



UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

Office of Policy
Planning

March 8, 2023

MEMORANDUM

FROM: Shannon Lane

TO: April Tabor

SUBJECT: Summary of Interview of Elizabeth Wilkins by the Economic Policy Institute

EXECUTIVE SUMMARY:

On March 1, 2023, Elizabeth Wilkins, Director of the Office of Policy Planning and Chief of Staff to the Chair, participated in a webinar hosted by the Economic Policy Institute (“EPI”) about the Federal Trade Commission’s (“FTC”) proposed Non-Complete Clause Rule, 88 Fed. Reg. 3482 (Jan. 19, 2023) (“Proposed Rule”). The webinar was led by Terri Gerstein, a senior fellow at EPI. Other participants in the webinar were Kevin Borowske and Evan Starr. Viewers had the opportunity to submit questions to the speakers. The webinar is publicly available.¹ This memorandum is to be placed on the public record pursuant to 16 C.F.R. § 1.26(b)(5) and the Notice of Proposed Rulemaking, under which summaries or transcripts of oral communications respecting the merits of the proposed rulemaking from any outside party to any Commissioner or Commissioner advisor are to be placed in the public record. This executive summary does not summarize the entire interview, but rather focuses on information concerning the Proposed Rule that is not already included in the rulemaking record.

Ms. Wilkins began by providing an overview of the FTC’s Proposed Rule. She pointed out particularly salient features of the Proposed Rule: the broad definition of workers and the broad, functional definition of non-compete clauses. She also stated that courts have scrutinized non-compete clauses on a case-by-case basis, looking at whether the agreement is reasonable as between the parties. Ms. Gerstein asked why the FTC was proposing this rule now. Ms. Wilkins responded that the FTC started looking at this issue because of the increased volume of economic literature in the last two decades showing the industry- and economy-wide effects of non-compete clauses. The agency asked what tools it has to look at non-competes other than individual case-by-case enforcement. One reason rulemaking is a more attractive option is because there is a body of evidence suggesting that non-competes have a significant effect on competition in labor and product markets and on innovation on an industry and economy-wide basis. The agency has also been focused on its unfair methods of competition authority, which is broader than the antitrust laws and allows the FTC to look at conduct that has a competitive effect in the aggregate.

When asked why the FTC banned all non-competes instead of just those for low-wage workers, Ms. Wilkins responded that the FTC found significant effects on competition across the

¹ Economic Policy Inst., *Noncompete clauses cut worker power off at the knees* (Mar. 1, 2023), available at https://www.youtube.com/watch?v=folZhiw_HLM. The video offers subtitles.

wage scale and across job descriptions, though the effects look a little different in different categories. For many hourly workers, non-competes are naked restraints on competition with no justification. They do not protect trade secrets or training investments. They also look coercive and exploitative, and they create enormous difficulty when a worker tries to get a new job.

For some higher-wage workers, there may be some reasons why employers would want to use non-competes such as protecting information and investments, but the FTC still found significant harm to competition. Wages are depressed for workers across the board regardless of industry or wage level. For innovation in product markets, the FTC is concerned about knowledge workers and executives with non-confidential knowledge who are subject to non-competes, because the cross-pollination of experience at new jobs might lead to new innovation. A CEO may be more likely to create a new business and create more competition. Thus, there are significant harms to competition higher on the wage scale.

Ms. Wilkins also addressed the other ways employers can protect their interests that are less restrictive than non-competes, such as non-solicitation and non-disclosure agreements as well as providing better pay and working conditions. Given the harms from non-competes and the other means for employers to meet their needs, the FTC found that an across-the-board ban was the right proposal.

Ms. Wilkins was also asked about the role of state law now that this rule has been proposed and whether the FTC was overreaching with this Proposed Rule. She confirmed that if finalized as proposed, the rule would cover all industries the FTC has jurisdiction over across the country. There is room for state policymaking in industries that the FTC cannot regulate. And the agency does not yet know exactly what will be finalized and it may be some time before a rule goes into effect, so there is considerable room for states to develop policy even as the FTC moves forward. She stated that the FTC had a mandate from Congress to police unfair methods of competition and it is using the tools that Congress gave it to do so. She also highlighted the reasons for a nationwide ban. First, unenforceable non-competes can still have chilling effects on workers and can effectively bind them, regardless of any state restrictions. A rule that is clear and simple can remove those chilling effects more effectively than a patchwork set of rules. Second, labor market effects do not stop at the state line, so it is hard for states to fully regulate them. Finally, there may be ways for employers to use choice of law provisions to circumvent state restrictions on non-competes. Given the harms, there is good reason for a nationwide rule. Ms. Wilkins closed by noting the outpouring of personal stories after the Proposed Rule was released, and that this was an issue people feel deeply about and impacts a broad swath of Americans. Non-competes depress people's wages, limit their opportunities and choices, and limit innovative products for consumers.