Dear Colleague,

On behalf of HR Policy Association, I'm writing to express our interest in working with you as you consider legislative proposals to address the use of noncompete agreements in the employment context. The Association and our member companies believe that noncompete clauses, when used responsibly, help companies protect vital investments in their employees, while ensuring the security of research and development, trade secrets, and institutional knowledge. As such, we want to ensure that legislative efforts to curtail the use of noncompete agreements do not inadvertently undermine employers' utilization of noncompete agreements for senior executives and employees with access to sensitive information.

Last year, the Association's Center On Executive Compensation **submitted comments** to the Federal Trade Commission on the legitimate business use of noncompete agreements, including for executives and employees with access to proprietary and sensitive information. As you consider legislative proposals, we encourage you to review our comments as we address questions such as the business justifications for non-compete clauses, how companies enforce noncompete agreements contained in standard employment contracts, and the frequency of enforcement. The comments provide insights into the business rationale on the use of noncompete agreements which could be helpful and have bearing on any legislative proposal that is considered in Congress.

Additionally, we understand that there are the following main arguments against the use of noncompete agreements, which we address below.

- **Noncompetes limit employee mobility** – It is important to note that noncompete agreements are limited in scope to a specific job function within a company, time and geography. Therefore, those who sign a noncompete agreement are not indefinitely prohibited from working for or operating as a competitor in the restricted field. To add, 16 states only allow noncompete agreements that are not so broad in nature as to excessively restrict employee career prospects. Further, noncompete agreements are only upheld in court if they are reasonable in scope.

- **Low- and middle-income employees are frequently subject to noncompete agreements** – This is contrary to most employment practices. Currently, 1 in 5 employees in the private sector is working under some form of non-compete covenant. This is roughly 20% of the workforce. These agreements are much more common for senior leadership roles and/or in technical fields involving sensitive, confidential information such as product design, cost, and pricing. To the extent that there are some companies that require low-wage workers and other non-executives not privy to proprietary information to sign noncompete agreements, states are already addressing this issue - as of May 2022, more than half of U.S. states have placed limits on noncompete agreements, 10 of which have specifically prohibited low-wage/hourly employees from entering into such contracts. Regardless, preventing this type of practice does not necessitate a general ban on noncompete agreements for all workers.

- **Employers can adequately protect themselves through "trade secret" agreements that are binding on former employees –** While such agreements are often signed, they are of limited practical value in many if not most instances. Since a company is not privy to the internal, and usually confidential, actions of its former employees, it can be

exceedingly difficult to prove that a violation has occurred. Moreover, an individual's insights into her/his former employer's market strategies can drive behavior by the new employer in ways that are imperceptible.

Accordingly, we strongly discourage Congress from pursuing legislation that would outright ban noncompete agreements. If Congress pursues such legislation, it would be counterproductive and would reduce U.S. competition. According to a World Law Group report, there are laws, or at least judicial or agency decisions, allowing enforceability of employment-based noncompete agreements all over the world. It is worth noting that in most of the jurisdictions, noncompete agreements are enforceable at least in certain respects, to the extent they are necessary for the protection of the employer's legitimate interests and comply with a certain number of requirements. If U.S. policymakers enact proposals to outright ban the use of employment-based noncompete agreements it will be the only country to do so, putting our country at a disadvantage to compete in the global market.

We strongly encourage you to consider our insights and concerns regarding proposals to limit or outright ban noncompete agreements. If you would like to discuss the business use of noncompete agreements in greater depth or would like a staff briefing, the Association is happy to facilitate this upon your request. Please contact me at Cbirbal@hrpolicy.org.

HR Policy Association is the lead organization representing chief human resource officers of major employers. The Association consists of more than 400 of the largest corporations doing business in the United States and globally, and these employers are represented in the organization by their most senior human resource executive. Collectively, their companies employ more than 11 million employees in the United States, over nine percent of the private sector workforce, and 20 million employees worldwide. These senior corporate officers participate in the Association because of their commitment to improving the direction of human resource policy.

Thank you in advance for your consideration,

Chatrane Birbal
Vice President, Government Relations
HR Policy Association

CC: Senate Health, Education, Labor, and Pensions

House Energy and Commerce Subcommittee on Consumer Protection and Commerce

House Education and Labor