IWF and IWV Oppose The Proposed FTC Prohibition On Noncompete Agreements

March 10, 2023

Dear Commissioners,

Independent Women's Forum and Independent Women's Voice are leading national women's groups that fight to enhance people's freedom, opportunities, and well-being. We oppose the Federal Trade Commission's (FTC) proposed **regulation** to impose a national prohibition on employers entering into voluntary noncompete agreements with employees on the grounds that this action constitutes unconstitutional administrative overreach. Furthermore, such a sweeping ban would threaten the competitiveness and intellectual property of employers nationwide.

In proposing such an expansive rule, the FTC is acting outside of the authority delegated to it by Congress, likely invalidating this rule. Noncompete agreements prevent workers from being employed by a competing company or starting a competing business after their employment concludes, typically within a certain geographic area and period of time. Some **30 million** people are currently covered by noncompete agreements according to the FTC. Banning this kind of legal, voluntary agreement would have a significant, widespread economic impact. Therefore, it should not be made by a few unelected bureaucrats, but by members of Congress who are directly elected by and accountable to the American people.

The Supreme Court confirmed this principle in its ***West Virginia v. EPA*** decision last year. In 2015, the Environmental Protection Agency (EPA) under President Barack Obama used an obscure and little-used provision of the Clean Air Act to impose cap-and-trade energy regulation. West Virginia and a number of other states argued that decisions of such magnitude should be made by the people's elected representatives in Congress, not the EPA.

SCOTUS agreed, holding that Congress did not grant to the administrative state the sweeping power that the EPA asserted. Courts are cautious to confer agencies broad authority in "extraordinary cases" involving significant social, political, or economic questions unless the regulating agency can demonstrate "clear congressional authorization" for the power it claims. Therefore, the judiciary is certain to consider a prohibition on every voluntary contractual agreement controlling the employment decisions of a worker—including employees, independent contractors, interns, volunteers, apprentices, etc.—after his or her time with an employer ends to qualify as an "extraordinary case."

All states currently limit noncompete agreements requiring that they impose reasonable restrictions on geographic scope, duration, and competitive activity. Recently, states have started to ban or increase restrictions on contractual agreements. California, North Dakota, and Oklahoma have banned noncompete

clauses for nearly all employees with limited exceptions. Washington, Colorado, Illinois, Arizona, and Nevada have enacted restrictions that effectively void them based on factors including workers' earnings.

Federally, a bipartisan group of U.S. Senators has reintroduced the "**Workforce Mobility Act of 2023**," which would largely ban the use of noncompete agreements nationwide as a matter of federal law. Therefore, the FTC's ban would override state legislatures, which have more knowledge of the industries and employment environments in their states, and Congress which is exploring restrictions on noncompete agreements.

There is a strong business case to preserve noncompete agreements in certain circumstances. These agreements serve to protect the confidential and proprietary information of a company. They can protect trade secrets, business or professional information, relationships with existing or prospective customers and clients, and specialized training. Companies will invest significant resources into developing these aspects of their business to build competence, competitive advantages, and a knowledgeable workforce. Noncompete agreements protect those investments.

It is reasonable that companies seek to prevent executives, senior and mid-level officials, and highly-skilled workers from taking confidential and proprietary information to a nearby competitor or starting their own businesses in direct competition. For low-level, minimum-wage, and less skilled workers—who may not even be privy to this information or who work in certain industries—noncompete agreements can be overly restrictive and stifle future working opportunities.

In freelancing, noncompete agreements can make it difficult for independent contractors to find new clients or maintain multiple clients. Women comprise over half of the **65 million people** who freelance today, from personal trainers and hair braiders to delivery drivers and personal assistants. Unreasonable noncompete agreements heighten the challenges to maintaining the flexible opportunities that allow them to balance work with other priorities such as caregiving.

These are important considerations that states and/or Congress should weigh when mulling policies related to noncompetes.

The FTC is operating far outside of its jurisdiction with this proposal, and it will likely be invalidated by the courts. We urge the FTC to withdraw this proposal.

Sincerely,

Patrice Onwuka
Director
Center for Economic Opportunity