

**Testimony of Sandeep Vaheesan, Open Markets Institute
Supporting Senate No. 1410
September 28, 2022**

My name is Sandeep Vaheesan. I am the Legal Director at the Open Markets Institute, an anti-monopoly research and advocacy group based in Washington, D.C. My colleagues and I have written extensively on the evils of non-compete clauses and other restrictive covenants and advocated for strict legal prohibitions on them.¹ As part of a labor and public interest coalition, the Open Markets Institute petitioned the Federal Trade Commission (FTC) in March 2019 to use its rulemaking authority to categorically ban non-compete clauses for all workers.² In his July 2021 Executive Order on Promoting Competition in the American Economy, President Biden called on the FTC to regulate the use of non-compete clauses.³

While we believe the New Jersey State Legislature should enact a full ban on non-compete clauses and functionally similar restrictive covenants, Senate No. 1410 is an important step in the right direction. First, it prohibits non-compete clauses for nine classes of enumerated workers, including nonexempt workers under the Fair Labor Standards Act, low-wage workers, and independent contractors. Second, it restricts the use of non-compete clauses for the rest of the workforce, notably limiting their temporal duration to no more than 12 months and requiring employers to pay a worker’s full salary and other compensation when a non-compete is in effect (commonly called “garden leave”). These restrictions and conditions would deter employers from using non-compete clauses as a matter of course, with employers likely using these contractual provisions only when strictly necessary to protect proprietary information. Third, the bill bans no-poach agreements,⁴ including between directly competing employers and staffing companies and their employer-clients, for low-wage workers.

¹ See, e.g., Sandeep Vaheesan & Matthew Jinoos Buck, *Non-Competes and Other Contracts of Dispossession*, 2022 MICH. ST. L. REV. 113; Sandeep Vaheesan, *Doctors, Nurses and Patients Could Suffer If Congress Doesn’t Outlaw These Contracts*, CNN, July 6, 2020, <https://www.cnn.com/2020/07/06/perspectives/non-compete-clauses-health-care/index.html>; Amanda Jaret & Sandeep Vaheesan, *Non-Compete Clauses Are Suffocating American Workers*, TIME, Dec. 19, 2019, <https://time.com/5753078/non-compete-clauses-american-workers/>; Sally Hubbard & Sandeep Vaheesan, *Noncompete Clauses Trap #MeToo Victims in Abusive Workplaces. The FTC Should Ban Them.*, USA TODAY, May 14, 2019, <https://www.usatoday.com/story/opinion/2019/05/14/sexually-harassed-women-trapped-noncompetes-abusive-workplaces-column/1184622001/>.

² Open Markets Institute, et al., *Petition for Rulemaking to Prohibit Worker Non-Compete Clauses*, <https://static1.squarespace.com/static/5e449c8c3ef68d752f3e70dc/t/5eaa04862ff52116d1dd04c1/1588200595775/Petition-for-Rulemaking-to-Prohibit-Worker-Non-Compete-Clauses.pdf>. See also Josh Eidelson, *Labor Groups Petition U.S. FTC to Ban Non-Compete Clauses*, BLOOMBERG, Mar. 20, 2019, <https://www.bloomberg.com/news/articles/2019-03-20/labor-groups-petition-u-s-ftc-to-prohibit-non-compete-clauses>.

³ Exec. Order No. 14036, 86 Fed. Reg. 36987, 36992 (July 9, 2021).

⁴ Under federal antitrust law, no-poach, no-hire, and other forms of collusion against workers by rival employers are already per se, or categorically, illegal. See, e.g., *Todd v. Exxon Corp.*, 275 F.3d 191, 201 (2d Cir. 2001) (Sotomayor, J.); *Vogel v. American Society of Appraisers*, 744 F.2d 598, 601 (7th Cir. 1984) (Posner, J.).

Non-competes and functionally similar contracts reduce labor market mobility and generally depress wages, wage growth, and small business formation.⁵ Research has found that non-competes discourage workers from leaving their jobs, even when employers cannot legally enforce the contracts in court.⁶ In states where non-competes are *unenforceable*, nearly 40% of workers reported turning down a job offer due to a non-compete clause.⁷ The existence of non-competes—regardless of whether employers can, or seek to, enforce them—is enough to harm workers.

Employers recognize this fact and use non-competes regardless of whether they can go to court to enforce their terms against workers. For example, while California law has prohibited judicial enforcement of non-competes since the 1870s (without clearly making these contracts illegal),⁸ approximately 45% of workplaces in the state impose non-compete clauses on at least some of their employees and nearly 30% require *all* workers to assent to these restraints.⁹

Whereas the harms from non-competes are real and well documented, the justification for these contracts does not withstand scrutiny. Employers and their representatives assert that non-competes are necessary for protecting trade secrets, customer lists, and other business information. According to this theory, restricting worker departure is necessary to prevent the appropriation of knowledge and know-how by rivals and workers who want to start competing businesses. To the extent employers do need to safeguard proprietary information, they have several less restrictive alternatives for preventing unauthorized disclosures. They can use trade secret and copyright law and targeted non-solicitation agreements to ensure that their information is protected.

If employers believe that retaining workers is the only way to protect their business information, they once again have other methods. To ensure a loyal workforce, employers can provide good wages, regular raises and promotions, and fair treatment on the job,¹⁰ as well as bonuses tied to

⁵ See, e.g., Brian Callaci, Sergio Pinto, Marshall Steinbaum & Matthew Walsh, *The Effect of No-Poaching Restrictions on Worker Earnings in Franchised Industries* 11 (2022), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4155577; Natarajan Balasubramanian, Jin Woo Chang, Mariko Sakakibara, Jagadeesh Sivadasan & Evan Starr, *Locked In? The Enforceability of Covenants Not to Compete and the Careers of High-Tech Workers*, 57(S) J. HUM. RES. S349, S351 (2022); Evan Starr, *Consider This: Training, Wages, and the Enforceability of Covenants Not to Compete* 17 (2018); U.S. Dep’t of Treasury, *Non-Compete Contracts: Economic Effects and Policy Implications* 20 (2016), https://home.treasury.gov/system/files/226/Non_Compete_Contracts_Economic_Effects_and_Policy_Implications_MAR2016.pdf; Toby E. Stuart & Olav Sorenson, *Liquidity Events and the Geographic Distribution of Entrepreneurial Activity*, 48 ADMIN. SCI. Q. 175, 197 (2003).

⁶ Evan Starr, J.J. Prescott & Norman Bishara, *Noncompetes and Employee Mobility* 3 (2019).

⁷ *Id.* at 42.

⁸ See *Edwards v. Arthur Andersen LLP*, 44 Cal.4th 937, 945 (2008) (citations omitted) (“[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. Today in California, covenants not to compete are void[.]”).

⁹ Alexander J.S. Colvin & Heidi Shierholz, *Noncompete Agreements* 5-6 (2019), <https://files.epi.org/pdf/179414.pdf>.

¹⁰ Janet Yellen, *Efficiency Wage Models of Unemployment*, in *ESSENTIAL READINGS IN ECONOMICS* 280 (Saul Estrin & Alan Marin eds., 1995)

length of tenure. For high-level workers with regular access to sensitive business information, employers can also opt out of the default rule of at-will employment through fixed-term employment contracts that commit both parties (employer and employee) to the relationship for a period.¹¹ Such contracts characterize professional sports in the United States today.

In contrast to these methods of protecting proprietary information, non-competes are, in the words of law professor Viva Moffat, “the wrong tool for the job.”¹² They are overbroad. Non-competes restrain worker mobility with the purported aim of protecting business information even if it is dated or trivial. For instance, a worker who has been with their employer for ten years—and generated substantial revenues and profits for the company—can be locked into place by a non-compete because the employer wants to guard job training materials provided to the worker years earlier. At the same time, non-competes are too narrow. They do not prevent, for example, the unauthorized, covert disclosure of trade secrets to competitors. They are poorly targeted for their ostensible purpose.¹³

Given their documented harms to workers and unpersuasive justification, non-compete clauses and no-poach agreements should be prohibited for all workers. Senate No. 1410 is a major step in that direction. It bans restrictive covenants for a significant fraction of the New Jersey labor force and protects other workers from overbroad non-compete clauses through, among other conditions, mandatory garden leave. We support this bill and urge your Committee and the Senate to pass it.

Thank you for the opportunity to testify in this matter.

¹¹ *Nickens v. Labor Agency of Metropolitan Washington*, 600 A.2d 813, 816 (D.C. 1991).

¹² Viva R. Moffat, *The Wrong Tool for the Job: The IP Problem with Noncompetition Agreements*, 52 WM. & MARY L. REV. 873 (2010).

¹³ Sandeep Vaheesan, *The Bogus Justification for Worker Non-Compete Clauses*, ONLABOR, Apr. 24, 2019, <https://onlabor.org/the-bogus-justification-for-worker-non-compete-clauses/>.