Work & Money

FirstService caretaker says he and wife were fired for union activity, wage theft lawsuit

The workers are also losing their housing and say a noncompete clause is stopping them from finding other work

By: Max Nesterak - February 2, 2023 3:33 pm

Kevin Borowske says he and his wife were fired by FirstService Residential as caretakers of Centre Village condominiums in downtown Minneapolis for organizing for a union. Courtesy photo.

Kevin Borowske and his wife were fired recently by FirstService Residential after a history of organizing workers for fair pay and a union.

He led a class-action lawsuit on behalf of Minnesota caretakers at FirstService — the largest property management company in North America —for wage theft and won a $225,000 settlement (before attorney fees) last year for 100 workers.

Then, he became one of the leaders of the unionizing campaign by caretakers and desk attendants of condo buildings managed by the company. FirstService has not recognized the union and declined to meet with union leaders.

That's why he wasn't entirely surprised when FirstService fired him and his wife, Larisa, last month, even though Borowske says they were good employees.

They had never been disciplined in their eight years working as caretakers of the Centre Village condominium building in downtown Minneapolis. One year, Borowske was even recognized as an outstanding employee at the company's annual event.

"It's because I'm the face of the union. It's their retaliation against me and my wife. It just has to be. It's the only thing that makes sense," Borowske said.

SEIU Local 26, the union representing FirstService caretakers and desk attendants, filed a complaint with the National Labor Relations Board, which oversees private-sector unions. The union alleges the termination is illegal retaliation against protected labor organizing.

Emails and a call to FirstService Residential were not returned.

In addition to losing their jobs, Borowske and his wife will have to move out of their apartment in Centre Village at the end of the month.

Borowske says they haven't been able to find a new apartment because they aren't currently employed and they haven't been able to find new jobs because of a noncompete clause in their contracts with FirstService.

Finding a similar job would be difficult even without a noncompete clause, since FirstService has contracts with a large share of the condominium associations in the Twin Cities. But the contract guarantees Borowske can't get similar work for the next year.

The employment contract Borowske and other FirstService caretakers signed stipulates that they may not work for "any management company serving condominium associations, homeowner associations, or cooperatives … in the Twin Cities Metropolitan Area" for a year after leaving the company.

Borowske says people have reached out to offer him work but he's declined.

"I'm afraid to take it, because FirstService can sue me," Borowske said.

The Federal Trade Commission has proposed a new rule banning employers from forcing workers to sign noncompete agreements, which the agency describes as "a widespread and often exploitative practice that suppresses wages, hampers innovation, and blocks entrepreneurs from starting new businesses."

About one in five American workers are bound by a noncompete agreement which costs workers more than $250 billion per year by decreasing competition, according to the FTC.

Democrats at the state Legislature have also introduced a bill (HF295/SF405) to ban noncompete agreements.

Borowske and his wife took jobs as caretakers with FirstService in 2014 and earned about $8 an hour to maintain the common areas of the downtown high-rise, including vacuuming the hallways, managing chlorine levels in the pool and hottub, and responding to residents' concerns around the clock.

Their wages have increased along with Minneapolis' minimum wage ordinance to more than $15 an hour plus free rent of their apartment including utilities.

However, FirstService didn't pay all the overtime wages Borowske earned for years.

Borowske filed his class-action lawsuit against FirstService in federal court in July 2020, alleging the company failed to pay him all the overtime wages he was entitled to. The company said it would pay him time-and-half after 30 hours, but only paid him at a higher rate for hours worked beyond 40 hours a week, according to Borowske's complaint.

The company also didn't include the value of his other compensation — rent, utilities, cell phone, etc. — in calculating the overtime rate as required by law.

Borowske said he and his wife received $15,000 for two years of unpaid wages through the settlement, which was approved by a judge in January 2022.

In June 2022, FirstService workers at condo buildings across the Twin Cities went public with their effort to unionize with SEIU Local 26. Borowske has been active in that campaign and participated in a two-day strike last October in an effort to force the company to negotiate a process for workers to hold a union election free from interference or harassment.

This week, the NLRB ruled there was merit to a complaint filed by SEIU Local 26 that a manager at Centre Village asked workers to sign a form saying they would not talk about working conditions with one another. The NLRB will next decide whether to settle the complaint with FirstService or bring a lawsuit.

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Good afternoon. Thank you to the chair and members of the committee for the opportunity to testify regarding research on non-compete contracts. My name is Ryan Nunn—I am the Assistant Vice President for Applied Research in the Community Development and Engagement division at the Federal Reserve Bank of Minneapolis. I am an economist with a focus on analysis of labor market institutions, including non-compete contracts, which I have worked on at the U.S. Treasury Department, the Brookings Institution, and now the Minneapolis Fed. The views I express today are my own and not necessarily those of the Minneapolis Fed or anyone else associated with the Federal Reserve System.

I am glad that the committee is focused on this important issue. Minnesota and many other states face a range of workforce challenges, and it is becoming increasingly clear that non-competes are part of that story. I will spend the bulk of my time describing what we have learned about non-competes, including how they affect workers, businesses, and the overall economy.

Non-competes are everywhere, including among lower-wage workers

Just ten years ago, it was widely believed that non-compete contracts were predominantly found among executives and high-tech workers. A number of studies focused on those groups, generating valuable information about how they affect migration patterns, career paths, and other outcomes. And to be sure, non-competes are somewhat more common among executives, high-tech workers, and those with higher wages generally.[1]

But what we did not know at that time is that non-competes are common throughout the labor market, including millions of workers without college degrees. The first researcher to discover this was Professor Evan Starr of the University of Maryland, who conducted his own survey to gain a comprehensive understanding of non-competes throughout the labor market.

Inspired by Prof. Starr, the Bureau of Labor Statistics incorporated questions about non-competes into recent rounds of a key, long-running survey. My colleagues and I used those new data to estimate that 13% of mid-career workers with just a high school degree reported having a non-compete. Similarly, 12% of workers earning less than $20 per hour reported having a non-compete.[2] These rates are likely underestimates, because many workers are unaware of having the contracts until it is pointed out to them by their employer.

Unfortunately, available sample sizes do not support a reliable state-specific estimate for Minnesota, but my best guess—extrapolating from national data—is that almost 350,000 workers have non-competes in our state.

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[1] See, for example, Marx (2011); Schwab and Thomas (2006); and Garmaise (2011).
[2] Boesch, Lim, and Nunn (2021).

These are large numbers. I believe it is this realization that non-competes are ubiquitous that has accelerated researcher and policymaker efforts to understand and address issues surrounding non-competes.

Why non-competes exist

In a few moments, I will describe research on the economic effects of non-competes. But before doing so, I find it helpful to think through the typical justifications for non-compete contracts and other reasons that researchers believe they are used.

The most typically referenced justification—and in my view, the most compelling—concerns trade secrets. In some cases, businesses must share trade secrets with workers in order for them to be productive. But if the employer fears that workers will take these valuable secrets to competing businesses, it may hesitate to share them in the first place, with negative consequences for productivity.

This is a reasonable concern. We have evidence that the relatively small group of workers with trade secrets are especially likely to have non-competes. But most workers with *non-competes* do not have trade secrets.[3] For lower-wage workers, this is particularly unlikely to be a serious issue.

What else might account for the proliferation of non-competes? This is an area of ongoing study. In research with my colleagues, we found that workers at multi-establishment firms are especially likely to have non-competes.[4] This may be because those firms have more developed HR practices and infrastructure that allow them to deploy the contracts. There are likely other differences between firms that we can connect with use of non-competes.

But the bigger picture many researchers have come to see is that non-competes are often driven by employers' desire to reduce their turnover and to gain leverage in wage negotiations. Without the possibility of easily moving to a competing firm, workers are in a weaker position when seeking better wages and working conditions. As we have learned about the conditions under which workers typically sign these contracts, this account has become more credible.

How non-competes are signed and enforced

Importantly, it appears that non-competes are typically presented to workers after the job offer was accepted. In a survey of electrical engineers, nearly half of workers actually reported having signed their non-competes on or after the first day of work.[5] This is not a moment at which workers can make an

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[3] Starr, Prescott, and Bishara (2019).
[4] Boesch, Lim, and Nunn (2021).
[5] Marx (2011).

informed decision, with a reasonable opportunity to decline. Indeed, only a very small minority of all workers with non-competes report actually negotiating over them.[6]

Moreover, workers are more likely to be taken advantage of when they have limited information about how the contracts can be enforced. There is much worker confusion over this. Workers in states that enforce less stringently—or not at all—are generally unaware that this is the case, and often respond to non-competes as if they are enforceable when they are not.[7]

State enforcement regimes do differ widely. California, North Dakota, and Oklahoma generally do not enforce non-competes. Other states vary in the details. For example, some states—like Minnesota—allow non-competes to be enforced even against workers who are laid off.[8] Another way that state law varies is in how willing courts are to modify unenforceable contracts, which has implications for whether employers feel comfortable writing aggressive, overly broad non-competes.

Non-competes and workers

Now I would like to turn to the research on how non-competes affect workers, businesses, and the overall economy. I'll start with effects on workers, which is the subject of some exciting new analysis.

One of the most useful studies in this area looks at a policy change in Oregon that made non-competes unenforceable for hourly paid workers. The authors of that study found that wages for those workers were higher after the change.[9] Another study examined wage changes for tech workers in Hawaii after the state made their non-competes unenforceable. Similarly, this reform boosted their wages.[10] These findings are consistent with other work showing that less stringent enforcement of non-competes is associated with higher wages.[11] Moreover, low-wage workers seem to benefit the most when non-competes are less strictly enforced.[12]

Wages aren't the only outcome one might care about. One consequence of non-competes that has been studied is the tendency for them to cause career detours. Non-competes cause some workers to leave their industries or states in order to escape their non-compete contracts.[13]

The same study of Hawaiian tech workers that I mentioned a moment ago also found that workers were more mobile after the reform. Somewhat surprisingly, non-competes also appear to reduce the mobility of workers who do *not* have non-competes. When firms are looking to hire in an industry where many

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[6] Starr, Prescott, and Bishara (2019).
[7] Prescott and Starr, forthcoming; Starr, Prescott, and Bishara (2020).
[8] Russell Beck n.d., accessed January 28, 2023.
[9] Lipsitz and Starr (2019).
[10] Balasubramanian et al. (2022).
[11] Johnson, Lavetti, and Lipsitz (2019).
[12] Starr (2019).
[13] Marx (2011); Marx, Singh, and Fleming (2015).

workers have non-competes, there is less incentive to spend time and money recruiting, which makes it more difficult to find jobs even for those workers without non-competes.[14]

On the positive side of the ledger, stringent non-compete enforcement leads to somewhat more worker training by firms.[15] This makes sense: non-competes make it harder for workers to leave, which in turn makes employers more confident that they will reap the rewards of training their workers.

However, the results from the wage studies I just mentioned suggest that the relatively small training increases are not enough to offset other negative effects for workers.

Non-competes and businesses

This is a good moment to switch gears and discuss effects on businesses. It is helpful to distinguish businesses in their role as employers of particular workers vs. businesses in their role as potential hirers. Obviously any given employer will have both roles, but non-competes have sharply different effects in each case.

For businesses trying to hang on to existing workers and pay them less, non-competes are helpful. The wage and turnover reductions I described a moment ago are contributions to employers' bottom lines. However, hiring is more difficult when non-competes are common, or when they are strictly enforced. This is especially a problem for entrepreneurs. When non-competes are more strictly enforced, there are fewer startups, which on average are less likely to survive. Even when they do survive, they tend to grow more slowly.[16] One study also finds that women entrepreneurs are more limited by non-competes than their male counterparts.[17]

Non-competes and the economy

What does this all mean for the overall economy? There are three main issues I worry about here: investment (in human capital and trade secrets), having productive matches between workers and firms, and the spread of new innovations.

As I mentioned a little while earlier, we do have evidence that non-competes raise investment, but the effect is small. A new paper compares the benefits of that extra investment with the costs of worse matches between workers and businesses. Intuitively, non-competes prevent workers from finding the best place for them to use their talents, and this reduces labor productivity. The author uses data on publicly listed firms to show that the costs of non-competes substantially outweigh the benefits.[18]

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[14] Starr, Frake, and Agarwal (2019).
[15] Jeffers (2019); Starr (2019).
[16] Ewens and Marx (2018); Starr, Balasubramanian, and Sakakibara (2017); Samila and Sorenson (2011).
[17] Marx (2018).
[18] Belenzon and Schankerman (2013).

A different issue is that non-competes can prevent new discoveries and innovations from spreading broadly through the economy. One study demonstrates this using patent citations, finding that strict enforcement of non-competes causes a large reduction in citations within states.[19] This effect is not especially surprising, because it has long been known that workers moving across businesses is one of the ways that innovations spread.

Options for addressing non-competes

Having just summarized much of the new research on non-competes, I'd now like to connect it with proposals for reform.

Those proposals have taken on a variety of forms. Just weeks ago, the Federal Trade Commission proposed that non-competes be broadly prohibited. However, it remains very unclear whether this proposal will ultimately be implemented and sufficiently enforced. Other proposals and enacted reforms at the state level have tended to be more narrowly tailored, specifying groups of workers who are ineligible for non-competes. Earlier I mentioned Oregon's reform that rendered non-competes unenforceable for hourly paid workers. More recently, Washington state, Illinois, Virginia, and other states have disallowed non-competes for those earning below an income threshold.

In my view, income thresholds are common because the argument in favor of non-competes for lower-wage workers has little justification in the evidence. Lower-wage workers are unlikely to possess trade secrets, and the research finds that they are particularly vulnerable to the harms of non-competes.

Another common provision in reform proposals—garden leave—is interesting because it requires employers to have skin in the game. If a particular non-compete contract is really needed to protect vital employer interests, like trade secrets, then the employer will find it worthwhile to pay for garden leave. Conversely, if a particular contract is not safeguarding vital employer interests, the employer can elect not to use it with that worker.

What might employers do instead of using non-competes? There are a variety of alternatives to non-competes that are often more narrowly tailored to the need at hand. For example, nondisclosure and intellectual property agreements can directly address trade secrets without preventing a worker from taking new jobs. A nonsolicitation agreement can stop an employee from taking a client list to a competing firm, but again without broadly restricting the ability of the employee to work.

Thank you again for the opportunity to speak today. I would be happy to follow up with any information that the committee might find useful.

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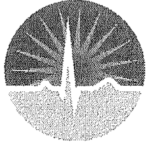
[19] Shi (2022).



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February 20, 2023

Dear Members of the Senate Judiciary and Public Safety Committee,

On behalf of the more than 10,000 members of the Minnesota Medical Association (MMA), I am writing in support of SF 405, which bans non-compete clauses in Minnesota. Simply put, non-compete provisions in physician contracts restrict competition and interfere with the patient/physician relationship.

In Minnesota, non-compete provisions are evaluated on their "reasonableness." In current healthcare settings, a physician must initiate a lawsuit against their employer and argue that their non-compete is unreasonable. This can be a significant financial and emotional burden on a physician and the patients they serve.

Many physicians are presented with a non-negotiable, non-compete provision within a prospective employment agreement, especially when new to practice. This limits their options to practice if they ever look for new employment. In addition to preventing physicians from practicing within a certain geographic area for a specified time, these provisions can also prevent them from informing their existing patients that they are leaving and providing their new location. A physician may be forced to leave the community and the patients they serve simply because they have a non-compete provision in their employment contract.

Employers argue that without non-competes, they will be at a significant financial loss when they invest in recruiting a physician, only to see that physician leave. There is nothing in this bill that prohibits an employer from recouping recruitment costs through other provisions in their employment contract. There are other, more positive, ways employers can encourage employees to stay. Non-competes create a hostage workforce culture where employees may want to leave but are forced to remain.

The MMA asks that Minnesota join the 12 other states that currently prohibit non-competes for physicians. Please support SF405.

Sincerely,

Will Nicholson, MD
President, Minnesota Medical Association

The Office of
Minnesota Attorney General Keith Ellison
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March 15, 2023

The Honorable Senator Ron Latz
Chair, Judiciary and Public Safety Committee
Minnesota Senate Office Building
St. Paul, MN 55155

Re: Senate File 405

Senator Latz and Members:

I write in support of Senate File 405—a bill that prohibits covenants not to compete in employment agreements. Non-compete clauses in employment contracts suppress wages, limit freedom, and stifle innovation. My Office has actively opposed the illegal use of non-compete agreements in Minnesota. I've led a group of states that urged the Federal Trade Commission to make rules outlawing non-compete clauses for low-wage workers. For all of these reasons, I support this bill. Stopping non-compete agreements from restricting Minnesotan workers' opportunities is a good thing for innovation in Minnesota.

Non-compete clauses don't just hurt workers. They also hurt the businesses that would benefit from hiring away a talented worker whose current employer isn't able to promote her or isn't doing enough to retain her. A dominant firm can even use them to lock up the talent pool and starve its competitors of high-quality employees. It's clear from non-compete clauses' prevalence that employers aren't just using them to protect confidential information and their investments in workers. Employers require non-compete clauses to make it impossible for workers to leave, all so they don't have to compete to retain their workers. Noncompete clauses are anti-competitive, anti-innovation, anti-worker, and anti-free market.

Non-compete clauses do a lot of harm and very little good. They prevent employees from leaving one job for a better one. They prevent employees from leaving a business and starting their own. Using non-competes clause, employers have bound a wide range of workers—from baristas to journalists to auto mechanics to sandwich makers—and deprived them of the freedom to work where they choose. Research suggests that non-competes currently shackle as many as one in five American workers.

What's worse, non-compete agreements are almost entirely unnecessary. If employers want to protect their investment in workers, they should incentivize them to stay—not punish them if they

leave. Employers can offer term contracts with job security for their workers. They can offer raises, promotions, and better working conditions to retain staff. They can protect their interests using appropriately tailored non-disclosure agreements and other less-restrictive covenants, and by using trade secret laws that already exist.

This bill is good common sense. It protects workers by freeing them from non-competes. It promotes innovation by allowing employers and entrepreneurs to hire the best possible person for their companies. SF405 ensures that an employer doesn't use non-compete clauses to inappropriately stifle innovation and competition in the marketplace to the detriment of competitors and workers instead of making its workplace better.

Thank you for allowing me to provide my recommendations with respect to this bill. If you have any questions or would like additional information, my team and I would be happy to help in any way that we can.

Sincerely,

KEITH ELLISON
Attorney General