April 19, 2023

Federal Trade Commission
Office of the Secretary
600 Pennsylvania Avenue NW
Washington, DC 20580

Re: Noncompete Clause Rulemaking, Matter No. P201200

Dear Chairwoman and Commissioners:

As the voice of all things work, workers and the workplace, SHRM is the foremost expert, convener and thought leader on issues impacting today's evolving workplaces. With nearly 325,000 members in 165 countries, SHRM impacts the lives of more than 235 million workers and families globally.

SHRM's membership of HR professionals and business executives sits at the intersection of all things work, helping to set positive collaboration and workplace cultures where workers and employers thrive together. This includes ensuring that proper protections are in place to safeguard proprietary information and intellectual property. Therefore, on behalf of our members and the undersigned SHRM Affiliates, we respectfully submit this comment for the Federal Trade Commission's (FTC) consideration. The proposed rule invalidating all noncompetes will impede SHRM members' ability to balance the needs of workers and employers and will reduce the contractual capabilities of reasonable and consenting parties.

The sweeping proposal significantly complicates HR professionals' responsibility to protect their workforces' intellectual property and also will prevent unfair competition. SHRM members invest considerable resources in providing training and educational assistance to their employees. Without the use of reasonable, narrowly tailored non-compete agreements, employers will be precluded from recouping their investments in employees as well as intellectual capital. This may force employers to abandon programs, to the detriment of employees, the American workforce at large, and research and development of such programs. We strongly encourage the FTC to allow the states and their courts to continue to strike an equitable balance between the interests of the employer and the employee, affording states the authority to determine what is best for their constituency, as opposed to the FTC pursuing the instant proposed rulemaking. In developing SHRM's comment, SHRM members submitted stories of how the FTC's proposed rule will impact their business. Many of these stories will be highlighted throughout the comment.

I. The Proposed Rule Is Overbroad.

The FTC's proposed rule prohibiting *all* non-competes is overbroad for multiple reasons. First, as a threshold matter, existing state law largely curbs the abuses the FTC identifies as justification for its rule. Specifically, in states where non-competes are allowed, such restraints must still be no broader in duration, geography, and activity than necessary to protect the

employer's legitimate business interests. *See, e.g.*, Illinois, 820 ILCS 90/15; Massachusetts, Section 24L(b)(iii), Oregon, ORS 653.295(c); Mich. Comp. Laws Ann. § 445.774a(1). In addition, many states have imposed income or employment thresholds necessary for the implementation of a noncompete agreement (and other restrictive covenants). *See, e.g.*, Illinois, 820 ILCS 90/10; Washington, RCW 49.62.020; Massachusetts, Section 24L(c); Oregon, ORS 653.295(b); R.I. Gen. Laws 28-59-3(a)(4).

> *We do HR consulting, particularly in the technical arena. This could mean that our employees could not be held accountable for the disclosure of client confidentiality. It would also have a simular impact on consulting firms who deal with US agencies as well as those who work with state and local government agencies. This also mean[s] that consulting firms could not hold their employees for violating the various federal and any state confidentiality statutes. But I and my company (me) could very likely would be held accountable.*

- *Organization (2-24 employees)*

Second, the rule applies to all noncompetes regardless of the classification of employee. SHRM agrees that noncompetes are unnecessary and inappropriate with low-wage workers, but the rule is not limited to such employees. Indeed, the rule would prohibit noncompetes with executives, managers and employees who pose an existential risk to their employers if allowed to terminate employment and immediately join a competitor or become one themselves. The threat posed by these employees cannot be mitigated by a nondisclosure agreement alone. The understanding that among other factors, the strategies to which the employees have access, help develop and are responsible for implementing, cannot be protected through a nondisclosure agreement alone, in the event such employees are hired by a direct competitor in a similar geographic area to perform a substantially similar job function. Any rule must definitively differentiate between agreements designed to limit labor market mobility and those that protect confidential trade secrets, strategic plans and other sensitive information.

> *We are a family-owned business with 4 locations in 4 different states in an industry that is extremely competitive. We only use non compete agreements with non solicitation and anti piracy clauses for Production shift managers and Department Managers (Warehouse, Quality Assurance, Production, Maintenance). Our term limit is 18 months within our geographical area in our specific industry. It would be devastating to our business if a manager decided to quit and raid our employees and/or use customer information for unethical purposes.*

- *Organization (50-99 employees)*

Third, the rule will deprive employers of existing contractual rights and obligations that were freely negotiated and entered into with their workers, as the proposed rule applies prospectively ***and*** retroactively. Every day, employers make decisions regarding hiring, training, incentivizing and promoting their workers in reliance on the existing law. Further, businesses make acquisitions through which key workers are retained and restricted from unfairly competing as part of the consideration paid in making the acquisition. Voiding existing agreements will arbitrarily and unfairly result in a taking without due process and an unearned windfall.

Fourth, the proposed carve-out of noncompetes in connection with a sale of business for owners of 25% or more equity is not tied to the practicalities of most transactions. In the first instance, many equity holders own less than 25% of the business because of multiple owners and the exchange of equity for financing from lenders. Second, key executives and managers may own little to no equity, but their continued employment may be a fundamental asset to be acquired in any transaction. If such employees were allowed to leave and promptly compete post-acquisition, that could render the entire acquisition illusory. Accordingly, all equity owners (and key employees) should be subject to reasonable restrictive covenants.

> *I am most concerned about the impact of this rule on employers' ability to protect trade secrets. One area we tend to use non-competes is with certain key staff that come to our company via acquisition. Acquisitions are high stakes transactions and often people are as important to the success as is the business and technology being acquired.*

- *Organization (1,000-2,499 employees)*

II. The Proposed Rule Will Harm Employees and Diminish Training and Education Opportunities.

Employers invest heavily in various training and education programs to compete in the marketplace and enable the professional development of their workforces. Employers make such investments with the expectation, and upon the condition, of obtaining a return on such investments. While the FTC's proposed rule carves out the recoupment of training costs provided the employer demonstrates a reasonable relationship to the expenses, the carve-out is insufficient to enable employers to invest in their employees' professional development freely.

> *We hire persons outside the United States under the H-1B guidelines. This requires us to pay a significant amount of money to invest on employment opportunities with the candidates. While we cannot recoup the money for the visas from the employee[,] we can have a contract for them to work for our organization for a couple of years and to have a non-compete clause in the contract to a degree. We also offer scholarships for employees if they fulfill a contract with our organization. In both cases, we grant "buy-outs" of their contracts if they choose to work for another company which allows us to recoup some of the money. Not being able to have some form of a non-compete clause or educational reimbursement would prevent us from being able to provide these opportunities to employees because it is so costly. Our organization is a 501 (c)3. Budgets must be monitored and adhered to so we can operate.*

- *Organization (250 – 499 employees)*

Training and educational development go well beyond formal training programs; they extend to on-the-job learning, promotional and credentialing activities, mentorship, and other opportunities. As a practical matter, employers cannot quantify the reasonable costs of such training because those costs are intertwined with the job duties and responsibilities of the employees. Estimating such costs poses an unreasonable and impracticable burden on HR professionals. Employers recoup their investment through the development of their workforce and the competitive advantages such investments bestow. It is reasonable to expect that after an

employer invests in its employees, those employees will not immediately join a competitor who may freely acquire and exploit those investments made by the previous employer.

> *We use non-compete, non-solicitation, and educational training contracts to grow the behavioral healthcare field. In the last 10 years, because of our ability to utilize these contracts and invest in our team and the field, we have provided over 800 high school diploma level, and over 120 professional level, team members with the opportunity to gain certifications and higher level education, including master's degrees. This has cost us over $10,000,000. If we are unable to protect our investment through the use of these agreements, we are forced to remain small (as others in our field have done) and limit the availability of desperately needed services, and pass these costs on to the employees. This is against our values and mission as a company, and we are strongly against this proposed [rule].*

- *Organization (250-499 employees)*

III. The FTC Lacks Legal Authority to Ban Noncompetes.

Noncompetes have been a matter of political significance over the past several years, with numerous states debating and enacting new laws regulating their use. These regulations include banning the use of restrictive covenants with low-wage workers, imposing minimum compensation thresholds, requiring notice periods, requiring specific consideration for noncompetes, and other terms. At the federal level, Congress has considered—but failed to enact—numerous bills that would have banned or placed limits on the use of noncompetes with workers. *See* VA Hiring Enhancement Act (H.R.3401) (to void noncompetes for physicians going to work at VA hospitals); Workforce Mobility Act of 2021 (H.R.1367) (to ban employee noncompetes); Workforce Mobility Act of 2021 (S.483) (*same*); Freedom To Compete Act of 2022 (S.2375) (to ban noncompetes for workers who are not exempt under the Fair Labor Standards Act); Restoring Workers' Rights Act of 2022 (H.R. 8755) (*same*); FTC Whistleblower Act of 2021 (H.R.6093) (to void noncompetes for whistleblowers to the FTC); Employment Freedom for All Act (H.R.5851) (to void noncompetes for any employee who is fired for not complying with their employer's COVID-19 vaccine mandate).

The substantial legislative activity described above is indisputable evidence of the economic and political significance of noncompetes. Congress has devoted significant time and resources to discussing noncompetes in employment contracts yet has not passed any legislation to preempt state law and completely ban their use. Nor has Congress ever delegated that authority to the FTC. Instead, Congress is observing the states' efforts to strike the right balance to protect the interests of all stakeholders from unfair competition. Congress tacitly recognizes that a broad, blanket ban on all noncompete agreements might harm and stifle workplace innovation. As the Supreme Court has long recognized, "States [] serve as "laborator[ies]" for "novel social and economic experiments." *W. Virginia*, 142 S. Ct. 2587, 2618 (2022) (internal citations omitted). "When an agency claims the power to regulate vast swaths of American life, it not only risks intruding on Congress's power, it also risks intruding on powers reserved to the States." *Id*., 142 S. Ct. at 2621. Accordingly, SHRM respectfully submits that the FTC's proposed rulemaking is legally impermissible.

IV. Less Onerous Alternatives Should be Considered by the FTC.

As discussed above, states have either enacted targeted legislation to mitigate the potential abuses resulting from noncompetes or are subjected to common law principles of equity that safeguard against the harms associated with overly broad and burdensome contracts, including noncompetes. There are options to protect vulnerable American workers without pursuing a ban on all noncompetes. Below are examples of less onerous alternatives, along with SHRM member stories, for the FTC to consider:

- Imposing minimum compensation thresholds to enforce restrictive covenants. As adopted by several states,[1] minimum compensation thresholds will ensure that lower-wage workers who are unlikely to pose a risk of unfair competition after termination of employment are not subject to noncompete agreements.

  We do not have non-competes for our hourly associates, we do have them for our exempt salaried associates. Our non-competes are only for direct competitors, not other retailers. Eliminating the non-compete could hurt our business since we are in retail and store leaders could go to work for a competitor and take important, valuable and confidential information with them.

  - *Organization (5,000-9,999 employees)*

- Limiting non-competes to managerial, executive level employees or those employees with material access to competitively sensitive information and development. SHRM data shows that the vast majority of employers only use non-competes with high-level employees.[2] Limiting the use of noncompete agreements to managers and executives who are likely to have access to and/or develop confidential and strategic information is consistent with present practice and allows for the use of noncompetes to prevent unfair competition and protect trade secrets from inevitable disclosure and use.[3]

  Our company really only utilizes non-compete agreements for highly compensated employees that are also equity partners in the firm, and thus are highly involved in the management of our business and are of significant value to our firm in terms of the relationships that they have in our business. We would also use them in acquisition scenarios to try to ensure that at least the key acquired staff stay for a required amount of time, otherwise what are we really "buying"? (We are a professional services firm, so the people and their relationships are very important.)

  - *Organization (50-99 employees)*

- Prohibiting or limiting noncompetes in specific industries where such agreements are against public policy. Some states have expressly carved out or limited the use of noncompetes in certain industries. *See, e.g.,* Conn. Gen. Stat. Ann. §§ 20-14p, 31-50a, 31-50b (physicans); Del. Code Ann. tit 6., § 2707 (physicans); Ind. Code Ann. § 25-22.5 (physicians); Iowa Code § 135Q.1-2 (health care agency workers providing direct

[1] *See* Section I, *supra*.
[2] In February 2023, SHRM surveyed its members on the FTC's proposed rule. 57% of survey respondents require workers that earn over $150,000 to sign noncompete agreements.
[3] *See also,* Idaho Code §§44-2701-2704 (limiting non-competes to "key employees").

services or nursing services to health care entity consumers); KRS § 216.724(direct care workers); 26 MRSA § 599 (employees earning wages at or below 400% of the federal poverty level); Mass. Gen. Laws ch. 112, §§ 74D 135C, 186 (registered nurses); NH RSA 329:31-a (physicians).

- Creating presumptions of enforceability and unenforceability depending on duration, geographic scope and/or activity restrictions. Some states, either through statute or common law, have created presumptions of enforceability based on the specific terms of the restraint. *See, e.g.*, Fla. Stat. Ann., § 542.335. Employers are thus motivated to draft narrow restraints to fit within the statutory presumptions.

- Limiting noncompetes on the precondition that material compensation and/or benefits be provided to the employee. Illinois, through bipartisan legislation, amended its Freedom to Work Act to explicitly require minimum consideration to enforce a noncompete, including two years of continuous employment or some combination of employment and other financial or professional benefits. *See* 820 ILCS 90.

V. Individual SHRM Member Stories

SHRM has an unwavering commitment to focus on policy, not politics. A key element in achieving this commitment is to elevate the voice of our members in the development of SHRM policy positions. To that end, below are additional testimonies from SHRM members, representing businesses and industries of all sizes, on how the FTC's proposed rule may impact their organizations:

> *I understand and agree with banning noncompete provisions for personnel who make less than $60K/year. When you go above that and the likelihood that the person is exposed to information that can damage the company increases exponentially, should that person take advantage, it is very difficult to recover… especially for a small business. Also, removal of noncompetes encourages and leads to poaching, which again, is most detrimental to small businesses.*

- *Organization (2-24 employees)*

> *It will have a great deal of impact on my organizations and many of those existing signed agreement would become unenforceable, but I agree with the proposed rule changes on a personal level and feel that these types of agreements should only apply to high earners or executive-level team members. These types of contracts harm people of color and low earners and limit their mobility and ability to achieve higher wages and work experiences.*

- *Organization (50-99 employees)*

> *In a competitive industry, client and service information are the goodwill that is the value of our business. Being unable to protect that information devalues our enterprise. We do not use unreasonable time periods or distances, just what makes sense in our small territory with multiple competitors.*

- *Organization (100-249 employees)*

We have had professional-level employees leave our organization, take a multitude of other differential levels of professionals, and start a competing business with our trade secrets, employees, and clients. Non-competes ensure we are able to justify not only paying for licenses that are nationally recognized, but also able to protect our investments and organization. We are also able to ensure that newly licensed individuals (we run an extensive intern and higher education program) are encouraged to continue learning how to provide high-quality services through additional time with our organization.

- *Organization (250-499 employees)*

  The proposed rule would negatively impact many businesses from the standpoint of fair business practices. Non-competes not only keep the market wages in line[,] they also deter companies from possible monopolization.

- *Organization (500-999 employees)*

  If we recruit a physician to join our team of employed physicians, that often includes an investment on our part in special equipment or software for the new physician. If that physician had the ability to leave our employment and begin working for the competitor down the road, it would hinder our willingness to invest large dollars into specialized equipment for a new physician, which could potentially impact the level of healthcare we would be able to offer in our rural location.

- *Organization (1,000-2,499 employees)*

  We provide financial benefits to employees in exchange for them not competing. The non-competes are limited to a particular geography or industry. If these were immediately not enforceable, do we get our money back? Also, we may reconsider various programs/benefits - part of their justification was the ability to get a non-compete. It also seems that there will be less market competition if employees are free to go to the competitor and inevitably share information about their prior company.

- *Organization (5,000-9,999 employees)*

  Repayment of student loans is one of the primary means of enticing employees to move and work in rural areas. And competitors will begin paying substantial monies to lure away individuals for the sole purpose of obtaining trade secrets.

- *Organization (10,000-24,999 employees)*

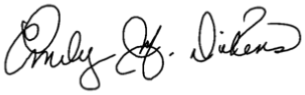
  If the FTC puts restrictions on non-competes, I will have to pay my employees more just to retain them. By paying some employees more, I will have to lay off others. By laying off others, I will have to contract my business. I will also have to raise prices for our customers, thereby contributing to inflation. Contributing to inflation will make it harder for my remaining employees to sustain a living wage, and make it impossible for my laid-off workers to survive without even more government intervention.

- *Organization (25,000-plus employees)*

VI. Conclusion

SHRM appreciates the opportunity to offer these comments on the FTC's proposed Noncompete Clause Rulemaking, Matter No. P201200. SHRM shares the FTC's interest in promoting a well-functioning labor market and the ability of workers to earn higher wages. The FTC's interest in worker mobility can be balanced with employers' interest in training workers and protecting confidential information. Fair competition and a healthy labor market can be achieved by recognizing the value of well-structured, narrowly tailored noncompete agreements with appropriate workers. SHRM looks forward to partnering with the FTC to ensure the final rule protects work, workers and the workplace.

Sincerely,



Emily M. Dickens
Chief of Staff, Head of Public Affairs & Corporate Secretary

SHRM State Councils
WYOMING SHRM
WEST VIRGINIA SHRM STATE COUNCIL
VIRGINIA SHRM STATE COUNCIL (HR VIRGINIA)
UTAH SHRM
TEXAS SHRM
SOUTH CAROLINA SHRM
RHODE ISLAND SHRM
PASHRM STATE COUNCIL
NEW YORK STATE SOCIETY FOR HUMAN RESOURCE MANAGEMENT, INC
SHRM NEW MEXICO
HR STATE COUNCIL OF NEW HAMPSHIRE
NORTH DAKOTA SOCIETY OF HUMAN RESOURCE MANAGEMENT COUNCIL (ND SHRM)
NORTH CAROLINA SOCIETY FOR HUMAN RESOURCE MANAGEMENT
MISSISSIPPI STATE COUNCIL OF SHRM
MINNESOTA STATE SHRM COUNCIL
MARYLAND SHRM STATE COUNCIL, INC.
LOUISIANA SOCIETY FOR HUMAN RESOURCE MANAGEMENT
HR INDIANA SHRM

ILLINOIS STATE COUNCIL OF SHRM
IDAHO STATE COUNCIL OF SHRM
PACIFIC STATE COUNCIL
HR FLORIDA STATE COUNCIL, INC.
DELAWARE SHRM STATE COUNCIL
ARIZONA SHRM STATE COUNCIL
ALABAMA SHRM STATE COUNCIL
ALASKA SHRM STATE COUNCIL
CALIFORNIA STATE COUNCIL OF SHRM
IOWA SHRM STATE COUNCIL
OHIO SHRM STATE COUNCIL
KANSAS STATE COUNCIL OF SHRM, INC.