a bill limiting or banning noncompetes is of the utmost importance. Given the deleterious effects that noncompetes have on workers’ wages, limiting them substantially is yet another tool to promote workers’ rights while improving the economy. Noncompetes have been shown to depress wages by reducing competition.⁶ This is because economists have also found correlations between states with strict noncompete enforcement and those with lower wage growth and lower initial wages.⁷ The Economic Policy Institute has noted that because noncompetes limit workers’ ability to take other jobs or start their own businesses, it is “not difficult to see that noncompetes may be contributing to the declines in dynamism in the U.S. labor market.”⁸ One study showed that in states where noncompetes are more strictly

³ Two studies have shown that 30-40% of workers received the noncompete after they have accepted the job offer. Starr, Evan, J.J. Prescott, and Norman Bishara, *Noncompetes in the U.S. Labor Force*, University of Michigan Law & Econ Research Paper No. 18-013, 2019 and Marx, Matt, *The Firm Strikes Back: Non-Compete Agreements and the Mobility of Technical Professionals*, American Sociological Review, vol. 76, no. 5, 2011, pp. 695-712.

⁴ Starr, Evan and Prescott, J.J. and Bishara, Norman, *Noncompetes in the U.S. Labor Force* (December 24, 2017), SSRN: <https://ssrn.com/abstract=2625714>.

⁵ The Defend Trade Secrets Act of 2016 created the first federal civil cause of action and also created a number of statutory remedies for the misappropriation of trade secrets in the United States. 18 USC § 1833(b)(3).

⁶ Marshall Steinbaum, *How widespread is Labor Monopsony? Some New Results Suggest its Pervasive*, ROOSEVELT INSTITUTE, December 18, 2017; Greg Robb, *Wage growth is soft due to declining worker bargaining power, former Obama economist says*, MARKETWATCH, August 24, 2018.

⁷ Starr, Evan, *The Use, Abuse and Enforceability of Non-Compete and No-Poach Agreements: A Brief Review of the Theory, Evidence and Recent Reform Efforts*, February 2019 Issue Brief, p. 10, available at: <https://eig.org/wp-content/uploads/2019/02/Non-Competes-Brief.pdf>

⁸ Alexander J.S. Colvin and Heidi Shierholz, *Noncompete Agreements*, THE ECONOMIC POLICY INSTITUTE, December 10, 2019, <https://www.epi.org/publication/noncompete-agreements/>

enforced, noncompetes reduce workers options to move to new firms.⁹ This reduction in labor market turnover or “churn” affects the overall job market. This is how noncompetes—one small, seemingly narrow agreement—have an outsized effect on the overall economy.

Public and Private Right of Action

Another key component of this legislation is the inclusion of a private right of action—important because of the information gap and power differential when it comes to these agreements. As discussed above, most noncompetes are presented in a “take it or leave it” fashion, and many employers are not open to negotiations on the terms of these waivers.

Second, noncompetes can rarely be challenged on their face, as they require an employer to file a case against an employee claiming that the employee has violated the noncompete provisions. This leads to a power differential that allows employers to enforce the agreements through “soft” measures, such as threats and sending cease-and-desist letters to the employee or the employee’s new job. Placing the burden of proof on the party attempting to enforce the noncompete will serve to change this balance of power and make it easier for workers to challenge the imposition of a noncompete.

A private right of action also allows employees to challenge the waivers and ensure that they are nullified before moving on to another employer and without the risk that they could be fired from their new occupation due to the previously signed waiver. This legislation, by providing a liquidated damages provision, will also discourage employers from unlawfully imposing their agreements. This type of provision will have a deterrent effect for unscrupulous employers who still attempt to bind their employees with noncompete agreements. And as part of the New York Labor Law, the Attorney General’s office should also be able to bring public enforcement actions against employers who violate this law as well.

Effect of Noncompetes on Workers of Color and Women

In our recent comments to the Federal Trade Commission’s proposed noncompete rule, we discussed the history of noncompetes and how their modern-day usage can be traced back to contracts forced on newly freed, formerly enslaved people.¹⁰ Beyond this history, noncompetes continue to affect workers of color and women. Researchers have found that noncompetes can have a detrimental impact on people of color because it gives businesses more power to discriminate.¹¹ Further, women in states with strict noncompete enforcement are less likely to

⁹ Matthew Johnson, Kurt Lavetti, & Michael Lipsitz, *The Labor Market Effects of Legal Restrictions on Worker Mobility* (June 6, 2020), 5, <https://ssrn.com/abstract=3455381>.

¹⁰ 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).

¹¹ 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>.

leave their jobs or start rival small businesses.¹² Women and workers of color are also less likely to negotiate, and their earnings are reduced by twice as much when they are in states with strict noncompete enforcement.¹³ Because of these effects on wages, noncompetes may have an effect on racial and gender wage gaps nationally.

State Reform

States throughout the country have restricted the usage of noncompetes since 2016, and New York State is behind many other states in enacting progressive legislation in this arena.¹⁴ California, Oklahoma, and North Dakota have had complete bans on the enforceability of noncompetes for decades.¹⁵ Amongst more recent changes, in 2021, Illinois updated its noncompete law to ban noncompetes for all workers making \$75,000 a year or less (a threshold that will increase every year to match inflation).¹⁶ The bill, lauded as a compromise by the defense bar, also prohibited employers from enforcing noncompetes against workers who are separated due to Covid-19 or similar circumstances. If an employer wants to enforce a noncompete against a worker separated due to a natural disaster, the employer will be required to pay the employee's base salary throughout the noncompete's duration.¹⁷ In Oregon, lawmakers amended the state's noncompete law to increase the salary threshold for enforcement of noncompete agreements to \$100,533.¹⁸ The amended law also requires employers to pay workers half of their annual base salary or \$100,533, whichever is higher, throughout the period that the noncompete is in effect. These amendments strengthened one of the strongest noncompetes laws in the country. Nevada also amended its noncompete laws as well, officially banning

¹² Tom Fleischman, Women indirectly hurt more by noncompete pacts, Cornell Chronicle, Oct. 5, 2021; Matt Marx, *Employee Non-Compete Agreement, Gender, and Entrepreneurship*, at 3, 27 (May 4, 2020), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3173831.

¹³ Tom Fleischman, Women indirectly hurt more by noncompete pacts, Cornell Chronicle, Oct. 5, 2021; Matt Marx, *Employee Non-Compete Agreement, Gender, and Entrepreneurship*, at 3, 27 (May 4, 2020), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3173831.

¹⁴ This issue became very popular in state-level reforms due to the exposé on Jimmy John's usage of these agreements with sandwich makers in 2016. See, Dave Jamieson, *Jimmy John's Makes Low-Wage Workers Sign 'Oppressive' Noncompete Agreements*, HUFFINGTON POST, October 13, 2014, available at: http://www.huffingtonpost.com/2014/10/13/jimmy-johns-non-compete_n_5978180.html.

¹⁵ U.S. Department of the Treasury, Office of Economic Policy, *Non-compete Contracts: Economic Effects and Policy Implications*, March 2016, p. 7; [Cal. Bus. & Prof. Code § 1660 \(1976\)](#). (“[i]n 1872 California settled public policy in favor of open competition, and rejected the common law ‘rule of reasonableness,’ when the Legislature enacted the Civil Code”); see also, Oklahoma, *Title 15 O.S.2001 § 219A* and North Dakota, *9-08-06 (Unlawful and Voidable Contracts)*.

¹⁶ Illinois Freedom to Work Act ("IFWA"), 820 ILCS 90/1 *et seq.*,

¹⁷ Peter Steinmeyer and Brian Spang, Noncompete Reform Balances Employee and Biz Interests, LAW360, June 2, 2021, <https://www.law360.com/articles/1387841/ill-noncompete-reform-balances-employee-and-biz-interests>

¹⁸ ORS 653.925 Noncompetition Agreements, https://oregon.public.law/statutes/ors_653.295

noncompetes for hourly workers.¹⁹ The Nevada law also provides for attorneys' fees for workers who challenge noncompetes if they are found to be unlawful.

A study in 2021 showed that the 2008 Oregon noncompete law increased hourly wages by 2 to 3 percent on average.²⁰ S.3100 will likely have an even larger effect on wages, if enacted, because it would be a much stricter noncompete law than the Oregon noncompete law passed in 2008. All these state law changes leveled the playing field for workers seeking to be freed from these onerous agreements and also encouraged small businesses. These state reforms have in large part contributed to federal reform as well.

National Landscape

Nationally, the Federal Trade Commission (FTC) issued a proposed rule that would also largely ban noncompetes, allowing noncompetes only in relation to the sale of a business.²¹ The FTC's assessment in its Notice of Proposed Rulemaking (NPRM) estimates that the FTC proposed rule, if implemented, will raise U.S. workers total earnings by \$250 billion per year.²² The NPRM received hundreds of thousands of comments, many from workers who had been adversely affected by noncompetes. When reviewing the comments, I saw comments from small businesses that found it impossible to hire, and from doctors who said that noncompetes made it impossible for them to work, among many others. Many of the worker comments were anonymous because many workers suffer retaliation in the workplace when speaking out about these issues. That is why national advocacy has been of the utmost importance in bringing these issues to light.

Also, the Workforce Mobility Act has been reintroduced. The bill, sponsored by Senators Chris Murphy (D) and Todd Young (R), was first introduced on February 25, 2021, and reintroduced on February 2, 2023. It would largely eliminate noncompetes for the majority of workers, only keeping them for workers involved in the sale of a business, similar to S.3100. This bipartisan bill would go a long way toward allowing workers to chart their own careers without being hampered by unlawful noncompetes.

¹⁹ Nevada Assembly Bill 47 relating to unfair trade practices, <https://legiscan.com/NV/bill/AB47/2021>
And a number of states have banned non-competes for hourly workers and workers who are eligible for overtime (non-exempt workers), such as Illinois, Rhode Island, New Hampshire and Maryland.

²⁰ Michael Lipsitz and Evan Starr, Low-Wage Workers and the Enforceability of Noncompete Agreements, *MANAGEMENT SCIENCE*, April 5, 2021, <https://pubsonline.informs.org/doi/10.1287/mnsc.2020.3918>

²¹ The President's executive order, released on July 9, 2021, directed federal agencies to act to increase competition and included specific language on noncompete reform. 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/>.

²² FTC Notice of Proposed Rulemaking, 16 CFR 910, p. 76, January 5, 2023, https://www.ftc.gov/system/files/ftc_gov/pdf/p201000noncompetenprm.pdf

Conclusion

NELP supports S.3100 because it will ensure that noncompetes will no longer obstruct workers in New York State from changing jobs to raise their pay or move to better working conditions or starting a new small business. Passing S.3100 will also provide New York State workers with access to state remedies and private rights of action to challenge unlawful noncompetes outright. S.3100 could only serve to make New York State a better place for workers. For these reasons, we therefore urge the passage of S.3100. Thank you for this opportunity to submit testimony.