Noncompete Ban Is Key To Empowering Low-Wage Workers

By **Brendan Lynch** (April 14, 2023)

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Management-side lawyers have made a steady drumbeat of complaints about the recent proposal by the Federal Trade Commission to ban noncompete agreements in the labor market. Lost in these protests is the startling reality that the broad use of noncompetes has eroded employment at will.

The typical justification for employment at will is that employers and employees have an equal and unlimited opportunity to end their employment relationship and enter a new employment contract with different parties.

In reality, at-will employment strongly favors employers, who are free to fire workers at any time without giving a warning or paying severance. On the contrary, workers who quit, and even many who are terminated, generally don't qualify for unemployment compensation.

There are, of course, some well-known exceptions to employment at will.

For example, employers cannot fire workers for illegal discriminatory reasons, and some states have a handful of public policy exceptions, which proscribe, e.g., retaliatory termination for filing of a workers' compensation claim.

As a rule, though, courts apply exceptions to the at-will rule in only the narrowest of circumstances, and all noncontractual employment relations are presumptively at will.

So, if you had told me a decade ago that employment at will gives workers rights, I would have laughed. The notion that workers and employers have equal power to sever their relationship is fictional, given that the employer is inconvenienced by having to fill a vacancy while the worker must figure out how to stay afloat financially between jobs.

Unfortunately, noncompete clauses shift the imbalance of at-will employment to further disempower workers. This is why the FTC's proposed ban on noncompetes is important.

In theory, the one benefit to workers from at-will employment is the freedom to leave a job and seek work somewhere else.

However, the proliferation of noncompetes in recent years sabotages what little freedom workers possess. Increasingly, workers can be fired at any time, without cause, but when burdened by a noncompete, they are barred from taking new jobs in their fields for an extended period of time after a job ends.

Workers who take new jobs that arguably implicate a noncompete can be forced to quit the new job and/or pay heavy financial penalties. Unless people have the means and flexibility to move to a new job market, they are either stuck at their current jobs, which may have poor pay, unfavorable hours and bad working conditions, or they must start over at an entry-level wage in a different field.

The result is that noncompetes eviscerate workers' rights to sever their employment relationships at will and find new jobs. Remarkably, sometimes employers even hold people they have fired to their noncompetes.

Most people think of noncompetes as an issue affecting high-income jobs, where workers can bargain for higher salaries in exchange for limitations on their future opportunities.

However, employers have considerably expanded their use of noncompetes to cover many low-wage workers. At least 18% of U.S. workers are subject to noncompetes, and almost 30% of noncompetes cover workers making below $13 per hour.[1]

As a legal aid attorney with Community Legal Services in Philadelphia, where I represent low-wage workers, I have seen a rising number of low-wage workers who have either been threatened with enforcement of a noncompete and a suit seeking damages, or else have been sued in court.

My low-wage clients never have the power to negotiate the terms of their employment. The vast majority are not unionized and get take-it-or-leave-it deals.

Increasingly, signing a boilerplate noncompete is just one more nonnegotiable condition of taking the job, yet it does not come with a trade-off of job security. Instead, the workers are still employed at will, subject to termination at any time for almost any reason.

In many cases, employers do not even have to offer something of value in exchange for a covenant not to compete. Most states insist that simply getting to keep the job itself is adequate consideration for a noncompete clause.

Low-wage workers, lacking any bargaining power, are not offered bonuses or incentives for agreeing to a noncompete — it just comes with the job.

Even where the employer legally must offer something of value — for example, in some states, employers must proffer a noncompete clause after the start of employment — it is never necessary to pay anything approaching enough money to live on while waiting out an extended forced absence from the labor market.

Although the law limits the enforceability of noncompete clauses in theory, this is not true in practice. Even when there is adequate consideration, noncompetes are only supposed to protect legitimate business needs, such as an investment in training employees or preventing workers with specialized knowledge from going straight to a competitor.

If these legal limits were fairly enforced and observed, noncompetes would rarely, if ever, be successfully used to prevent low-wage workers from taking new jobs. After all, these workers almost never get extensive training or access to confidential information.

Moreover, courts are typically required to balance the employer's needs against the employee's need to earn a living. If workers were truly taken into consideration, it would be difficult to justify enforcement of a noncompete against someone who was living paycheck to paycheck, whose poverty-level wages had never afforded the opportunity to establish a financial cushion, and who might well not be able to obtain unemployment compensation.

In reality, those principles are only applied if a worker challenges a noncompete in court, but low-wage workers cannot afford to hire an attorney or pay penalties and litigation costs. As a result, these agreements usually operate by the threat of enforcement alone.

When a former employee gets a new job offer and the old company threatens to sue the worker and the new company, the mere threat is often enough to get the new company to cut the worker loose. Thus, the sheer existence of a noncompete restricts workers' opportunities even where there's no genuine business need for the employer.

Of course, these clauses also impose a burden on prospective new employers, who are limited in their pool of new hires, with many of the people with the most relevant experience precluded.

At CLS, we have seen numerous cases in which a new employer, having already gone through the hiring and onboarding process, was threatened with a lawsuit, and in some cases sued and hauled into court on such dubious grounds as tortious interference with contractual relations.

This is precisely why the FTC's proposal to ban the use of noncompete clauses is so important: Theoretical limitations on the use of noncompetes have very little practical value to low-wage workers, who will continue to be hurt by the mere existence of these clauses unless they are outlawed.

The FTC's proposal, which is open for comment through April 19, would restore the implicit deal that justifies the rule of at-will employment.

Employers would be free to hire whoever they wished, and workers would be free to seek jobs with better pay and benefits or with more favorable hours or conditions.

A small handful of states already ban noncompetes — most famously, California — and the rest of the country should join them. While employment at will cannot be seen as an "employment right," it is the least that workers who lack ordinary contract rights should be able to expect.

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[1] https://www.epi.org/publication/noncompete-agreements/.