March 11, 2020

****Via electronic submission: http://www.regulations.gov ****

Federal Trade Commission
600 Pennsylvania Avenue, N.W.
Washington, D.C. 20580

Re: Non-Compete and No-Poach Clauses Used in Employment Contracts

Dear Commissioners:

Thank you for the opportunity to comment on the Federal Trade Commission's workshop, "Non-Competes in the Workplace: Examining Antitrust and Consumer Protection Issues." I write on behalf of the Restaurant Law Center, which is a public policy organization affiliated with the National Restaurant Association, the largest foodservice trade association in the world. This labor-intensive industry is comprised of over one million restaurants and other foodservice outlets employing 15 million people—approximately 10 percent of the U.S. workforce. Foodservice providers are the nation's second-largest private-sector employers. Despite its size, the industry is comprised mainly of small businesses; even well-known brand restaurants are often a collection of smaller franchised businesses.

The Restaurant Law Center's purpose is to promote laws and regulations that allow the entire foodservice industry to continue growing and creating jobs. It does so by providing regulatory agencies and the courts with the industry's perspective on regulatory and legal matters, such as this one, that might significantly impact the foodservice industry.

In these comments, I would like to urge the FTC to recognize the value of non-compete, no-poach, and related provisions for manager/salaried-level employees. As detailed below, these types of provisions are a vital tool for businesses seeking to protect

significant investments in the training and development of their manager/salaried-level employees, to provide top-notch service to their customers, and to safeguard sensitive and confidential business information and trade secrets.

Banning these provisions will therefore harm the industry, which in turn will harm both the industry's workers and customers. And, while the current patchwork of state laws and regulations creates challenges for the industry, any new federal efforts in this area should be sure not to amplify or magnify those challenges.

The foodservice industry has good reasons to use reasonable restrictive covenants for manager/salaried-level employees, and those provisions do not harm hourly workers.

The industry's employees are crucial to the industry's success. Industry businesses spend significant time and money to find, hire, train, and retain the best people. In particular, employers in the foodservice industry dedicate substantial resources to developing the skilled employees who are critical to manage operations, to execute on business plans and market strategy, to supervise and train other employees, and to maintain high levels of service and customer satisfaction.

To protect those investments in manager/salaried-level employees, foodservice industry employers may use reasonable and limited non-compete and no-poach provisions. Not all foodservice industry employers use such provisions. But those that do use them for manager/salaried-level employees have strong business reasons for doing so. For example, restrictive covenants for such category of employees reduce costly disruptions in operations and service that harm goodwill and degrade the customer experience.

Reasonable restrictive covenants are particularly important for foodservice management businesses, which provide on-site restaurants, cafeterias, and catering services to other businesses (such as stadiums, office buildings, and hospitals). Foodservice management companies invest significant resources in training and deploying skilled manager/salaried-level employees to establish on-site operations, build client relationships, and to run and evolve the day-to-day operations of those sites based upon client and customer needs.

As a result, they may use no-poach and non-compete agreements to protect that investment and to ensure that competitors or even the businesses they serve do not reap a windfall by hiring the foodservice management company's fully trained, manager/salaried-level employees to do the same work at the same location but for a different employer.[1] Relatedly, reasonable limits on manager/salaried-level employees may also serve to protect restaurants' and foodservice management companies' confidential, proprietary, and trade secret information—including the valuable knowledge and market intelligence gained by experience—and to appropriately deter competitors from targeting employees merely because they have that information.[2]

Reasonable restrictive covenants for manager/salaried-level employees are also important for franchise restaurants. Franchisees often spend tens of thousands of dollars, and months of employee time, to train manager/salaried-level employees on franchise-specific systems, operations, and business methods.

Thus, a franchisor may ask franchisees to adopt non-compete and no-poach agreements to protect the resources and time that the franchisees have invested in management, and to discourage another same-brand franchisee from seeking a windfall by poaching those trained managers.[3] In many cases, then, the use of non-compete and no-

[1] *See, e.g.*, *Compass Grp. USA, Inc. v. Eaton Rapids Pub. Sch.*, 349 F. App'x 33, 34–36 (6th Cir. 2009) (affirming that school district violated non-compete agreement by soliciting and hiring food management company's employee after deciding to provide food management services in-house).

[2] *See, e.g., Certified Restoration Dry Cleaning Network, L.L.C. v. Tenke Corp.*, 511 F.3d 535, 549 (6th Cir. 2007) ("the non-compete clause prevents [franchisees] from using their knowledge of [franchisor's] Restoration DC System and the relationships they established as Plaintiff's franchisee to steal customers from Plaintiff's new franchisee."); *First Fin. Bank, N.A. v. Bauknecht*, 71 F. Supp. 3d 819, 839 (C.D. Ill 2014) (explaining that where a company has invested substantial time, money and effort to develop a trade secret, the trade secret should be protected from others, including departing employees, who obtain it through improper means); *Sensus USA, Inc. v. Franklin*, 2016 WL 1466488, *7 (D. Del. Apr. 14, 2016) (noting that restrictive covenants may appropriately protect legitimate business interests, including "preserving employer good will and protecting an employer's confidential information, including customer lists, pricing, trade secrets and proprietary information").

[3] *See, e.g.*, *Tilden Recreational Vehicles, Inc. v. Belair*, 786 F. App'x 335, 340 (3d Cir. 2019) ("A non-compete agreement may be used to protect an employer's investment in training an employee …"); *Nationwide Mut. Ins. Co. v. Cornutt*, 907 F.2d 1085, 1087–88 (11th Cir. 1990) ("A protectable interest can also arise from the employer's investment in its employee, in terms of time, resources and responsibility."); Rachel S. Arnow-Richman, *Bargaining for Loyalty in the Information Age: A Reconsideration of the Role of Substantive Fairness in Enforcing Employee Noncompetes*, 80 Or. L. Rev. 1163, 1203-04 (2001) ("[D]espite the strategic importance of cultivating internal talent, employers may not make such investments for fear that their efforts will merely aid the competition."); *see also Singas Famous Pizza Brands Corp. v. New York Advert. LLC*, 468 F. App'x 43, 46

poach agreements in the franchise context may not actually limit manager/salaried-level employees from working for other foodservice businesses, or even for other franchisees of a different brand.

To be sure, non-compete and no-poach provisions may not be the best practice for hourly workers or any worker who is not made aware of the provisions. But those workers are not harmed when reasonable restrictive covenants are appropriately used with manager/salaried-level employees. And such restrictions are not unfair or deceptive as applied to manager/salaried-level employees who receive notice of the restrictions. Accordingly, there is no reason to ban restrictive covenants across the board and strong business reasons not to do so.

The current patchwork of state laws creates challenges for the foodservice industry.

Currently, states take many different approaches to regulating the use of non-compete and no-poach agreements. Consistent with important principles of federalism, those varied approaches appropriately reflect regional and local priorities, as well as the views of policymakers outside of Washington, D.C.[4] As a result of those various approaches, different legal standards and requirements may apply (or be absent) depending on where a company does business.

The sufficiency of state law as to restrictive covenants, whether there are any "gaps" in existing state regulation, and how any supposed "gaps" could be filled, therefore, depends on the particular facts and circumstances of each situation. This uncertainty is an expensive reality that the many other foodservice businesses that operate in multiple jurisdictions contend with every day. Those businesses may welcome FTC activity, in particular consumer and industry guidance, at least insofar as it increases certainty and predictability without causing more harm than good.

(2d Cir. 2012) ("restrictive covenants in franchise agreements are also necessary to neutralize the 'danger that former franchisees will use the knowledge they have gained from the franchisor to serve its former customers, and … damage the good will of the franchisor.'").

[4] *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) ("It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.").

The patchwork of state laws is particularly problematic when states attempt to regulate beyond their borders. This is not an abstract concern: some especially aggressive regulators have asserted supposed authority to regulate agreements that apply to employees *outside* their borders—even if the employer is complying with the state law where the employee is located.

Regardless of whether a state has such nationwide authority (a suspect proposition, to say the least), the assertion of such authority makes compliance with varied state laws all but impossible for the many foodservice businesses that operate in multiple jurisdictions. At a minimum the FTC should strongly consider reining in these state-level practices.

Any federal efforts, if appropriate at all, should not add to existing challenges for the foodservice industry or harm workers.

Should the FTC opt to take steps to limit or discourage non-compete or no-poach provisions,[5] those steps should not further complicate an already complex legal landscape. Nor should any new federal efforts impose arbitrary restrictions on foodservice-industry employers or add to the significant local, state, and federal regulatory burdens that those businesses currently face.

The FTC should tread very carefully when it comes to new federal actions related to restrictive covenants. The FTC should take care to treat businesses fairly, to simplify existing regulation, and to build consensus around commonsense best practices—such as limiting restrictive covenants for hourly employees and requiring notice to manager/salaried-level employees subject to restrictive covenants.

The FTC should also ensure that any new federal efforts recognize that non-compete and no-poach provisions are valid, legal, and important for the foodservice industry, and that such provisions encourage employers to invest in training and developing manager/salaried-level employees that drive their people-focused businesses. Finally, the

[5] For purposes of this submission, I assume, but do not concede, that the FTC has authority to regulate or take enforcement action related to restrictive covenants in general and as applied to restaurant or other foodservice industry employers, that the FTC has an adequate basis for any such regulation or enforcement, and that the FTC and any regulatory or enforcement action it undertakes complies fully with all applicable substantive and procedural rules (including those under the Administrative Procedure Act and the Constitution).

FTC should closely scrutinize any proposal to limit or ban restrictive covenants as applied to manager/salaried-level employees to avoid the strong negative impacts and harmful unintended consequences that may result from such measures.

Conclusion

On behalf of the Restaurant Law Center, I thank you for this opportunity to submit comments and encourage you to contact me at aamador@restaurant.org or 202-331-5913 with any further questions or concerns.

Sincerely,

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Executive Director

*I would like to thank outside counsel for their assistance in drafting these comments:

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