



March 20, 2023
Federal Trade Commission
600 Pennsylvania Avenue, NW
Washington, D.C. 20580

Submitted electronically via www.regulations.gov

Re: Proposed Non-Compete Clause Rule, 16 CFR Part 910, RIN 3084-AB74, Matter No. P201200

Wisconsin Manufacturers & Commerce (WMC) welcomes the opportunity to provide these comments to the Federal Trade Commission (FTC) in response to its proposed Non-Compete Clause Rule, 16 CFR Part 910, RIN 3084-AB74.

WMC is the largest general business association in Wisconsin, representing approximately 3,800 member companies of all sizes, located throughout the state and from every sector of the economy. WMC is the state chamber of commerce, state manufacturer's association and state safety council. Since its founding in 1911, WMC's mission has been to make Wisconsin the most competitive state in the nation to do business. That mission includes ensuring that Wisconsin employers and employees have the ability to freely negotiate their relationship. For this reason, WMC is strongly opposed to the proposed rule.

Non-compete clauses are an issue of state law, not federal regulation, and have been for more than a century. As the FTC acknowledges in its Notice of Proposed Rulemaking (NPRM), 47 states, or 94%, permit non-competes in some capacity, while only three states prohibit them entirely. Moreover, as the NPRM also notes, "[s]tates have been particularly active in restricting non-compete clauses in recent years" to combat unreasonable non-competes and to ensure procedural safeguards. In other words, the states are actively monitoring and adjusting their non-compete policies consistent with both the Constitution and principles of democratic governance.

Wisconsin's state legislature has made a policy choice to recognize reasonable non-compete clauses and courts have upheld that policy choice as legitimate and pro-competitive. Without clear direction from Congress, a federal agency has no business intervening in state law and interrupting state-governed contract law.

Moreover, Congress never gave the FTC the necessary statutory authority and it is unconstitutional for a federal agency to issue such a sweeping rule without express authorization. The FTC has not been granted the statutory authority by Congress to issue rules regulating competition such as the contractual relationship between employers and employees. In contrast, Congress expressly gave the FTC statutory authority to issue rules to protect consumers, such as to prevent fraud and false advertising. If the FTC were to be allowed to

write this rule, there would be no limit to additional rules it might write in the name of “promoting competition.”

Allowing for appropriate non-compete clauses helps Wisconsin’s economy, employers and employees. Having a blanket ban on non-compete clauses will harm both employers and employees. One way that non-compete clauses are beneficial to employers and employees is that the clauses encourage investment in employees. As the FTC acknowledges, two studies have found that “non-compete clauses increase employee training and other forms of investment.”

Wisconsin has a shortage of skilled workers. WMC members often cannot find applicants with specialized skills needed to fill their positions. Due to the shortage, more and more employers are hiring unskilled workers and then investing significant resources to provide the employees with highly specialized skills-based training. This training makes the employee highly marketable to the employer’s competitors.

Under this rule, WMC members are concerned that employer-paid training and education, such as skills-based training, graduate tuition reimbursement and post-graduate tuition reimbursement, would be severely curtailed as the employer could no longer expect the employee to stay with the company for any duration. Put another way, the rule would give the employer no recourse if the employee was poached by another employer upon completing their training or receiving their tuition reimbursement. The investment in training and education would no longer provide reasonable returns, and employers will simply end the programs. Employees would have fewer training and educational opportunities as a result.

Additionally, Wisconsin’s employers use non-compete clauses to protect their intellectual property. Without the availability of non-compete clauses, employers will be forced to take significant efforts to restrict employee knowledge, including strict limitations on information sharing, restriction of computer access and dividing business structures in order to protect trade secrets and client lists.

This proposed rule is inappropriate, lacks statutory authority and is harmful to the employer-employee relationship. Therefore, WMC urges the FTC to not proceed with this rule and instead leave this matter as an issue for the states. Thank you for your consideration of these comments.

Sincerely,

A handwritten signature in blue ink, appearing to read "Kurt R. Bauer", with a large, stylized flourish at the end.

Kurt R. Bauer
President/CEO

Wisconsin Manufacturers & Commerce