

April 19, 2023

April Tabor
Secretary of the Commission
Office of the Secretary
Federal Trade Commission
600 Pennsylvania Avenue NW, Ste. CC-5610
Washington, DC 20580

Re: Federal Trade Commission Non-Compete Clause Rule, RIN: 3084-AB74

Dear Secretary Tabor:

The National Demolition Association (NDA) represents nearly 500 U.S. and Canadian companies that offer standard demolition services as well as a full range of demolition-related services and products. NDA educates members on the latest advances in equipment and services, provides educational programs and tools to stay abreast of regulatory and safety matters and keeps regulators informed about issues in our industry. NDA also increases public awareness of the economic and societal benefits of demolition.

On January 19, 2023, the Federal Trade Commission (FTC) published a Notice of Proposed Rulemaking (NPRM) in the Federal Register regarding non-compete clauses pursuant to Sections 5 and 6(g) of the Federal Trade Commission Act. According to the FTC, the proposed rule would provide that it is an unfair method of competition for an employer to enter into or attempt to enter into a non-compete clause with a worker; to maintain with a worker a non-compete clause; or, under certain circumstances, to represent to a worker that the worker is subject to a non-compete clause.¹

NDA opposes the FTC's proposed rule to eliminate non-compete clauses and believes it would negatively affect the demolition industry and broader U.S. economy. Specifically, NDA has concerns regarding the NPRM's impact on the ability of employers to protect proprietary information, increased compliance costs, and unprecedented executive overreach into private employment contracts.

Protecting Employer Assets

Demolition contractors, like many employers, have historically relied upon non-compete clauses to protect sensitive information that is integral to the competitiveness of their business. Employers routinely use these agreements to safeguard proprietary information such as their intellectual property, customer lists, trade secrets, techniques, and other assets. Eliminating non-compete clauses could potentially put this critical business information at risk and permanently damage an employer's ability to compete in the marketplace.

This is of particular concern for smaller entities that heavily depend on the protection of proprietary information to sustain and grow their business. According to the FTC's estimates, the proposed rule would have a wide-ranging impact on the small business community as 2.94 million small firms, comprising 3.08 million small establishments, use non-compete clauses to protect sensitive information.²

¹ 88 FR 3482

² 88 FR 3532

Compliance Costs

NDA has concerns regarding the financial impact the proposed rule would have on employers' balance sheets, particularly increased compliance costs. According to the NPRM, the FTC estimates the direct compliance costs and the costs of updating contractual practices would total \$246.16 to \$492.32 for each small firm, plus an additional \$71.52 for each establishment owned by that firm. A single-establishment firm would bear estimated costs of \$317.68 to \$563.84.³

NDA believes the FTC did not fully consider all of the potential compliance costs for employers when drafting the proposed rule and more analysis is need before issuing such an extension regulation. The elimination of non-compete clauses could significantly increase legal costs for employers as they seek alternative legal avenues to protect their intellectual property and other proprietary assets in the courts. The proposed rule would require some employers to substantially alter the process in which they hire, train and retain talent and necessitate additional employer resources to rescind existing non-compete agreements and inform workers of those changes. These added administrative costs imposed by the proposed rule could have a detrimental financial impact on businesses and lead to diminished job growth.

Executive Overreach in Private Contracts

Additionally, NDA has serious questions regarding the FTC's legal authority to issue such a sweeping and broad regulation affecting private contracts without consent from Congress. NDA believes the FTC's proposed rule drastically exceeds the agency's legislative mandate to protect consumer interests by restricting the freedom of employers and workers to enter into mutually agreed upon contracts. As stated by FTC Commissioner Christine S. Wilson in her dissent on the proposed rule, the statutory underpinnings of the NPRM are dubious at best and the rule is likely to be defeated in the courts once finalized:

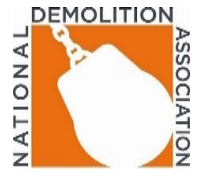
*"The NPRM is vulnerable to meritorious challenges that (1) the Commission lacks authority to engage in "unfair methods of competition" rulemaking, (2) the major questions doctrine addressed in West Virginia v. EPA applies, and the Commission lacks clear Congressional authorization to undertake this initiative; and (3) assuming the agency does possess the authority to engage in this rulemaking, it is an impermissible delegation of legislative authority under the non-delegation doctrine, particularly because the Commission has replaced the consumer welfare standard with one of multiple goals. In short, today's proposed rule will lead to protracted litigation in which the Commission is unlikely to prevail."*⁴

Moreover, the argument for a federal rule on non-compete clauses is even less persuasive when you consider that these agreements are already regulated at the state level and have traditionally been an issue of state law. Currently, 47 states have laws that allow non-compete clauses⁵. These laws include specific guidelines and limits on the enforceability of these agreements. Historically, the court system has upheld these agreements as long as they strictly adhere to state requirements and have not enforced agreements that are overly restrictive and unreasonable in accordance with state law.

³ Ibid.

⁴ Federal Trade Commission. Dissenting Statement of Commissioner Christine S. Wilson. Regarding the Notice of Proposed Rulemaking for the Non-Compete Clause Rule. Commission File No. P201200-1. January 5, 2023. https://www.ftc.gov/system/files/ftc_gov/pdf/p201000noncompetewilsondissent.pdf

⁵ 88 FR 3494



A one-size-fits-all rule by the federal government would upend decades of legal precedent on the state level and result in protracted litigation and uncertainty for both employers and workers.

Conclusion

For the reasons outlined above, NDA opposes the FTC's proposed rule to ban existing and future non-compete agreements and urges the agency to reconsider its position before issuing a final rule.

Thank you for the opportunity to provide comment on this issue. For any questions, please contact NDA's Director of Government Affairs Alex McIntyre at amcintyre@demolitionassociation.com.

Sincerely,

A handwritten signature in black ink, appearing to read "J. Lambert", is positioned below the word "Sincerely,".

Jeff Lambert
Chief Executive Officer
National Demolition Association (NDA)