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Submitted via portal on www.regulations.gov/commenton/

Federal Trade Commission
600 Pennsylvania Avenue, NW
Washington, DC 20580

Re: Non-Compete Clause Rulemaking, Matter No. P201200

Dear Members of the Federal Trade Commission:

I submit these comments on my own behalf and on behalf of the Florida Chapter of the National Employment Lawyers Association (Florida NELA) in support of the entire Non-Compete Clause Rule as proposed.

Florida NELA is a non-profit organization dedicated to protecting the rights of workers throughout the state of Florida. Florida NELA promotes the civil rights of employees, applicants, and former employees by assisting the lawyers who represent them. Florida NELA is an affiliate state chapter of the National Employment Lawyers Association. Florida NELA has filed numerous amicus briefs with federal and state courts which have been recognized by courts in assisting in the evaluation of issues of Florida employment law. *See, e.g., Gogel v. Kia Motors Mfg. of Georgia, Inc.,* 967 F.3d 1121, 1163 (11th Cir. 2020*); Donovan v. Broward Cnty. Bd. of Comm'rs,* 974 So. 2d 458, 461 (Fla. 4th DCA 2008).

On a daily basis, the members of Florida NELA advise employees (and those labeled as independent contractors) on Florida's draconian law on non-compete agreements and other restrictive covenants. We speak with employees about the substantial risks they take when they leave a job to pursue the American dream of starting their own business or even just consider moving to a better paying job at the fast-food restaurant down the street. Even more heart-wrenching is having to counsel an employee who has been fired without cause, but the employer is still enforcing a non-compete against them.

I personally have 25 years' experience in representing employers and employees in Florida in non-compete matters. I have represented individuals who perform manual labor for minimum wage and chief executive officers of publicly traded corporations in non-compete matters. In almost every instance when I am discussing Florida non-compete law the individual is surprised about how Florida law treats non-compete agreements and the amazing anti-worker bias.

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In Florida, a non-compete clause typically prohibits an individual from working for a competitor or starting their own business for two years after the termination of their business relationship, regardless of the reason for termination. While there were previously geographic limits, with the growth of the internet many businesses now claim to have nationwide operations and seek to prevent individuals from working anywhere for a two-year period.

As noted in the Notice and the proposed rule, there are a broad range of contract provisions that, while not explicitly labeled as non-competes, are used to restrict individuals from working after the termination of their business relationship. For example, non-solicitation clauses prohibiting soliciting potential customers for two years are functionally a non-compete because businesses consider virtually everyone potential customers. There are also non-disclosure agreements, which will prohibit an employee from disclosing or utilizing any information about their employer, typically for a two-year period after termination. These are often written not to protect true trade secrets but rather the mundane, commonly known information and are used to prevent legitimate competition.

In addition, sometimes these agreements are structured so that the individual receives a signing bonus when they begin employment but requires the employee to return the bonus or to be bound by the restrictions for a very lengthy period of time. Similarly, liquidated damages provisions and training-repayment agreements are also used to restrict employees' ability to work.

Under Florida law, these restrictive employment covenants are used against employees and those labeled as agents or independent contractors. *See* Fla. Stat. 542.335(1)(d)(1).

These contract provisions are often contained in the same document, which is typically presented to the individual as part of a package of items they need to click to accept, either at the start of employment or disguised as an innocuous update to policies and procedures. Because of the use of click to agree, the individuals are often unaware of these post-employment restrictions.

Non-compete clauses are almost always presented as take-it-or-leave-it contracts and, under Florida law, where continued employment is sufficient consideration for enforcement of a non-compete, an employer can implement a non-compete at any time in the employment relationship. In addition, where there is an employment at-will relationship, a Florida employer can terminate an employee at any time and for any reason, including refusal to sign a non-compete agreement. Taken in combination, the individual has no meaningful way to avoid the unilateral implementation of a non-compete.

Although Florida has a broad general prohibition on contracts that restrain trade, Florida law on non-competes are a huge exception to this prohibition. *Compare* Fla. Stat. §542.18 ("Every contract, combination, or conspiracy in restraint of trade or commerce in this state is unlawful.") with Fla. Stat. §542.335. As detailed in the Notice, Florida is "the state which enforces non-compete clauses most strictly." *See* Notice at page 21.

It must also be noted that the basis courts in other states use to limit non-compete agreements identified in the Notice are greatly restricted in Florida. For example, in discussing "[t]he first basis on which a non-compete clause can be found unreasonable is where the restraint

is greater than needed to protect the employer's legitimate interest" the Notice states, "[i]f the employer can demonstrate a legitimate interest, the employer must then show the non-compete clause is tailored to that interest." *See* Notice at page 52. Under Florida law, as long as the employer is able to establish a *prima facie* case that restraint is reasonably necessary, the burden is on the employee to establish that the restriction is overbroad, overlong or otherwise unnecessary. *See* Fla. Stat. §542.335(1)(c).

More disturbingly, the Notice identifies "[t]he second basis under which a non-compete clause can be found unreasonable is where the employer's need for the non-compete clause is outweighed by the hardship to the worker and the likely injury to the public," but Florida law does not allow consideration of one of these basis at all and greatly limits consideration of the other. *See* Notice at page 53. Under Florida law, the court is explicitly not permitted to consider the hardship to the worker that the non-compete will cause. *See* Fla. Stat. §542.335(1)(g)(1) ("In determining the enforceability of a restrictive covenant, a court [s]hall not consider any individualized economic or other hardship that might be caused to the person against whom enforcement is sought.") With respect to public policy considerations, Florida law specifically provides, "[n]o court may refuse enforcement of an otherwise enforceable restrictive covenant on the ground that the contract violates public policy unless such public policy is articulated specifically by the court and the court finds that the specified public policy requirements substantially outweigh the need to protect the legitimate business interest or interests established by the person seeking enforcement of the restraint." *See* Fla. Stat. §542.335(1)(i).

In addition, Florida law turns the normal rules of contract construction upside down. Rather than construing the agreements against the party who drafted them or against the non-compete, Florida law provides, "[a] court shall not employ any rule of contract construction that requires the court to construe a restrictive covenant narrowly, against the restraint, or against the drafter of the contract." *See* Fla. Stat. §542.225 (1)(h). Florida law also requires the court to construe the agreement in the employer's favor. *Id.*

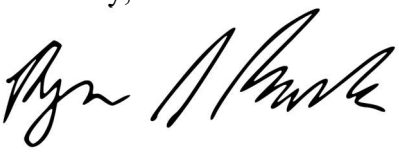
It is against this backdrop that Florida NELA strongly endorses the entire Non-Compete Clause Rule as proposed. We believe that the Rule should apply equally to all workers, whether a laborer or an executive, whether paid minimum wage or with stock options, whether an employee or an independent contractor. Non-compete clauses prevent all workers from taking better opportunities. Further, senior executives and those who are highly compensated are often in a position to start new businesses, which will lead to the development of new products, services and even markets. There can be a magnifying effect from these individuals being able to fully compete as opposed to being forced to be unproductive for years, often during the prime of their working careers. Because of this we support the provisions of the proposed rule which clarify that the term "worker" includes an employee, individual classified as an independent contractor, extern, intern, volunteer, apprentice, or sole proprietor who provides a service to a client or customer. Similarly, because of the variation of methods and terminology used to restrict employees after the termination of their business relationship, we support the broad prohibition on non-competes and all of their functional equivalents.

Further, we urge the FTC to include franchisees in the rule. It is our experience that an increasing number of industries are relying upon franchise models. In fact, data from the United

States Census Bureau shows that many industries have shifted to a franchise model. *See Nearly 300 Industries Offer Franchise Opportunities* by Bárbara Zamora-Appel and Nidaal Jubran, December 01, 2021 available at https://www.census.gov/library/stories/2021/12/franchising-is-more-than-just-fast-food.html. Many of these new entrants are just as subject to exploitation as employees or independent contractors and should be protected. Further, if there is a different rule for franchisees, companies will just label their workers franchisees in an attempt to impose non-compete restrictions.

On my own behalf and on behalf of the members of Florida NELA I thank you for undertaking this important work and for consideration of these comments in support of the proposed rule. If we can provide further information, please contact me.

Sincerely,



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