


COUNCIL OF THE DISTRICT OF COLUMBIA
COMMITTEE ON LABOR AND WORKFORCE DEVELOPMENT
COMMITTEE REPORT

1350 Pennsylvania Avenue, NW, Washington, D.C. 20004

TO: All Councilmembers
FROM: Councilmember Elissa Silverman 
Chairperson, Committee on Labor and Workforce Development
DATE: November 19, 2020
SUBJECT: Report on B23-0494, the “Ban on Non-Compete Agreements Amendment Act of 2020”

The Committee on Labor and Workforce Development, to which B23-0494 the “Ban on Non-Compete Agreements Amendment Act of 2020” was referred, reports **favorably** thereon with amendments, and recommends its approval by the Council.

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I. BACKGROUND AND NEED

Executive Summary

B23-0494, the “Ban on Non-Compete Agreements Amendment Act of 2020,” was introduced by Councilmember Elissa Silverman on October 8, 2019. It was co-introduced by Chairman Phil Mendelson and Councilmembers Charles Allen, Anita Bonds, Mary Cheh, Jack Evans, Brianne Nadeau, and Trayon White; Councilmember Vincent Gray co-sponsored the legislation. The proposed legislation would ban non-compete agreements for most District workers, and this committee print bans non-compete agreements for all District workers. With this legislation, the District joins California, Montana, North Dakota, and Oklahoma among the states that prohibit virtually all non-compete agreements.¹ The print specifies that employers will still be able to contract with their employees to protect employers’ confidential customer and client lists, proprietary information, trade secrets, and business reputation.

¹ “Are Your Noncompete Agreements Dying of Old Age?” *JD Supra*, July 16, 2019, available at: <https://www.jdsupra.com/legalnews/are-your-noncompete-agreements-dying-of-34228/>

Non-compete agreements vary in scope and content, but usually they are a contract between an employer and an employee stating that the employee will not work for a competitor for a period of time after that worker leaves their employer within the specific geographic region in which the employer operates.²

In practice, non-competes are fundamentally anti-competitive. They depress wages, inhibit entrepreneurship, and deplete the market of jobs.³ Accordingly, job seekers, employers, and the local economy all stand to benefit from a ban on non-compete agreements. Studies have shown that banning non-compete agreements for hourly workers can increase those employees' earnings power, with one recent study finding an increase of as much as 21 percent.⁴ Banning non-competes has also been shown to improve workers' ability to move out of undesirable jobs into better ones ("job mobility") while enabling residents to remain in their chosen field and location. Prohibiting these provisions will help strengthen the District's considerable efforts to train its workforce for better and high-paying jobs.

Banning non-competes also assures employers that they have the broadest access to qualified candidates possible, since the pool of qualified recruits is not artificially limited. And, finally, the Committee believes outlawing non-compete provisions will strengthen the District's entrepreneur class. If a worker covered by a non-compete has a new idea for a company, they may be unable to start their business here in the District because of the non-compete, and could be forced to move out of the region. Banning non-compete clauses therefore will help workers improve their lives, help companies secure better talent, and foster a stronger start-up culture.

The print would also forbid the use of a non-compete term in an employer's policy manual or in an employment contract. Employees would be protected under the bill from retaliation – such as threats, discipline, or firing – by an employer or prospective employer for raising a red flag about a potential violation of this bill.

Non-compete agreements sometimes have been used by employers as a mechanism to protect proprietary information, trade secrets, and client lists, but there are stronger and more precise tools available to employers to safeguard business interests without restricting labor supply. These tools include trade secret laws; non-disclosure agreements which legally bind two parties to confidentiality; and non-solicitation agreements which prohibit a former employee from taking clients, customers, or patients from a former employer.

The introduced version of the bill prohibited non-compete agreements below a certain wage threshold. However, witness testimony to the Committee and further research demonstrated the impossibility of establishing an appropriate wage threshold above which the ban should not apply. It is simpler, fairer, more practical, and more enforceable to have a complete ban on non-competes. Non-competes are used across various wage tiers, and non-competes are harmful to

² Alexander J.S. Colvin and Heidi Shierholz, "Report: Noncompete agreements," Economic Policy Institute, December 10, 2019, available at: <https://files.epi.org/pdf/179414.pdf>.

³ Michael Lipsitz and Evan Starr, "Low-Wage Workers and the Enforceability of Non-Compete Agreements," April 20, 2020, available at: <https://ssrn.com/abstract=3452240>.

⁴ Michael Lipsitz and Evan Starr, "Low-Wage Workers and the Enforceability of Non-Compete Agreements" April 20, 2020, available at <https://ssrn.com/abstract=3452240>.

workers at all salary levels, as well as to the local economy.⁵ If an average hourly wage was set as the threshold, employers of salaried workers would have to record those employees' hours of work and regularly calculate the hourly wages earned to ensure that they comply with the law. The DC Chamber of Commerce objected to this administrative burden for businesses that relied on salaried workers. At the same time, many professions where non-compete agreements are the most harmful, such as the medical profession, would likely be above any such wage threshold.⁶ Further, all workers, even those earning a higher salary, should be entitled to change jobs.

Background

As an initial matter, what constitutes a “non-compete agreement” can be misunderstood. Often the non-competition requirement is contained within a broader agreement that also restrains the employee from taking customers or stealing confidential information. Accordingly, many people erroneously believe that non-compete agreements protect against these other harms. But those problems can be avoided through trade secrets laws,⁷ non-disclosure agreements, and non-solicitation agreements⁸ which specifically target these business risks.⁹

Non-compete agreements are commonly used to restrict technology workers, physicians, and personal trainers, but in recent years, lower-paid workers such as fast food workers, camp counselors, and office cleaners have been required to sign these agreements.¹⁰ The non-compete provision is often presented on the first day of employment, a point in time when workers have already foregone other opportunities. At this stage, they are unlikely to decline or even attempt to negotiate the non-compete term.¹¹ Often the non-compete terms being imposed on low-wage workers are not even legal because they too broadly restrict the former employee.¹² However, as several witnesses appearing before the Committee noted, that doesn't matter to a worker who is

⁵ See Attachment 7: David J. Balan, *Labor Non-Compete Agreements: Tool for Economic Efficiency, or Means to Extract Value from Workers?* November 17, 2020, refuting the most common arguments in favor of using non-compete agreements as unsound.

⁶ Notably, non-compete agreements have been outlawed for United States attorneys since 1961. See American Bar Association Formal Ethics Opinion 300 (1961).

⁷ These include the Defend Trade Secrets Act of 2016, 18 USC § 1833(b)(3), and the Uniform Trade Secrets Act of 1988, D.C. Code §36-401 et seq.

⁸ Lisa Guerin, “Understanding Non-Solicitation Agreements,” available at : <https://www.nolo.com/legal-encyclopedia/understanding-nonsolicitation-agreements.html>.

⁹ Najah A. Farley, *Non-Compete Provisions In Context: Why NELP Supports Calls for Reform*, September 27, 2018, available at: <https://www.nelp.org/blog/non-compete-provisions-context-nelp-supports-calls-reform/> ([A] “more appropriate legal tool for protecting such intellectual property is to prohibit employees from disclosing such information, through non-disclosure conditions.”) Note: Ms. Farley also provided testimony at the December 6, 2019 Committee hearing.

¹⁰ Steven Greenhouse, “Noncompete Clauses Increasingly Pop Up in Array of Jobs,” *NY Times*, June 8, 2014, available at: <https://www.nytimes.com/2014/06/09/business/noncompete-clauses-increasingly-pop-up-in-array-of-jobs.html>.

¹¹ According to a survey by the Economic Policy Institute, 88 percent of workers did not negotiate over the terms of the agreement. Alexander J.S. Colvin and Heidi Shierholz, Economic Policy Institute, *Report: Noncompete agreements*, December 10, 2019, available at: <https://files.epi.org/pdf/179414.pdf>.

¹² Due to the burden a non-compete imposes on an individual's livelihood, where an employer can show that the agreement is protecting a legitimate business interest, courts will generally limit a non-compete agreement to one or two years' duration, and only for the geographic region where the former employee worked or was assigned. See generally Kelly, Catherine Pastrok, American Bar Association, “Non-Compete Agreements: What Every Company and Employee Should Know,” July 26, 2016.

afraid of being sued by their previous employer and can't afford a lawyer. When the time comes to leave a job, workers abide by the terms of the non-compete agreement they signed and lose the ability to draw on their accrued knowledge and skills to advance to a better job.¹³

One public witness, Brent St. Amant, said that he was coerced into signing a non-compete agreement and has subsequently had to turn down job opportunities in his field as a result. Faith Rokowski, another public witness, testified that having signed a non-compete agreement made her feel that she had no choice but to put up with ongoing workplace harassment. After diligently researching her legal rights because she could not afford to hire a lawyer, Ms. Rokowski secured a new job at a substantial increase in pay, but told the Committee that she still feared retribution by her former employer even if she did not technically violate the non-compete agreement. In a public statement, the Communications Workers of America (CWA) union has raised concerns about non-compete clauses because they “can literally derail [early-career professionals’] future success,” echoing the concerns Ms. Rokowski related to the Committee.¹⁴

Agreements not to compete hinder low-wage workers and higher earners in some overlapping and some distinct ways. For all workers, including Mr. St. Amant and Ms. Rokowski, non-competes limited their ability to use their full breadth of knowledge and skills in order to earn the best living. Low-wage workers abiding by non-competes lose their ability to get a second job if they are unable to earn a living wage from their first job; workers are also hindered from changing jobs if they need to do so for other reasons, such as a desire to work closer to home, to access health insurance, or secure a more stable schedule. Ms. Rokowski said that she and her co-workers were mostly young, women, and people of color, groups that disproportionately face workplace abuse, sexual harassment, and unfairly low pay.

Employers that use non-compete agreements with their more highly-paid workers harm their local economies by driving away highly-skilled workers and depressing wages.¹⁵ Hawaii, for example, implemented a ban on non-competes for the technology industry in order to protect and grow that sector.¹⁶ The legislature said that “restrictive employment covenants impede the development of technology businesses within the State by driving skilled workers to other jurisdictions.” The state also wanted to protect Hawaiians’ pathway into those local jobs.

Similarly, when physicians sign non-competes, they are prevented from opening or joining medical offices even where there is a demonstrated need. Qualified health care workers who cannot advance in their field within the same job market due to a restrictive non-compete have no choice

¹³ What makes a “better job” is subjective, but employees may prioritize improved wages, leave time, work location, job security, opportunities for advancement, job quality, and/or flexible hours. See National Employment Law Project (NELP), *Legislative Brief: A State Agenda for America’s Workers, 18 Ways to Promote Good Jobs in the States*, November 2018, available at: <https://www.nelp.org/publication/state-agenda-americas-workers-18-ways-promote-good-jobs-states/>.

¹⁴ CWA, News Release: NewsGuild Calls for National Legislation to End Non-Compete Agreements for Junior Employees, June 16, 2016, available at: <https://cwa-union.org/news/newsguild-calls-for-national-legislation-end-non-compete-agreements-for-junior-employees>.

¹⁵ Natarajan Balasubramanian, Jin Woo Chang, Mariko Sakakibara, Jagadeesh Sivadasan, and Evan Starr, “Locked In? The Enforceability of Covenants Not to Compete and the Careers of High-Tech Workers,” April 2020, available at: <http://jhr.uwpress.org/content/early/2020/05/04/jhr.monopsony.1218-9931R1.full.pdf>.

¹⁶ Hawaii House Bill 1090 Regular Session. (July 1, 2015). Retrieved November 17, 2020, from: https://www.capitol.hawaii.gov/session2015/bills/HB1090_CD1_.HTM.

but to leave the region altogether.¹⁷ Hospitals use non-competes to bind workers to their institutions; however, doctors bound by non-competes are dissuaded from speaking out about unsafe conditions.¹⁸ Hospitals' and clinics' ability to recruit is also impaired when their competitors use non-competes and can exacerbate the growing shortage of doctors.¹⁹ Finally, it is also harmful to patients when they are prevented from continuing to see their preferred doctor due to a non-compete agreement, and must instead start over with a doctor who lacks the cumulative knowledge and skill to care for that patient.²⁰ In order to ensure adequate medical care for patients and safety within institutions, it is the best policy for the District of Columbia to ban the use of non-competes for medical professionals.²¹

A 2016 report by the U.S. Department of the Treasury estimated that 15 percent of workers without a college degree were covered by non-competes, and 14 percent of workers making less than \$40,000 a year were covered by non-competes.²² Non-competes are still more common among higher-paid workers, covering approximately 45 percent of survey respondents where the typical education level is at least a college degree.²³ But, of all workers who have signed a non-compete agreement, approximately 53 percent of these are hourly workers because they make up such a large share of the workforce.²⁴

The District has already taken steps to ban non-competes for some industries. It has outlawed non-compete agreements for broadcast professionals such as television anchors and radio DJs since 2003. At the time that law was finalized, the Subcommittee on Labor, Voting Rights, and Redistricting wrote:

The record reveals that noncompete clauses are not necessary for a healthy, competitive broadcast industry, but they do cause unfairness and hardship to employees. The threat of being forced to either move to a different market or being prohibited from working in one's

¹⁷ Michelle Andrews, "Did Your Doctor Disappear Without a Word? A Noncompete Clause Could Be the Reason," *NY Times*, March 15, 2019, available at: <https://www.nytimes.com/2019/03/15/business/physician-non-compete-clause.html>.

¹⁸ Sandeep Vaheesan, *Doctors, nurses and patients could suffer if Congress doesn't outlaw these contracts*, CNN, July 6, 2020, available at: <https://www.cnn.com/2020/07/06/perspectives/non-compete-clauses-health-care/index.html>

¹⁹ Xiaoming Zhang, Daniel Lin, Hugh Pforsich Hugh, and Vernon W. Lin. *Physician workforce in the United States of America: forecasting nationwide shortages*. Hum Resoure Health. 2020;18(1):8. Published 2020 Feb 6, available at: <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7006215/>.

²⁰ AnneMarie Schieber, "How Non-Compete Provisions Shackle Physicians & Hurt Patients," *The Hill*, January 7, 2020, available at: <https://thehill.com/opinion/healthcare/477180-how-non-compete-clauses-shackle-physicians-and-hurt-patients>.

²¹ Sandeep Vaheesan, "Doctors, nurses and patients could suffer if Congress doesn't outlaw these contracts," CNN, July 6, 2020, available at: <https://www.cnn.com/2020/07/06/perspectives/non-compete-clauses-health-care/index.html>. ("According to one multistate survey from 2018, approximately 45% of primary care doctors are bound by non-compete clauses. Research has found that employers have also imposed non-compete clauses on nurses.")

²² U.S. Department of the Treasury, *Non-compete Contracts: Economic Effects and Policy Implications*, March 2016, available at: <https://www.treasury.gov/resource-center/economic-policy/Documents/UST%20Non-competes%20Report.pdf>.

²³ Alexander J.S. Colvin and Heidi Shierholz, Economic Policy Institute, *Report: Noncompete agreements*, December 10, 2019, available at: <https://files.epi.org/pdf/179414.pdf>.

²⁴ Michael Lipsitz and Evan Starr, "Low-Wage Workers and the Enforceability of Non-Compete Agreements" (April 20, 2020). Available at SSRN: <https://ssrn.com/abstract=3452240>.

profession can force employees to accept less favorable terms than would be available in an otherwise free market. In short: non-compete provisions limit competition, serve as a restraint of trade, and unfairly treat workers.²⁵

COMMITTEE PRINT:

Definitions

The print defines a non-compete provision as a term in a contract between an employer and an employee, including those commencing an employer-employee relationship, that bars the employee from working for another person or running the employee's own business. The employer cannot request or require the employee to agree to such a term.

The print provides that non-disclosure, non-disparagement, and confidentiality contract terms that are otherwise lawful are not impaired by this bill. The DC Chamber of Commerce testified that without non-competes, businesses would not be able to protect their trade secrets or other valuable information, like customer lists, so this was clarified in the print. The print also specifies that if an employee buys a business from a former employer, that buyer can require a non-compete term from the seller in order to protect their business investment.²⁶

Covered employers are those operating in the District, as well as prospective employers. Covered employees are any individual employed in the District of Columbia by an employer, and this tracks the definition in the DC minimum wage law. It also includes a prospective employee who an employer reasonably anticipates will perform work on behalf of the employer in the District of Columbia, since non-compete agreements are usually executed on or before the employee's first day of work.²⁷

Prohibition on use of non-competes

The print only requires three things of employers, only one of which is an affirmative action: first, do not enter into non-compete agreements; second, do not retaliate against employees; and third, inform employees of their rights.

The print prohibits the use of non-compete agreements by employers, including prospective employers, and protects prospective and existing employees from being asked or required to sign one. Any non-compete signed after the effective date of this legislation will be unenforceable. The print restricts an employer from having a workplace policy that prohibits an employee from working for another employer. However, employers are not restrained from having routine requirements such as attendance policies or lawful requirements about when employees may request time off work.

The introduced version of B23-494 established a salary threshold below which the non-compete prohibition would apply. That version of the bill applied to any District worker earning

²⁵ Council of the District of Columbia, Subcommittee on labor, voting rights, and redistricting, "Committee Report on Bill 14-812, the Broadcast Industry Contract Freedom Act of 2002," October 10, 2002.

²⁶ The clarification was made even though the plain terms of the law's prohibitions only restrict employers (including prospective employer); they do not restrict employees.

²⁷ See Attachment 7: The White House, *Non-Compete Agreements: Analysis of the Usage, Potential Issues, and State Responses*, May 2016, page 5.

three times the minimum wage per hour or less, according to the hourly rate of pay the worker earned from the employer per hour as calculated per calendar quarter. At the Committee hearing, the Committee heard so much evidence of the harms that non-compete agreements can cause,²⁸ and no consensus on where to set the wage threshold, that the threshold was eliminated in the committee print of the bill.

A universal ban on non-compete agreements will be simpler to follow, understand, and enforce than one that applies to only workers that earn a certain wage. Typically, laws contingent on a workers' earnings must establish a standard formula for employers to use to determine which employees are covered by the law, since employers may choose to pay on an hourly, commission, salary, or piece-rate basis.²⁹ To ensure that all workers are treated the same, the introductory version of this bill required the employer look back over each employee's earnings for the most recent calendar quarter and calculate the rate of pay based on the total earnings divided by hours worked. With a universal ban, employers will not be required to do these periodic calculations to determine whether workers earn above or below the threshold level. A universal ban is also easier to convey in outreach to the public and to workers who inquire about their rights.

The print requires employers to provide their workers with the following text: "No employer operating in the District of Columbia may request or require any employee working in the District of Columbia to agree to a non-compete policy or agreement, in accordance with the Ban on Non-Compete Agreements Amendment Act of 2020." This brief message can easily be provided to workers with other onboarding materials, in introductory emails upon hire, on a company's intranet, on pay stubs, or all of the above. It must be provided within 90 days of the law's applicability date and within 7 days of an employee starting a new job. An employee that has not received this notice and wants assurance that they are covered by the ban can request the statement in writing and the employer must provide it within 14 days. This will enable workers who fear they are bound by a non-compete clause in a contract or policy to receive written confirmation that the law applies to them. An employer that had its employee sign an unlawful non-compete will have two options: provide the notice, thereby assuring the employee that they are not bound to the non-compete, or create an easily provable violation of the law that should trigger an investigation by DOES.

Prohibition on retaliation

The print prohibits employers from retaliating or threatening retaliation against employees for seeking information about their rights, filing a complaint, or otherwise exercising their rights, such as cooperating with an investigation. Retaliation is an adverse action, and includes such things as threatening an employee, reducing their hours, or issuing a written warning, or anything else an employee in the same situation would interpret as an adverse action. Most commonly, retaliation occurs after the employer learns – or comes to believe – that an employee has exercised their rights. But the bill also protects against an employer that threatens future retaliation, such as a lawsuit if

²⁸ See, for example, footnotes 1, 2, 3, 6, 7, and 8.

²⁹ See, for example, US Department of Labor, *Fact Sheet 56A: Overview of the Regular Rate of Pay Under the Fair Labor Standards Act (FLSA)*, December 2019, available at: <https://www.dol.gov/agencies/whd/fact-sheets/56a-regular-rate>.

the employee takes another job.³⁰ If an employer warns an employee or group of employees that the employer plans to retaliate in the future, for example, this chills all employees' willingness to fully exercise their rights and to report violations to enforcement entities. This kind of threat also impedes the government's ability to fully investigate because it makes workers less likely to inform those entities of violations.

Enforcement

Employees who believe that their rights under this bill have been violated will be able to seek recourse via the same enforcement mechanisms that apply to the Wages and Workplace Fraud, Living Wage, Sick and Safe Leave, and Minimum Wage laws.³¹ Specifically, the Mayor will enforce and administer the bill's provisions by receiving complaints and initiate investigations, with both the Mayor and the Attorney General empowered to investigate and bring actions against violators. The Attorney General, acting in the public interest, may pursue charges against an employer or other person violating the law. The bill also conforms with the District's Administrative Procedure Act to protect employers' due process rights. Individuals will also have a right of private action.

The bill aims to deter violations by requiring penalties to the District and relief to employees that have been harmed. These payments make the bill an effective deterrent. Penalties recovered from employers will go into the Wage Theft Prevention Fund, an existing special fund, and money in the Fund can be used to enforce this law and other District workplace law. The greater penalty for retaliation is necessary because employees can lose wages and standing in their office when they have been disciplined or otherwise faced adverse action; retaliation can also signal to fellow employees that they should not try to report or cooperate with investigations of legal violations when they arise.³²

Anyone pursuing a violation of the law on behalf of employees may also recover relief for those employees in the amounts specified by this bill. When an employer is found liable for a violation, it must pay relief of between \$500 and \$1000 per employee. The agency or court may assess the minimum penalty where circumstances warrant, such as where an employer has made a clear, good faith attempt to comply with the law, but a higher penalty in cases where the violation is more harmful or intentional while applying the law uniformly to all covered employers.

The bill provides for greater relief and penalties where an employer was previously found to have violated the law. Also, any time the employer takes an adverse action against an employee or group of employees, it is chargeable as a separate instance of retaliation for each employee who experienced the action.³³ The enforcement agency or court finding a violation of the bill can

³⁰ Regardless of whether the employee actually has exercised their rights, the employer may retaliate based on that belief.

³¹ D.C. Code § 32-1306.

³² See U.S. Equal Employment Opportunity Commission, "Retaliation- Making it Personal", available at <https://www.eeoc.gov/retaliation-making-it-personal> ("If retaliation for [filing a complaint of discrimination, participating in a discrimination proceeding, or otherwise opposing discrimination] were permitted, it would have a chilling effect upon the willingness of individuals to speak out against employment discrimination or to participate in the EEOC's administrative process or other employment discrimination proceedings.")

³³ In addition, as under existing law, the Attorney General may seek attorneys' fees, court costs, payment of back wages unlawfully withheld from employees, liquidated damages equal to treble any back wages unlawfully withheld from employees, and equitable relief.

exercise its discretion when applying the statutory relief and penalty provisions depending on the facts of any particular case. Finally, the print conforms with the District's Administrative Procedure Act to protect employers' due process rights to be notified of the charges brought against them and to request and appear at a fair hearing.

II. LEGISLATIVE CHRONOLOGY

October 8, 2019	Introduced by Councilmembers Silverman, Evans, Allen, T. White, Cheh, Nadeau, Bonds, and Chairman Mendelson; co-sponsored by Councilmember Vincent Gray
October 8, 2019	Referred to Committee on Labor and Workforce Development
October 18, 2019	Notice of Intent to Act published in the District of Columbia Register
October 25, 2019	Notice of Public Hearing published in the District of Columbia Register
December 6, 2019	Public Hearing on B23-0494
November 19, 2020	Consideration and vote on B23-0494 by the Committee on Labor and Workforce Development

III. POSITION OF THE EXECUTIVE

In written testimony submitted to the Committee for the record, Department of Employment Services (DOES) Director Unique Morris-Hughes presented a neutral assessment of the bill. DOES anticipated that it would require additional funding and would need to draft regulations governing investigations, enforcement, and to provide guidance to employees and employers. The agency estimated that over 200,000 IT, professional, scientific, technical, and financial industry workers would be covered by the ban.

IV. HEARING RECORD AND SUMMARY OF TESTIMONY

The Committee on Labor and Workforce Development held a public roundtable on Friday, December 6, 2019 at 10:00 a.m. in Hearing Room 500 of the John A. Wilson Building. The witnesses were:

- Evan Starr, PhD, Assistant Professor, University of Maryland Robert H. Smith School of Business
- Daniel Katz, Senior Counsel, Washington Lawyers' Committee for Civil Rights and Urban Affairs
- Najah Farley, Senior Staff Attorney, National Employment Law Project (NELP)
- Brent St. Amant, Public Witness
- Faith Rokowski, Public Witness
- Dan Essrow, Public Witness
- Randolph Chen, Co-Acting Section Chief of the Social Justice Section in the Public Advocacy Division, testified Office of the Attorney General for the District of Columbia
- Geneva Kropper, Public Witness
- Marcy Karin, Public Witness

- Erika Wadlington, Director of Public Policy & Programs, DC Chamber of Commerce
- Justin Palmer, Vice President, Public Policy & External Affairs, District of Columbia Hospital Association

A. Hearing Testimony

Six organizational and public witnesses who testified at the roundtable supported the bill. The Office of the Attorney General also testified in support.

Evan Starr, PhD, Assistant Professor, University of Maryland Robert H. Smith School of Business, is the author of several studies of non-compete agreements and has written and spoken extensively on the topic. He supported the legislation. He said that majority of non-compete signers are hourly-paid workers because they represent such a large portion of the labor force. He pointed out the discrepancy in bargaining power that often accompanies non-competes, saying that non-competes are negotiated approximately 10 percent of the time. Dr. Starr said that most research suggests that where non-competes are used and enforceable, wages, entrepreneurship, and job-to-job mobility are reduced, making it harder to hire. He noted that it is not a worker-versus-employers issue, because employers are on both sides of the equation: they don't want to lose workers to competitors, but they also want to hire from competitors. Finally, he said that nondisclosure agreements and trade secret laws are more targeted methods of protecting business interests.

Daniel Katz, Senior Counsel, Washington Lawyers' Committee for Civil Rights and Urban Affairs testified in support of the legislation. He said his legal clinic has encountered some of the low-wage workers who have been subject to non-compete agreements. He cited the significant numbers of low wage workers restricted by noncompete agreements and pointed out that these employees lack bargaining power in order to reject unfair terms an employer might impose. He noted the law would help to remove barriers to opportunity for workers and translate into increased mobility for women workers and workers of color.

Brent St. Amant, Public Witness, lives in Ward 6. He testified about the personal harm non-compete agreements have caused him. He was asked to sign one on his first day at his first job out of college and didn't feel that he had the power to negotiate the terms of the agreement. Since leaving that job, he has had to turn down multiple job opportunities due to conflicts with the non-compete agreement. He supports the bill to increase competition and prevent other new workers from facing the harm he faced as a result of his non-compete.

Faith Rokowski, Public Witness, testified about the influence non-compete agreements had on keeping her and her former coworkers in an abusive workplace. She signed a non-compete agreement without full understanding of what it meant or any ability to negotiate its terms. When she decided to leave due to her unfair salary and poor work environment, she risked being sued. She supported the bill because she believes the burden should not be on people like her to agonize over case law and risk extreme legal expenses before leaving an abusive work environment. She also pointed out that she and her co-workers were all women of color, who disproportionately face workplace abuse, sexual harassment, and unfairly low pay.

Dan Essrow, Public Witness, supported the legislation because he said it would help workers trapped in undesirable or low-paying jobs because they are bound by non-compete agreements. He

framed his support as consistent with the values that workers have a right to respect, to receive a living wage for their labor, and to freely pursue better job opportunities when they arise.

Najah Farley, Senior Staff Attorney, National Employment Law Project (NELP), testified in support of the legislation. She said that the rationales employers use to justify non-competes do not apply to most workers making below the salary threshold proposed in the introduced bill: these workers do not normally have access to trade secrets or other valuable information that could harm the employer if disclosed. She said that employers often present a non-compete agreement to a newly hired employee on the first day of work, when it is least likely that the employee will negotiate or reject its terms. Ms. Farley also mentioned that non-competes depress wages by reducing competition for jobs. She supported helping workers fight non-competes by providing government enforcement and a private right of action.

Randolph Chen, Co-Acting Section Chief of the Social Justice Section in the Public Advocacy Division, testified on behalf of the **Office of the Attorney General** in favor of the bill. Mr. Chen explained that the legislation furthers workers' rights by encouraging job mobility and fair wages. He said that non-compete agreements are almost never necessary in low-to-middle-wage work, but instead lopsidedly benefit employers while resulting in lower wages and reduced job prospects for workers. He added that the bill will protect local businesses in addition to workers, and that it is in line with practices in other states. Mr. Chen also testified that the increased use of non-compete agreements could end up harming local businesses because they deprive other employers from the opportunity to hire an otherwise qualified worker.

B. Written Testimony

Written testimony regarding the legislation was submitted by four witnesses:

Geneva Kropper, Public Witness, supported the legislation because of her personal experience with a non-compete in the District of Columbia. She said that non-competes limit employees' ability to work, pursue higher wages, and advance in their fields. Her personal experience with a non-compete occurred in her first post-college job in her digital strategy role. She said that she signed the agreement unaware that it was overbroad and likely not enforceable by her employer, but without the resources to challenge the agreement in court, she had to abide by its terms. This experience motivated her to begin organizing with former colleagues who had similar experiences. Some of them were being paid far below what was usually paid in their field. She also pointed out that if workers with non-compete agreements face sexual harassment or other workplace abuse, they can feel trapped in their jobs despite it being unsafe. The proposed legislation would ensure that these workers can escape abusive working conditions and stay in their fields.³⁴

Marcy Karin, Public Witness, wrote that non-compete agreements have the potential to restrict low-wage workers' upward mobility, safety, and economic security. These workers may lack the education, language, negotiating skills, training, network, bargaining power, or a combination of these to determine whether a non-compete agreement is legal or enforceable. She submitted a chart comparing compares non-compete laws in other states to assist the Council assess the different options for coverage thresholds, notice requirements, and enforcement.

³⁴ See also Attachment 7: Geneva Kropper, *The Freedom to Leave* (flyer distributed at the Council).

Erika Wadlington, Director of Public Policy & Programs, DC Chamber of Commerce, said that the DC Chamber did not support the bill as introduced. She recommended changes to protect business owners' confidential and proprietary information and to ensure that employers selling their business to a former employee would not be hindered from voluntarily agreeing to a non-compete term. Ms. Wadlington also supported limiting the application of the law to only those workers that are protected under the Fair Labor Standards Act (FLSA) -- which establishes a federal minimum wage and overtime pay for certain workers—rather than including more highly-paid “Exempt” workers. She explained that including these “exempt” employees would mean employers would have to begin recording the hours they worked in order to determine their average hourly pay, only then knowing whether a non-compete would be permitted.

Justin Palmer, Vice President, Public Policy & External Affairs, District of Columbia Hospital Association, submitted testimony requesting that the Council limit the application of the non-compete ban so the wage threshold above which the law would not apply would align with neighboring jurisdiction's bans. He provided the example of Maryland which limits the application of its law to workers earning \$15 or less. He recommended that the ban apply to workers earning no more than two times the minimum wage.

VI. IMPACT ON EXISTING LAW

B23-0494 bars employers from requiring, requesting, or entering into non-compete agreements beginning with the law's applicability date. Contracts entered into before this date will not be impaired or altered. The bill amends An Act To provide for the payment and collection of wages in the District of Columbia to give the Mayor and Attorney General the power to investigate and enforce compliance with the law. The bill also provides that penalties recovered from employers will go into the Wage Theft Prevention Fund, an existing special fund, and money in the Fund can be used to enforce this law. For the sake of clarity in applying the law, B23-0494 repeals the Broadcast Industry Contracting Freedom Act of 2002 which previously banned the use of non-competes.

VII. FISCAL IMPACT STATEMENT

The attached fiscal impact statement issued by the District's Chief Financial Officer states that funds are not sufficient in the FY2021 budget and proposed FY 2021 through FY 2024 budget and financial plan to implement the bill. An additional \$207,000 in FY 2021 and \$730,000 for the four-year plan are necessary to fund B23-0494.

VIII. SECTION BY SECTION ANALYSIS

Section 101 defines terms used in the bill.

Section 102 establishes the rights of employees and the restrictions on employers, specifically:

Subsection a bars employers from requiring or requesting that their employees sign an agreement that contains a non-compete provision.

Subsection b establishes that a non-compete provision in an agreement covered by the law is legally void and unenforceable.

Subsection c states that employers' workplace policies may not prohibit employees from being employed or performing work for another person or for the employee's own business.

Subsection d specifies the protections when an employer threatens to retaliate or does retaliate against an employee. The employer may not retaliate against an employee for the employee's refusal to agree to a non-compete provision, alleged failure to comply with an unlawful non-compete provision, the employee's discussing, informing, or complaining to another about a provision or policy that the employee reasonably believes to be prohibited by this law, or for requesting information the employer is required to provide to the employee by law.

Subsection e requires the employer to provide the following text to covered employees: "No employer operating in the District of Columbia may request or require any employee working in the District of Columbia to agree to a non-compete policy or agreement, in accordance with the Ban on Non-Compete Agreements Amendment Act of 2020" to inform them of the law.

Section 103 details how administrative complaints and enforcement should be conducted, specifically:

Subsection a provides that the Mayor and Attorney General will administer and enforce the bill, detailing their powers and the rights of employers charged with violating the bill.

Subsection b details the penalties the Mayor can obtain for any violation of the bill, ranging from \$350 to \$1,000 for an initial violation of most provisions; however, the minimum penalty for a violation of the bill's anti-retaliation provisions shall be \$1,000. The subsection also details procedures the Mayor must follow before collecting penalties.

Subsection c states that a person can file a complaint with the Mayor or in court and appeal to the DC Court of Appeals. It says that existing procedures shall also apply to the conciliation, resolution and enforcement of an administrative complaint filed under the bill.

Subsection d details relief payable to employees according to the employer's violation.

Section 104 requires the Mayor to issue rules implementing this bill.

Section 201 amends An Act To provide for the payment and collection of wages in the District of Columbia to specify that civil fines and administrative penalties recovered from enforcing this bill will become part of the existing Wage Theft Prevention Fund and money in the fund shall be used to enforce this and other laws.

Section 301 repeals the Broadcast Industry Contracting Freedom Act of 2002 which previously banned the use of non-compete agreements for individuals, other than salespeople, working in that industry.

Section 302 specifies the bill's applicability date.

Section 303 contains the fiscal impact statement.

Section 304 establishes the effective date.

IX. COMMITTEE ACTION

The Committee on Labor and Workforce Development convened at 10:00 a.m. on November 19, 2020, to consider and vote on B23-0494. Chairperson Silverman recognized the presence of a quorum, consisting of herself and the rest of the Committee: Councilmembers Charles Allen, David Grosso, Kenyan McDuffie, and Robert C. White.

Councilmember Silverman provided an opening statement regarding the committee print of the bill:

I introduced this bill on October 8, 2019, and it was co-introduced by Chairman Phil Mendelson and Councilmembers Charles Allen, Anita Bonds, Mary Cheh, Jack Evans, Brianne Nadeau, and Trayon White; Councilmember Vincent Gray co-sponsored the legislation. The Committee held a hearing on the bill on December 6, 2019.

This legislation would protect District workers from having to sign employment contracts – known as non-compete agreements -- that prevent them from taking a second job, subsequently working for another employer doing similar work, or starting a business. Simply put, allowing non-compete agreements hurts workers in our city: they are paid less, they are less likely to get a raise even in strong labor markets, and experience greater wage disparity by gender and race. If you can get better pay, more shifts, or leave a toxic workplace, you should be free to do so.

Non-competes also have negative effects on our local economy. Entrepreneurs who want to hang out a shingle in their home city are instead forced to them to forego their business idea or relocate away from Washington, DC when their employer has required them to sign a non-compete. And, when a new business owner starts to set up shop, we want him or her to be able to recruit the most experienced Washingtonians to work for them—not to have to move away or recruit from out-of-town because other businesses are locking their workers in with non-compete agreements. With this legislation, the District will join California, Montana, North Dakota, and Oklahoma, states that prohibit virtually all non-compete agreements.

Let me also address some concerns that have been raised. First of all, I want to point out that the Committee has worked with the DC Chamber of Commerce. The print makes clear that employers will still be able to use other types of contract terms to protect important business interests: client, customer, and patient lists; proprietary information; and trade secrets. I want to emphasize this: banning non-competes does not mean that businesses will lose the ability to protect their trade secrets or customer lists. They will continue to be able to enter into agreements to protect those.

I also want to address concerns that were raised from our hospital community about being able to protect investments in workers: for example, if a worker receives specialized training, employers should be able to realize a return on their investment.

In the hospital industry right now, we are seeing incredible demand for certain doctors, particularly in the ICU. The Committee has explored this issue: we have spoken with DCHA, some of the hospitals, as well as doctors who work in our local hospitals. One doctor pointed out to me that, especially in this pandemic, we want to make sure there is

a flow of labor supply to where we need it the most. We want to make sure that it is our District residents who are trying to fill those jobs in the ICU; a non-compete could mean that a Virginia or Maryland doctor might end up filling that slot because our District workers are in non-competes that handcuff them.

I am willing to have a discussion, as I have told my colleagues, and to continue to engage with the Hospital Association and our various hospitals to talk about this issue more and see how we can address their concerns at first reading of the bill.

Chairperson Silverman then opened the floor for discussion of the measure.

Councilmember Grosso acknowledged his strong support of the ban on non-compete agreements for low-wage workers, which he said he believes can be harmful, stifle job opportunity for low wage workers, and inhibit low-wage workers from building their resumes and skills in order to help grow in their careers. However, he stated that non-competes may be necessary in some instances and industries, especially where employees have valuable skills and it is reasonable for employers to want to retain the talent or have invested in that talent. He said only a few other states take the outright ban approach. An income cap would be similar to what neighboring states do. Specifically, in Maryland, the ban only covers workers earning the minimum wage, around \$30,000 per year; in Virginia, it's around \$60,000 a year. The proposed District ban would be too far out of line with other states in the region, put DC at a competitive disadvantage with neighbors, and allow them to recruit more of our specialty employees, especially in the health sector. Councilmember Grosso said that in his view, the Committee print is more in line with California, which is more of a monolithic type of economy and which does not face competition concerns as DC does.

Councilmember Grosso had circulated an amendment prior to the meeting which he then discussed. It would limit coverage of the bill to those earning \$75,000 per year or less, or a prospective employee expected to earn that. Councilmember Grosso said this dollar figure was chosen because it would cover half or more workers in the region, although it would be the highest in the region compared to our neighbors. He said the median wage in DC is approximately \$74,000 per year, according to May 2020 Bureau of Labor Statistics' occupational earnings data. It would bring the District in line with neighboring jurisdictions while also having the highest income cap in the region. Councilmember Grosso said that he preferred a general approach over carving out one particular industry, saying that the Council could not predict which employers were investing resources in their employees and trusting higher-wage employees with confidential information that needed protection. He asked Councilmember Silverman to respond to these concerns.

Councilmember Silverman responded that she had great concerns about the proposed amendment and asked colleagues to vote against it if Councilmember Grosso was going to move it. First, she said that an income cap is arbitrary where an employee making \$85,000 could be handcuffed by a non-compete agreement but someone earning \$73,000 wouldn't, and she didn't understand the logic that would make \$75,000 per year the proper limitation. Second and third, she said that income caps are anti-entrepreneurial and could hinder innovation in DC's technology sector. We don't want to prevent innovation and entrepreneurship by telling someone earning \$90,000 a year cannot take their good idea and start their business in Washington, DC. Finally,

she pointed out that the cap was burdensome to businesses that employed workers above and below the wage threshold because these businesses would now have to analyze pay records to determine which workers were covered by non-compete agreements and which were not.

She said that almost all academic literature says non-compete agreements are anti-entrepreneurial and harmful to workers and economies. Councilmember Silverman said she had not spoken with the hospitals but she would be happy to sit down with them to discuss their concerns to discuss why there might be an industry-specific reason why they need to use non-compete agreements.

Councilmember Grosso said he wanted to speak to the technology example raised by Councilmember Silverman. He said that a technology company in the District that invests to train a worker in programming or other skills, or gives them insights into how to run a business, could then see that employee pick up and move next door, opening up a new shop doing the same thing. He asked, why would a technology company start up in the District to begin with? He said that DC has trouble competing with the incentives other states offer. He stated that he believes that when an entrepreneur sets up new business, they will also want to have their employees also sign non-compete agreements. Councilmember Grosso said the industry needs protection or the businesses will move out of DC where they don't have to comply. He said that the District should try to align itself with neighboring jurisdictions and that only five states have outright bans. Finally, he returned to his rationale for suggesting a wage threshold on the ban. Councilmember Gross stated that a business invests more money and confidence in an employee the more they pay that person, in the form of more money, confidence, and access to information.

Councilmember McDuffie commented that his colleagues had made good points, and thanked Councilmember Silverman for her willingness to address the concerns raised by Councilmember McDuffie and his colleagues related to the hospital industry. He pointed out that California does not enforce non-compete agreements and yet it is the center of tech innovation and start-ups in the United States, although he agreed there were likely many distinctions between the economies of DC and California.

Councilmember McDuffie said that he was concerned about some of the largest employers in the District—the health care sector—being at a competitive disadvantage compared to their counterpart institutions out of state, noting that the sector makes important contributions to our local economy. He said it might be appropriate to put DC on a level playing field with Maryland and Virginia to protect our intellectual capital in the District, and that he was open to Grosso's approach. He said he was curious if there was room to reach a compromise because of the shared concern about protecting workers while not placing large employers and small businesses at a disadvantage.

Councilmember White said that he understood the thought behind Councilmember Grosso's approach, but didn't support a salary cap for DC because it would still stifle employment mobility for people earning \$30,000, \$40,000, or even \$80,000, and who lack the leverage to negotiate a non-compete agreement. He said that someone who is heavily recruited has the leverage to negotiate their employment contract better than someone who can more easily be replaced. Councilmember White said that in light of the current unemployment situation in the District—during the pandemic, especially—the District should not limit employees' economic mobility. He noted the exception in the bill that would allow businesses to prevent workers from

taking sensitive information. He said he had spoken with Howard University Hospital and wanted to understand their industry-specific concerns, but expressed his interest in a more targeted amendment approach.

Councilmember Allen stated that he would support the legislation as drafted and did not support the proposed amendment from Councilmember Grosso. Councilmember Allen said that Councilmember White had raised good points around which parties have power and leverage in these relationships, and who we want to protect. He thanked the Chairperson for her willingness to consider the concerns raised. He said he was open to entertaining a further discussion to understand hospitals' concerns.

Chairperson Silverman said that she takes seriously the concerns her colleagues raised. She said that she will meet with the DC Hospital Association and the hospitals themselves in order to understand their industry-specific concerns about why they need to use non-compete agreements. Councilmembers Grosso and White asked to be a part of those conversations. Councilmember Silverman said she would meet with them. She stated that she would not support Councilmember Grosso's amendment.

Councilmember Grosso acknowledged his colleagues' comments and stated that Councilmember Silverman's willingness to work was appreciated and asked when the bill's first reading would be. He said that it would likely be more beneficial to work on an amendment for first reading rather than push his amendment through. He asked to be included in the conversations with the hospitals and said he would support the committee print of the bill today with the understanding that discussions would continue. Councilmember Silverman asked whether he was withdrawing his amendment, and he stated that he was.

Discussion having ended, Chairperson Silverman moved the proposed committee print and report for B23-0494, with leave for Committee staff to make technical and conforming amendments.

The members voted as follows:

	<u>Vote</u>
Chairperson Elissa Silverman	Yes
Councilmember Charles Allen	Yes
Councilmember David Grosso	Yes
Councilmember Kenyan McDuffie	Yes
Councilmember Robert C. White	Yes

Thus, the committee print and accompanying report were passed, with the Members present voting in favor of the print.

The committee meeting adjourned at 10:40 a.m.

X. ATTACHMENTS

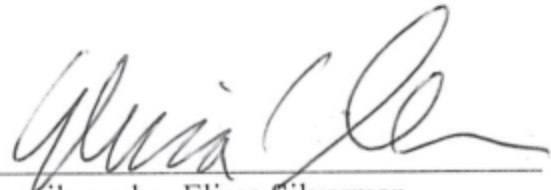
1. B23-0494 as introduced
2. Committee referral memo
3. Notice of Intent to Act
4. Public hearing notice for B23-0494 for the December 6, 2019 hearing
5. Public hearing agenda and witness list for the December 6, 2019 hearing
6. Public hearing witness testimony
7. Additional background materials for the record: White House Report: *Non-Compete Agreements: Analysis of the Usage, Potential Issues, and State Responses*, May 2016; David J. Balan, *Labor Non-Compete Agreements: Tool for Economic Efficiency, or Means to Extract Value from Workers?* November 2020; Geneva Kropper, *The Freedom to Leave* (flyer distributed at the Council).
8. Amendment (withdrawn), Fiscal Impact Statement, and Legal sufficiency determination
9. Fiscal Impact Statement for B23-0494
10. Legal sufficiency determination for B23-0494
11. Comparative Print of B23-0494
12. Committee Print of B23-0494

Attachment 1

B23-0494 as introduced

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3 Chairman Phil Mendelson



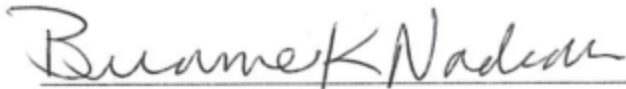
Councilmember Elissa Silverman

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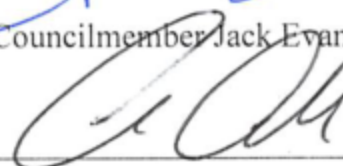
7 Councilmember Mary M. Cheh



Councilmember Jack Evans

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10 Councilmember Brianne K. Nadeau



Councilmember Charles Allen

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14 Councilmember Anita Bonds



Councilmember Trayon White, Sr.

15
16 A BILL
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18
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21
22 IN THE COUNCIL OF THE DISTRICT OF COLUMBIA
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25
26

27 To ban the use of non-compete provisions in employment agreements and workplace policies, to
28 protect employees' right to make a complaint or file a court case, and to bar employers
29 from retaliating against employees who inquire about their rights; to amend An Act to
30 provide for the payment and Collection of wages in the District of Columbia to add the
31 Ban on Non-Compete Agreements Amendment Act of 2019 provisions to existing
32 employee rights that are enforceable via a private action, via administrative enforcement,
33 and by the Attorney General acting in the public interest, and to specify statutory
34 penalties and relief.
35

36 BE IT ENACTED BY THE COUNCIL OF THE DISTRICT OF COLUMBIA, That this
37
38 act may be cited as the "Ban on Non-Compete Agreements Amendment Act of 2019".
39

40 TITLE I. BAN ON NONCOMPETE AGREEMENTS AND POLICIES.

41 Sec. 101. This title shall be cited as the "Ban on Noncompete Agreements Act of 2019".

42 Sec. 102. Definitions.

43 For the purposes of this title, the term:

44 (1) "Employee" shall have the same meaning as provided in section 3(2) of the
45 Minimum Wage Act Revision Act of 1992, effective March 25, 1993 (D.C. Law 9-248; D.C.
46 Official Code § 32-1002(2)).

47 (2) "Employer" shall have the same meaning as provided in section 3(3) of the
48 Minimum Wage Act Revision Act of 1992, effective March 25, 1993 (D.C. Law 9-248; D.C.
49 Official Code § 32-1002(3)).

50 (3) "Non-compete provision" means a term of a written agreement between an
51 employer and an employee that restricts or bars the employee from being simultaneously or
52 subsequently employed by another employer:

53 (A) In a particular geographic region; or

54 (B) For an indefinite or specified period of time.

55 (4) "Regular rate of pay" means (a) the wages paid per hour to a worker,
56 excluding any premium payments received for hours worked over 40 hours per week, or (b) if
57 the wages are paid on an alternate basis such as salary, commission, or piece work, the average
58 amount paid per hour worked during the most recent calendar quarter, which shall be determined
59 by dividing the total amount paid during the calendar quarter by the total number of hours
60 worked in the calendar quarter.

61 (5) "Retaliation" means an adverse employment action, including a threat, verbal
62 warning, written warning, reduction of work hours, suspension, or termination, that an employer
63 takes against an employee for exercising or attempting to exercise a right guaranteed under this
64 title.

(6) "Workplace policy" means the rules and restrictions that an employer imposes on one or more employees, whether written or in practice.

Sec. 103. Non-compete rights and restrictions.

(a) No employer shall require an employee whose regular rate of pay, or prospective employee whose prospective regular rate of pay, is less than or equal to 3 times the minimum wage provided for in section 4 of the Minimum Wage Act Revision Act of 1992, effective March 25, 1993 (D.C. Law 9-248; D.C. Official Code § 32-1003), to sign an agreement which includes a non-compete provision.

(b) A non-compete provision contained in an agreement between an employee whose regular rate of pay is less than or equal to 3 times the minimum wage provided for in section 4 of the Minimum Wage Act Revision Act of 1992, effective March 25, 1993 (D.C. Law 9-248; D.C. Official Code § 32-1003), and an employer shall be void as a matter of law, provided, that the agreement was entered into on or after the effective date of this title.

(c) An employer shall not have a workplace policy that limits the right of employees whose regular rate of pay is less than or equal to 3 times the minimum wage provided for in section 4 of the Minimum Wage Revision Act of 1992, effective March 25, 1993 (D.C. Law 9-248; D.C. Official Code § 32-1003), from being simultaneously or subsequently employed by another employer in a particular geographic region or for an indefinite or specified period of time.

(d) No employer shall retaliate against an employee for:

(1) The employee's alleged failure to comply with a non-compete provision or workplace policy that violates this title; or

(2) Asking or informing the employer, a prospective employer, a coworker, legal counsel, or a governmental entity about the existence, applicability, or validity of a non-compete provision in an agreement or workplace policy that an employee reasonably believes violates this title, including in a formal written complaint.

(e) Nothing in this title is intended to impair an employer's ability to place reasonable restrictions on an employee's right to request or use leave from work, provided such restrictions do not violate the laws of the District of Columbia or the United States.

Sec. 104. Penalties and relief.

(a) An employer who violates section 103 shall be liable for employee relief as follows:

(1) An employer who violates section 103(a) or (c) shall be separately liable for each violation, to each employee subjected to the violation, for monetary relief in an amount not less than \$500 and not greater than \$1,000.

(2) An employer who attempts to enforce a non-compete provision that is void as provided in section 103(b) of this title shall be liable to each employee against whom the non-compete provision was enforced in an amount not less than \$1,500.

(3) An employer who retaliates against one or more employees in violation of section 103(d) shall be separately liable for each instance of retaliation to each employee subject to retaliation in an amount not less than \$1,000 and not more than \$2,000.

(b) The Mayor may assess a penalty of up to \$500 for each violation of this title, except that each violation of section 103(d) assessed against an employer shall be no less than \$1,000.

TITLE II. ENFORCEMENT OF THE BAN ON NON-COMPETE AGREEMENTS ACT
OF 2019.

Sec. 201. An Act to provide for the payment and Collection of wages in the District of Columbia, approved August 3, 1956 (70 Stat. 620); D.C. Official Code § 32-1301 *et seq.*), is amended as follows:

(a) Section 1 (D.C. Official Code § 32-1301) is amended by adding a new paragraph (2D) to read as follows:

“(2D) “Ban on Non-Compete Agreements Amendment Act” means the Ban on Non-Compete Agreements Act of 2019, introduced on October 8, 2019 (Bill ____).”.

(b) Section 6 (D.C. Official Code § 32-1306) is amended as follows:

(1) Subsection (a) is amended as follows:

(A) Paragraph (1) is amended by striking the phrase “this act, the Living Wage Act,” both times it appears and inserting the phrase “this act, the Ban on Non-Compete Agreements Act, the Living Wage Act,” in its place.

(2) Paragraph (2)(A) is amended by striking the phrase “this act, the Minimum Wage Revision Act, the Sick and Safe Leave Act, or the Living Wage Act” and inserting the phrase “this act, the Ban on Non-Compete Agreements Amendment Act, the Living Wage Act, the Minimum Wage Revision Act, or the Sick and Safe Leave Act.” in its place.

(3) Subsection (a-1) is amended by striking the phrase “the Living Wage Act, the Minimum Wage Revision Act” and inserting the phrase “the Ban on Non-Compete Agreements Amendment Act, the Living Wage Act, the Minimum Wage Revision Act,” in its place.

(4) Subsection (b)(2) is amended by striking the phrase “this act, the Living Wage Act, the Sick and Safe Leave Act, or the Minimum Wage Revision Act” and inserting the phrase “of this act, the Ban on Non-Compete Agreements Amendment Act, the Living Wage Act, the Minimum Wage Revision Act, or the Sick and Safe Leave Act” in its place.

(5) Subsection (d)(2)(A) is amended by striking the phrase “this act, the Living Wage Act, the Sick and Safe Leave Act, and the Minimum Wage Revision Act” and inserting the phrase “this act, the Ban on Non-Compete Agreements Amendment Act, the Living Wage Act, the Minimum Wage Revision Act, and the Sick and Safe Leave Act” in its place.

(c) Section 8 (D.C. Official Code § 32-1308) is amended as follows:

(1) Subsection (a)(1)(A) is amended as follows:

(A) The lead-in language is amended by striking the phrase “or the Living Wage Act” both times it appears and inserting the phrase “the Ban on Non-Compete Agreements Act, or the Living Wage Act” in its place.

(B) Subparagraph (vi) is amended by striking the phrase “or the Living Wage Act” and inserting the phrase “the Ban on Non-Compete Agreements Amendment Act, or the Living Wage Act” in its place.

(2) Subsection (c)(1) is amended by striking the phrase “or the Living Wage Act” both times it appears and inserting the phrase “the Ban on Non-Compete Agreements Act, or the Living Wage Act” in its place.

TITLE III. FISCAL IMPACT AND EFFECTIVE DATE.

Sec. 301. Fiscal impact statement.

The Council adopts the fiscal impact statement in the committee report as the fiscal impact statement required by section 4a of the General Legislative Procedures Act of 1975, approved October 16, 2006 (120 Stat. 2038; D.C. Official Code § 1-301.47a).

Sec. 302. Effective date.

This act shall take effect following approval by the Mayor (or in the event of veto by the Mayor, action by the Council to override the veto), a 30-day period of congressional review as

155 provided in section 602(c)(1) of the District of Columbia Home Rule Act, approved December
156 24, 1973 (87 Stat. 813: D.C. Official Code § 1-206.02(c)(1)), and publication in the District of
157 Columbia Register.

Attachment 2

Committee referral memo

COUNCIL OF THE DISTRICT OF COLUMBIA
1350 Pennsylvania Avenue, N.W.
Washington D.C. 20004

Memorandum

To : Members of the Council

From : 
Nyasha Smith, Secretary to the Council

Date : October 16, 2019

Subject : Referral of Proposed Legislation

Notice is given that the attached proposed legislation was introduced in the Legislative Meeting on Tuesday, October 8, 2019. Copies are available in Room 10, the Legislative Services Division.

TITLE: "Ban on Non-Compete Agreements Amendment Act of 2019", B23-0494

INTRODUCED BY: Councilmembers Silverman, Evans, Allen, T. White, Cheh, Nadeau, Bonds, and Chairman Mendelson

CO-SPONSORED BY: Councilmember Gray

The Chairman is referring this legislation to the Committee on Labor and Workforce Development.

Attachment

cc: General Counsel
Budget Director
Legislative Services

Attachment 3

Notice of Intent to Act

COUNCIL OF THE DISTRICT OF COLUMBIA NOTICE
OF INTENT TO ACT ON NEW LEGISLATION

The Council of the District of Columbia hereby gives notice of its intention to consider the following legislative matters for final Council action in not less than **15 days**. Referrals of legislation to various committees of the Council are listed below and are subject to change at the legislative meeting immediately following or coinciding with the date of introduction. It is also noted that legislation may be co-sponsored by other Councilmembers after its introduction.

Interested persons wishing to comment may do so in writing addressed to Nyasha Smith, Secretary to the Council, 1350 Pennsylvania Avenue, NW, Room 5, Washington, D.C. 20004. Copies of bills and proposed resolutions are available in the Legislative Services Division, 1350 Pennsylvania Avenue, NW, Room 10, Washington, D.C. 20004 Telephone: 724-8050 or online at www.dccouncil.us.

COUNCIL OF THE DISTRICT OF COLUMBIA

PROPOSED LEGISLATION

BILLS

B23-471	Independent Compliance Office Establishment Act of 2019 Intro. 9-17-19 by Councilmembers McDuffie, Nadeau, Allen, T. White, Todd, Bonds, R. White, and Grosso and referred sequentially to the Committee on Facilities and Procurement, the Committee on Labor and Workforce Development, and the Committee on Business and Economic Development with comments from the Committee on Judiciary and Public Safety
B23-472	Electronic Smoking Device Sales Restriction Amendment Act of 2019 Intro. 9-24-19 by Councilmember Cheh and referred to the Committee on Judiciary and Public Safety with comments from the Committee on Health and the Committee on Business and Economic Development
B23-487	Service Animal in Training Clarification Amendment Act of 2019 Intro. 10-8-19 by Councilmembers Cheh, R. White, and T. White and referred to the Committee on Judiciary and Public Safety

B23-488	<p>Student Activity Fund Theatrical and Music Performance Expenditures Act of 2019</p> <p>Intro. 10-8-19 by Councilmember Cheh and referred sequentially to the Committee on Education and the Committee of the Whole</p>
B23-489	<p>Intra-District Transfer Limitation Amendment Act of 2019</p> <p>Intro. 10-8-19 by Councilmember Cheh and Chairman Mendelson and referred to the Committee of the Whole</p>
B23-490	<p>Pre-qualification for Homeownership Tax Relief Amendment Act of 2019</p> <p>Intro. 10-8-19 by Councilmembers Bonds, Grosso, McDuffie, Cheh, Nadeau, and Todd and referred to the Committee on Business and Economic Development with comments from the Committee on Housing and Neighborhood Revitalization</p>
B23-491	<p>Ranked Choice Voting Act of 2019</p> <p>Intro. 10-8-19 by Councilmembers Grosso, Silverman, Nadeau, and Cheh and referred to the Committee on Judiciary and Public Safety</p>
B23-492	<p>Local Residents Voting Rights Amendment Act of 2019</p> <p>Intro. 10-8-19 by Councilmembers Grosso, R. White, Silverman, Bonds, Nadeau, Evans, Todd, and Allen and referred to the Committee on Judiciary and Public Safety</p>
B23-493	<p>Enhanced Representation Charter Amendment Act of 2019</p> <p>Intro. 10-8-19 by Councilmembers Grosso, Nadeau, and R. White and referred to the Committee of the Whole</p>
B23-494	<p>Ban on Non-Compete Agreements Amendment Act of 2019</p> <p>Intro. 10-8-19 by Councilmembers Silverman, Evans, Allen, T. White, Cheh, Nadeau, Bonds, and Chairman Mendelson and referred to the Committee on Labor and Workforce Development</p>

Attachment 4

Public hearing notice for B23-0494 for
the December 6, 2019 hearing

**COUNCIL OF THE DISTRICT OF COLUMBIA
COMMITTEE ON LABOR AND WORKFORCE DEVELOPMENT
NOTICE OF PUBLIC HEARING**
1350 Pennsylvania Avenue, NW, Washington, DC 20004

**CHAIRPERSON ELISSA SILVERMAN
COMMITTEE ON LABOR AND WORKFORCE DEVELOPMENT**

ANNOUNCES A PUBLIC HEARING ON

B23-494, Ban on Non-Compete Agreements Amendment Act of 2019

**Friday, December 6, 2019, 10:00 a.m.
Hearing Room 500, John A. Wilson Building
1350 Pennsylvania Avenue, NW
Washington, DC 20004**

Councilmember Elissa Silverman, Chairperson of the Committee on Labor and Workforce Development, announces a public hearing before the Committee on B23-494, the Ban on Non-Compete Agreements Amendment Act of 2019. The law would protect District workers who earn up to three times the hourly minimum wage from having to sign Non-Compete Agreements, which are contracts that prevent workers from taking a job – either at the same time or in the future – with a different employer in the same industry or geographic area. The bill would also ban this language in a company policy manual or handbook. Employers in violation of the law could be investigated and assessed penalties and employees could recover damages from an employer that violated their rights. The hearing will be held at 10 a.m. on Friday, December 6, 2019, in Room 500 of the John A. Wilson Building.

Those who wish to testify before the Committee are asked to contact Ms. Charnisa Royster at labor@dccouncil.us or (202) 724-7772 by 5:00 p.m. on Wednesday, December 4, 2019, to provide their name, address, telephone number, organizational affiliation and title (if any), as well as the language of oral interpretation, if any, they require. Witnesses who anticipate needing language interpretation, including American Sign Language (ASL) interpretation, are requested to inform this office of the need as soon as possible but no later than Wednesday, November 27, 2019 at 3:00 pm. Those wishing to testify are encouraged, but not required, to submit 15 copies of written testimony. Those representing organizations will have five minutes to present their testimony, and other individuals will have three minutes to present their testimony; less time will be allowed if there are a large number of witnesses.

If you are unable to testify at the roundtable, written statements will be made a part of the official record. Written statements should be submitted by email to Ms. Royster at labor@dccouncil.us or mailed to the Committee on Labor and Workforce Development, Council of the District of Columbia, Suite 115 of the John A. Wilson Building, 1350 Pennsylvania Avenue, N.W., Washington, D.C. 20004. The record will close at 5:00 p.m. on Friday, December 20, 2019.

Attachment 5

Public hearing agenda and witness list
for the December 6, 2019 hearing

**COUNCIL OF THE DISTRICT OF COLUMBIA
COMMITTEE ON LABOR AND WORKFORCE DEVELOPMENT
AGENDA AND WITNESS LIST**
1350 Pennsylvania Avenue, NW, Washington, DC 20004

**CHAIRPERSON ELISSA SILVERMAN
COMMITTEE ON LABOR AND WORKFORCE DEVELOPMENT**

AGENDA AND WITNESS LIST

B23-0494 - the Ban on Non-Compete Agreements Amendment Act of 2019

**Friday, December 6, 2019, 10:00 a.m.
Hearing Room 500, John A. Wilson Building
1350 Pennsylvania Avenue, NW
Washington, DC 20004**

I. CALL TO ORDER

II. OPENING REMARKS

III. WITNESSES

- Evan Starr, PhD, Assistant Professor, University of Maryland Robert H. Smith School of Business
- Daniel Katz, Senior Counsel, Washington Lawyers' Committee for Civil Rights and Urban Affairs
- Najah Farley, Senior Staff Attorney, National Employment Law Project (NELP)
- Brent St Amant, Public Witness
- Faith Rokowski, Public Witness
- Dan Essrow, Public Witness
- Randolph Chen, Co-Acting Section Chief of the Social Justice Section in the Public Advocacy Division, Office of the Attorney General for the District of Columbia

IV. ADJOURNMENT

Attachment 6

Public hearing witness testimony

Oral Testimony for the DC Committee on Labor and Workforce Public Hearing on B23-494, Ban on Non-Compete Agreements Amendment Act of 2019

Chairperson Silverman and Members of the Committee:

Thank you for the opportunity to testify on the important topic of noncompete agreements. My name is Evan Starr and I am an Assistant Professor at the University of Maryland's Robert H. Smith School of Business.

A noncompete agreement is an employment provision that prohibits a departing worker from joining or starting a competing firm. As an example, I would like to read the text of a noncompete signed in 2015 by a temporarily-employed Amazon packer making \$12 an hour:

During employment and for 18 months after the Separation Date, Employee will not, ... engage in or support the development, manufacture, marketing, or sale of any product or service that competes or is intended to compete with any product or service sold, offered, or otherwise provided by Amazon ... that Employee worked on or supported, or about which Employee obtained or received Confidential Information.

The reason noncompetes like this are important is because they may prevent workers from working where they want and earning what they could in the labor market.

The last few years have seen a bevy of new laws seeking to ban noncompetes for all or a subset of workers, including in Massachusetts, Washington, Florida, New Hampshire, Illinois, Hawaii, New Jersey, my home state of Maryland, and across the whole United States.

In my research I have sought to understand how common noncompetes are, how they influence workers and firms, and what sort of effects banning them has on economic activity.

In my testimony today, I'd like to make the following points:

First, noncompetes are everywhere. Doggy daycare workers, unpaid interns, volunteer coaches, janitors, and hair stylists are just some of the jobs in which noncompetes have been found. In a 2014 study of 11,500 US workers, JJ Prescott, Norman Bishara, and I estimate that approximately 1 in 5 private sector workers were bound by noncompetes, and that approximately 40% of labor force participants had ever signed one. We also find that while noncompetes are more common among highly-paid workers, hourly-paid workers actually make up the majority of noncompete signers because they represent such a large part of the labor force.

Second, noncompetes are negotiated over just 10% of the time and are regularly asked of workers when they have limited bargaining power, such as on the first day of the job.

Third, despite reasonable arguments that noncompetes might benefit workers and firms, most research suggests that the use and enforceability of noncompetes reduces wages, entrepreneurship, and job-to-job mobility, making it harder for firms to hire, and creating negative spillovers in the market.

For example, after Oregon banned noncompetes for low-wage workers in 2008, my colleague Michael Lipsitz and I find that hourly-worker wages rose up to 6% five years after the ban, while job-to-job mobility rose 17%. We also find that the wage gains were stronger for women than for men.

In another study, my coauthors and I examine a ban on noncompetes that Hawaii implemented in 2015 for *only* high-tech workers—an occupation in which the potential benefits of investment are very salient. Yet similar to the low-wage study, we find that this ban raised quarterly earnings for new hires by 4% and increased job mobility by 11%.

Other studies find that where it is easier to enforce noncompetes, the startup rate is lower and businesses struggle to hire.

Taken together, these results suggest that noncompetes do indeed prevent both low-wage and high-tech workers from working where they want and earning what they could in the market.

Fourth, bans on noncompetes do not tell the whole story. In states where noncompetes are unenforceable, they still cover 19% of the workforce. Moreover, these unenforceable noncompetes also appear to chill employee mobility.

Fifth, two recent studies suggest that the negative effects of noncompetes are borne not only by those who sign them, but also by others in the labor market.

Sixth, other tools can do similar jobs for the firm without constraining worker options so severely. For example, nondisclosure agreements and trade secret laws can protect trade secrets, while nonsolicitation agreements can protect clients. Yet neither these provisions limit job options for departing workers. The efficacy of noncompetes should be judged based on their value relative to these less restrictive alternatives.

Finally, I would like to note that this is not a classic firm vs. worker issue because firms are on both sides of the equation: Firms may not want to lose workers to competitors, but they would like to hire from competitors.

I would also like to note that it has been uplifting to see bipartisan interest in these reform efforts.

I look forward to your questions. Thank you.



WASHINGTON LAWYERS' COMMITTEE
FOR CIVIL RIGHTS AND URBAN AFFAIRS

Council of the District of Columbia
Committee on Labor and Workforce Development
B23-0494 – Ban on Non-Compete Agreements Amendment Act of 2019
Testimony of Daniel A. Katz, Senior Counsel
December 6, 2019

For more than fifty years, the Washington Lawyers' Committee for Civil Rights and Urban Affairs ("WLC") has labored to defend the rights of working people and to address the issues of poverty, racism, and other forms of discrimination. To effectively meet these challenges, WLC works with a broad array of community groups, labor unions, faith communities, and law firms throughout the Washington, D.C. metropolitan area. Among these efforts are our workers' rights clinics, which each month assist over 100 low-wage D.C. area workers who face wage theft, discrimination on the job, illegal terminations, and employers who otherwise do not comply with legal protections. In addition to these workers' rights clinics, WLC litigates claims on behalf of employees who have faced discrimination in the workplace, wage theft, as well as claims on behalf of persons illegally excluded from employment.

Our experiences assisting thousands of low-wage workers who attend the clinics, along with 50 years of experience litigating claims challenging employment discrimination and other inequities at work, inform our position that the Council should approve the Ban on Non-Compete Agreements Amendment Act of 2019, B23-494. By prohibiting non-compete agreements for those earning under \$42.00/hour, this legislation would prohibit low and mid-wage workers from being subject to restrictive non-compete covenants. In addition, the protections afforded by the legislation would be enforceable

under the D.C. Wage Payment Law, thus affording low wage workers a private right of action to enforce its provisions.

Non-compete clauses do not only apply to highly compensated executives or other high-earners with expertise regarding trade secrets, customers, products or research. Employers of low-wage workers throughout the D.C. economy, including restaurants, home-healthcare agencies, cleaning companies, nonprofit organizations, and retail stores, require employees to sign non-compete agreements that prevent them from working in a specific sector or type of position for a period of time following the termination of their current employment. In a city like the District of Columbia, with a high cost of living, a large racial wealth gap,¹ and a large racial income gap, banning non-compete agreements for low- and mid-wage workers would remove unjustified barriers to job opportunities and translate into increased mobility for women workers and workers of color.

D.C.'s experience is not unique. A March 2016 Department of Treasury report demonstrates the proliferation of these agreements to most sectors of the labor market, across industries and skill levels. It estimates that 15 percent of workers without a college degree and 14 percent of workers making less than \$40,000 per year are restricted by non-compete clauses.² As mentioned above, this includes a significant number of employees working in low wage jobs. For example, it includes the individual interviewed recently at the workers' rights clinic, who labored as a process server. Upon being

¹ Kijakazi et al. (2016 November). The Color of Wealth in the Nation's Capital: A Joint Publication of the Urban Institute, Duke University, The New School, and the Insight Center for Community Economic Development. Retrieved from https://www.urban.org/sites/default/files/publication/85341/2000986-2-the-color-of-wealth-in-the-nations-capital_0.pdf.

² U.S. Department of Treasury, Office of Economic Policy. (2016 March). Non-compete Contracts: Economic Effects and Policy Implications. Retrieved from <https://www.treasury.gov/resource-center/economic-policy/Documents/UST%20Non-competes%20Report.pdf>.

terminated without cause, the company reminded him that he long ago signed a non-competition agreement that would prohibit him from working for any company, conceivably a competitor, in any city in the country. And it includes, for example, an individual who distributes snack foods for sale to convenience stores, who sought to leave his job for another food distribution job after 20 years, only to be told that the non-compete he signed 20 years earlier prevents him from working in food distribution within a 100 mile radius.

The Ban on Non-Compete Agreements Amendment Act of 2019 will protect workers who earn up to three times the hourly minimum wage from this unjustifiably restrictive and coercive practice. On behalf of low-wage workers in D.C., we recommend that the Council approve this measure. Below, we will discuss how non-compete agreements:

- Prevent worker mobility and depress wages;
- Perpetuate the power differential between employer and employee; and
- Disparately disadvantage women and workers of color in the D.C. area.

Non-Compete Clauses Prevent Worker Mobility and Depress Wages

When an employer requires a worker to sign a non-compete agreement, the employer intends to restrict the employee from accessing other employment opportunities. The existence of the agreement - and the prohibitive expense of hiring a lawyer to challenge such a clause - deters employees from leaving their current position or seeking other opportunities. Workers bound by non-compete agreements are thus trapped in jobs they wish to leave, and their future opportunities are restricted.

For non-union employees, leaving a job - or having the option to leave the job - is often a worker's only way to secure better wages and conditions. Non-compete clauses

eliminate this opportunity because they interfere with the employee's ability to quit and work elsewhere. Labor economists' research demonstrates that the increasing use of non-compete provisions and "no-poaching" clauses have an impact even beyond that experienced by the individual worker, as use of such disincentives restricts labor market competition and contributes to mass wage stagnation, rising inequality, and declining productivity."³ The research further demonstrates that the use of non-compete agreements depresses the wages of workers that have never signed one: if a competitor undercuts its workers' wages, the employer can then do the same to its own employees.⁴ A 2016 Department of Treasury report supports this analysis, finding that hourly wages in states that refuse to enforce non-compete agreements are higher than hourly wages in states that enforce non-compete agreements.⁵

As workers build skills through their employment, non-compete clauses restrict them from advancing their careers within their industries, taking better jobs, or starting their own businesses.⁶ If a worker subject to a non-compete leaves her position, she may

³ Krueger, A., and Posner, E. (2018, Feb. 28). How Corporate America is Suppressing Wages for Many Workers." N.Y. Times. (Feb. 28, 2018) Retrieved from: <https://www.nytimes.com/2018/02/28/opinion/corporate-america-suppressingwages.html>; Krueger, A., and Posner, E. (2018, Feb. 27). A Proposal for Protecting Low-Income Workers from Monopsony and Collusion. The Hamilton Project. Retrieved from https://www.hamiltonproject.org/assets/files/protecting_low_income_workers_from_monopsony_collusion_krueger_posner_pp.pdf; Covert, B. (2018, Feb. 15). Does Monopoly Power Explain Workers' Stagnant Wages. The Nation. Retrieved from <https://www.thenation.com/article/does-monopoly-power-explain-workers-stagnant-wages/>.

⁴ Starr, E., Frake, J., and Agarwal, R. (2018, Jun. 30). Mobility Constraint Externalities. Forthcoming at Organization Science. Retrieved from SSRN: <https://ssrn.com/abstract=3027715> or <http://dx.doi.org/10.2139/ssrn.3027715>

⁵ U.S. Department of Treasury. Non-compete Contracts: Economic Effects and Policy Implications.

⁶ Starr, et al.. Screening Spinouts?; Stuart, T.E., and Sorenson, O. Liquidity Events and the Geographic Distribution of Entrepreneurial Activity. *Administrative Science Quarterly*, vol. 48, no. 2, 2003, pp. 175-201.; Samila, S., and Sorenson, O. Non-Compete Covenants: Incentives to Innovate or Impediments to Growth. *Management Science*, vol. 57, no. 3, 2011.; Balasubramanian, et al., The Effect of Curtailing Enforceability.; Marx, M. (2018, May). , Punctuated Entrepreneurship (Among Women). U.S. Census

be forced into a different field than where she accumulated experience and training. In D.C., many low-wage workers work in multiple positions to pay their bills and support their families. Non-compete agreements may eliminate their ability to work in multiple positions in the same industry simultaneously. As non-compete agreements limit and disincentivize employee mobility, WLC recommends that D.C. ban their use for low and mid-wage workers.

Non-Compete Agreements Perpetuate Inequality in the Employee/

Employer Relationship

Since employers impose non-compete clauses as a condition of employment, the agreements exacerbate inequality between an employer and employee. Non-union employment is generally at-will. Theoretically, this means employers or employees can choose to terminate the employment relationship at any time. However, when an employer coerces the employee to sign a non-compete agreement as a term of hiring, it may limit where an employee can work in the future, preventing the worker from finding other employment, while placing no restrictions on the employer.

At the start of their employment, a vast majority of low-wage workers have no leverage to bargain over wages, hours, or provisions in an employee handbook such as a non-compete clause. Researchers found that of workers asked to sign a non-compete agreement by their employer, just seven percent of workers with less than a bachelor's degree attempted to bargain over a non-compete clause.⁷ Low-wage workers legitimately

Bureau Center for Economic Studies. Retrieved from <https://www2.census.gov/ces/wp/2018/CES-WP-18-26.pdf>.

⁷ Starr, E., Bishara, N., and Prescott, J.J. (2019, Aug. 30). Noncompetes in the U.S. Labor Force. U of Michigan Law & Econ Research Paper No. 18-013. Retrieved from

fear that objecting to the employer's terms of employment will result in them losing the job.

Workers often do not know whether they are bound by a non-compete agreement, do not know its details, and do not know the legal implications. Employers often require employees to sign non-compete agreements that are hidden within the stack of first-day paperwork, or tucked into an employee handbook the employer requires an employee to sign, often with little or no time to review. Because private legal counsel is costly, low-wage workers lack access to legal counsel to review conditions of employment before starting a new job. It bears repeating that providing low wage workers a private right of action to combat non-compete provisions made illegal by this legislation will increase these workers access to legal representation.

Research shows that 30 to 40 percent of new employees are required to sign non-compete clauses after they have already accepted a job offer. In addition to requiring an individual to accept a job without complete disclosure of the terms and conditions of employment, this forces a worker to choose between (1) signing the agreement and having a job or (2) refusing to sign the agreement and walking away jobless. Most workers must choose the first option to provide for their families.

Employers enforce non-compete agreements by taking legal action⁸ and/or interfering with the employment reference process for employees seeking other work. Even if an agreement may not be enforceable in court, employers use non-compete

SSRN: <https://ssrn.com/abstract=2625714> or <http://dx.doi.org/10.2139/ssrn.2625714>
https://extranet.sioe.org/uploads/isnie2015/starr_prescott_bishara.pdf

⁸ See, e.g. *Ellis v. James V. Hurson, Assoc., Inc.*, 565 A.2d 615 (D.C. 1989)(employer seeks injunctive relief to enforce non-compete covenant against 10-year former employee).

agreements to intimidate workers from seeking new jobs. In this way, non-compete clauses produce a chilling effect on the labor market. In one study, nearly 40 percent of employees reported turning down a job offer from a competitor because of a non-compete provision.⁹ Unlike claims under anti-discrimination or wage payment statutes, challenges to non-compete provisions do not arise under fee shifting statutes. This makes it unlikely low-wage workers will be able to secure legal assistance to challenge those non-competes that may be legally vulnerable.

Non-Compete Agreements Harm Women and Workers of Color

Non-compete terms are especially pernicious for workers of color and women because they are more likely to live paycheck-to-paycheck to provide for their families, have less bargaining power, and are more concentrated in low-wage jobs. Lack of financial resources and lack of wealth means that a family is solely dependent on immediate income from wages. In D.C., 67% of Black families and 59 % of Hispanic families had annual incomes under \$75,000.¹⁰ In D.C., the median wealth for black families is \$3,500, while median wealth is \$284,000 for white families.¹¹ Lack of wealth and financial resources means that workers are less likely to challenge inequitable employment practices, such as non-compete agreements, because of their need for wages from employment for survival.

The negative impact of non-compete agreements is compounded for low-wage women workers, who comprise the majority of low-wage workers. The National

⁹ For evidence on the chilling effect of non-competes, see: Starr, E., Bishara, N., and Prescott, J.J. "Non-competes in the U.S. Labor Force.

¹⁰ Hendey, L. and Lei, S. (2016, Dec.). A Vision for an Equitable DC. The Urban Institute. Retrieved from <https://www.urban.org/features/vision-equitable-dc>.

¹¹ Kijakazi et al. The Color of Wealth in the Nation's Capital.

Women's Law Center report based on Census data shows that women of all races are more likely than men to work in low-wage jobs, and that Black and Latina women are significantly overrepresented in the low-wage workforce.¹² To explain the compounded impact of non-compete agreements on women, scholar Orly Lobel writes, "[w]hile non-compete restrictions impose hardships on every worker, for women these restrictions tend to be compounded with other mobility constraints, including the need to coordinate dual careers, family geographical ties and job market re-entry after family leave."¹³ These constraints, as well as the fact that women are overrepresented in low-wage work in D.C.,¹⁴ mean that banning non-compete agreements will increase on-the-job protections for women.

Workers of color are also overrepresented in low-wage work in D.C. The 2017 Department of Employment Services Minimum Wage Economic Impact Study shows that non-white workers comprise approximately 75 percent of workers in minimum wage positions, although they only comprise approximately 54 percent of the total D.C. workforce.¹⁵ Approximately 10 percent of white workers earned less than \$15.00 per hour, while this rate is doubled for Hispanic workers, and tripled for Black workers.¹⁶

¹² Tucker, J. and Patrick, K. (2017, Aug). Low-Wage Jobs are Women's Jobs: The Overrepresentation of Women in Low-Wage Work. National Women's Law Center. Retrieved from <https://nwlc-ciw49tixgw5lbab.stackpathdns.com/wp-content/uploads/2017/08/Low-Wage-Jobs-are-Womens-Jobs.pdf>

¹³ Orly L. (2017, May 4). Opinion, Companies Compete but Won't Let Their Workers Do the Same, N.Y. Times, Retrieved from <https://www.nytimes.com/2017/05/04/opinion/non-compete-agreements-workers.html>.

¹⁴ Miller, M, Mian, P., & Zhang, Y. (2017, November 1). Minimum Wage Impact Study, Department of Employment Services Office of Wage and Hour. Retrieved from https://does.dc.gov/sites/default/files/dc/sites/does/page_content/attachments/Minimum%20Wage%20Impact%20Study%20Report_r1.pdf

¹⁵ Miller, M, Mian, P., & Zhang, Y. Minimum Wage Impact Study, Department of Employment Services Office of Wage and Hour.

¹⁶ Miller, M, Mian, P., & Zhang, Y. Minimum Wage Impact Study, Department of Employment Services Office of Wage and Hour.

The proposed legislation will ban non-compete agreements for these workers and enable job mobility that otherwise could be restricted.

Labor economists document that non-compete agreements are especially harmful in communities where workers are unemployed and underemployed at higher rates¹⁷ because the individual worker is in an especially weak position to negotiate the terms of their employment. D.C. has one of the highest unemployment rates in the country. The Bureau of Labor Statistics lists the District of Columbia as having higher unemployment than all but two states.¹⁸ Within D.C., unemployment is concentrated in Wards 7 and 8, with rates that triple and quadruple the unemployment rates of Wards 1, 2 and 3.¹⁹ The unemployment rate of Black D.C. residents is more than 5.5 times the unemployment rate of white D.C. residents,²⁰ and D.C. has the highest Black unemployment rate in the nation at 12.4 percent.²¹ These high rates of unemployment for workers of color in D.C. mean that an employer will likely have many options to fill the position if a worker refuses to accept a position, if the worker resigns, or if the employer illegally terminates the worker. On the other hand, the worker will likely have fewer or no employment options.

¹⁷ Johnson, M. and Lipsitz, M. (2017, Dec. 14). Why are Low-Wage Workers Signing Non-compete Agreements?

¹⁸ Local Area Unemployment Statistics. United States Department of Labor Bureau of Labor Statistics. Retrieved from <https://www.bls.gov/web/laus/laumstrk.htm>.

¹⁹ Unemployment Data for DC Wards. District of Columbia Department of Employment Services. Retrieved from

https://does.dc.gov/sites/default/files/dc/sites/does/release_content/attachments/DC%20Ward%20Data%20Dec17-Nov17-Dec16.pdf.

²⁰ Hendey, L. and Lei, S. A Vision for an Equitable DC.

²¹ <https://www.epi.org/publication/2018q3-unemployment-state-race-ethnicity/>

Banning Non-Compete Agreements Will Protect D.C. Workers

There is no federal law preventing or limiting the use of non-compete clauses in employment. States are acting to fill this regulatory void. For example, as of May of this year, Maryland law voids any non-compete agreement for workers who earn less than \$31,200 a year or \$15.00 per hour through the Non-compete and Conflict of Interest Clauses Act.²² A study testing the effectiveness of Oregon's 2008 ban on non-compete agreements for hourly workers found that the ban has increased hourly wages by two to three percent, increased job mobility, and decreased the probability of being unemployed.²³

Other states have chosen to regulate non-compete clauses through enforcement. For example, California prevents the enforcement of these agreements against any worker.²⁴ Investigations by state Attorneys General have resulted in some employers, including WeWork²⁵ and Jimmy John's sandwich shops,²⁶ to drop requirements that employees sign non-compete agreements. Meanwhile, the limited number of cases decided by the District of Columbia Court of Appeals do not address the impact non-compete covenants have on low wage workers.²⁷

²² http://mgaleg.maryland.gov/2019RS/Chapters_noln/CH_753_sb0328e.pdf; Md. Code Ann., Labor & Employ. Art., § 3-716.

²³ Lipsitz, Michael and Starr, Evan, Low-Wage Workers and the Enforceability of Non-Compete Agreements (September 10, 2019). Available at SSRN: <https://ssrn.com/abstract=3452240> or <http://dx.doi.org/10.2139/ssrn.3452240>

²⁴ CA Bus. & Prof. Code § 16600.

²⁵ <https://www.npr.org/2018/09/18/648881004/wework-backs-down-on-employee-non-compete-requirements>

²⁶ <https://www.cnn.com/2016/06/22/jimmy-johns-drops-non-compete-clauses-following-settlement.html>

²⁷ See, e.g. *Gryce v. Lavine*, 675 A.2d 67 (D.C. 1996)(dissolution of law partnership); *Deutsch v. Barsky*, 795 A.2d 669 (D.C. 2002)(dissolution of dental partnership).

On behalf of low-wage workers in the District of Columbia, WLC recommends that D.C. join the states that have already taken action to eliminate the barrier to economic mobility created by unnecessary and harmful non-compete agreements, and ban the use of non-compete agreements for low- and mid-wage workers, provide workers with a right to contest non-compete restrictions in court, and establish penalties for employers that violate this law.

We urge the Council approve B23-0494, the Ban on Non-Compete Agreements Amendment Act of 2019.

Thank you.

Testimony of Najah Farley

National Employment Law Project

In Support of Proposed B23-494, Ban on Non-Compete Agreements Amendment Act of 2019

Hearing before the Council of the District of Columbia

Committee on Labor and Workforce Development
Wilson Building
Room 500
1350 Pennsylvania Avenue, N.W.
DC 20004

December 6, 2019

Najah Farley
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Thank you, Chair Silverman and members of the Committee on Labor and Workforce Development for the opportunity to testify today. My name is Najah Farley. I am a senior staff attorney at the National Employment Law Project (NELP). The National Employment Law Project is a non-profit, non-partisan research and advocacy organization specializing in employment policy. We regularly partner with federal, state and local lawmakers on a wide range of issues to promote workers' rights and labor standards enforcement.

I testify today in support of B23-494, which would significantly limit the use of non-compete covenants for employees and other workers in the District of Columbia. Research suggests that nearly 1 in 5 workers in the United States are currently bound by a non-compete.¹ Employers' stated reasons for using non-competes are typically to protect trade secrets, screen for employees that intend to stay with the company, and protect investment in employee trainings.² However, these policy rationales do not apply to most workers making below the salary threshold proposed in B23-494. In fact, they are antithetical to the very idea of work in low wage industries and middle wage industries, where workers do not normally have access to trade secrets, nor do they control the company, and restricting future employment is not appropriate for the level of training and investment that workers in lower and middle wage industries receive in their workplaces. Because non-competes depress wages by reducing competition, permitting their continued usage will only contribute to worse conditions for workers in the District of Columbia.³ We therefore urge the passage of B23-94.

I first came to this issue when I was an Assistant Attorney General at the New York State Office of the Attorney General. We opened an investigation into Jimmy John's usage of non-competes after public outcry over their usage with sandwich makers. We uncovered the usage of the non-competes in stores throughout upstate New York. After this investigation, we opened a complaint line to field complaints from workers who were subject to these provisions and discovered that they were being used in many industries and across income levels. We received complaints from phlebotomists, IT professionals, security guards, bike messengers, school cafeteria workers amongst others. This initiative resulted in four investigations and I think that the work is ongoing, even though I am no longer in the office.

I. What are non-competes and how prevalent are they?

¹ Evan Starr, JJ Prescott & Norman Bishara, *Noncompetes in the U.S. Labor Force* (2017)

² U.S. Department of Treasury Office of Economic Policy, *Non-compete Contracts: Economic Effects and Policy Implications* (2016)

³ Marshall Steinbaum, *How widespread is Labor Monopsony? Some New Results Suggest its Pervasive*, ROOSEVELT INSTITUTE, December 18, 2017; Greg Robb, *Wage growth is soft due to declining worker bargaining power, former Obama economist says*, MARKETWATCH, August 24, 2018.

Covenants not to compete, or non-competes, are purported agreements limiting a party's ability to accept work within specified industries, geographies, and/or time periods. Non-competition provisions are solely imposed by employers on employees, often as a condition of getting a job, and bar an employee or freelancer from going to a competing employer or related business for a period following the end of an employment relationship with their current employer. By signing one, the employee must agree that if they quit working for their employer, they will not work for a competitor for a period of time afterwards. Many are for a period of a year or more. Usually they are bound by either industry or geography, but some are very broad, implicating entire regions of the United States. Some may even list rival specific competitor companies that employees may not move to after leaving the previous employer.

Because the provisions are presented by employers as part of the employment process, we at NELP refer to them as coercive waivers, rather than agreements because most employees do not have the power to change them or negotiate their implementation. Often the non-compete waivers are presented in a "take it or leave it" fashion and employees are forced to sign or forego the job opportunity.

The definition of a "competitor" has also been very fraught, with some non-competes defining banned competitors as any similar business. This kind of breadth, along with large geographic restrictions, have kept workers from being able to move between jobs once they have gained expertise in an area or field, and have in some cases kept workers trapped in sub-par jobs.

Studies have also confirmed that non-competes are more widespread than initially thought. Just a few years ago, most people assumed that only executives and CEO's were bound by such agreements, but in 2016, researchers Evan Starr, J.J. Prescott and Norman Bishara estimated that 18% of workers are covered by non-competes, which amounts to nearly 30 million people. They also found that up to 40 percent of workers had been covered by a non-compete at one time during their careers.⁴ In a report called "Non-Compete Contracts: Economic Effects and Policy Implications," the U.S. Department of Treasury found that in about half of states, even laid off workers or those fired without cause can be subject to non-competes. Even in California, where they are banned, 19 percent of workers have signed non-competes. So, they can still bind employees to their current job, if they believe the non-competes have the force of law.

II. Government Enforcement and a Private Right of Action are Necessary to Stop the Spread of Abusive Non-Compete Waivers

NELP's position is that government enforcement and a private right of action are necessary components to non-compete legislation because of the information gap and power

⁴ U.S. Department of Treasury Office of Economic Policy, Non-compete Contracts: Economic Effects and Policy Implications (2016), p. 7.

differential when it comes to these agreements. First, I will address the information gap. As I discussed above, most non-competes are presented in a take it or leave it fashion and many employers are not open to negotiations on the terms of these waivers. Also many employees are not even aware that they can be negotiated. The Starr, Prescott and Bishara study looked at this issue and found that workers rarely negotiate on the issue of non-competes, largely because many receive the non-compete as a condition of a job offer or after accepting the job offer and lack the power to do so.⁵ Of those who received the non-compete before the job offer, only 10 percent bargained over the non-compete.⁶ Of the 90 percent who did not bargain, 38 percent did not realize that the terms of the non-compete were negotiable.⁷

Second, non-competes can rarely be challenged on their face, as they require an employer to file a case against an employee claiming that the employee has violated the non-compete provisions. This leads to a power differential that allows employers to enforce the agreements through “soft” measures, such as threats, sending a cease and desist letter to the employee, or to the employee’s new job. Government enforcement would allow offices, such as the D.C. Department of Employment Services to investigate the usage of such agreements, without the employer having filed a case against the employee. Similarly, a private right of action would allow employees to challenge the waivers and ensure that they are nullified before moving on to other employment and without the risk that they could be fired from their new occupation in light of the previously signed waiver.

III. Non-compete Agreements are not Needed to Protect Trade Secrets in the Employment Context

Employers cite the protection of trade secrets as a major reason for the need to use non-competes. However, workers in low wage and middle wage industries, such as those in food service, security and similar occupations where non-competes are widespread, are unlikely to have access to the trade secrets of their employers. Further, those who do have access to that information and improperly share it with a competitor can be held responsible without a non-compete agreement. Federal law prohibits sharing this type of information via the Defense of Trade Secrets Act.⁸ Also, non-disclosure agreements

⁵ Two studies have shown that 30-40% of workers received the non-compete after they have accepted the job offer. Starr, Evan, J.J. Prescott, and Norman Bishara, *Noncompetes in the U.S. Labor Force*, University of Michigan Law & Econ Research Paper No. 18-013, 2019 and Marx, Matt, *The Firm Strikes Back: Non-Compete Agreements and the Mobility of Technical Professionals*, American Sociological Review, vol. 76, no. 5, 2011, pp. 695-712.

⁶ *Id.*

⁷ *Id.*

⁸ The Defend Trade Secrets Act of 2016 created the first federal civil cause of action and also created a number of statutory remedies for the misappropriation of trade secrets in the United States. 18 USC § 1833(b)(3).

("NDA's") are increasingly used to protect this type of information by employers, making the usage of a non-compete provision for this reason obsolete.

Additionally, although non-compete agreements are more common in high-paying jobs with access to trade secrets, 12% of workers without a college degree and earning less than \$40,000 a year reported signing a non-compete.⁹ This indicates that companies are not merely using non-competes to protect trade secrets, but are relying on them to control workers' mobility and reduce their bargaining power. Historically, non-competes were imposed on higher-level employees to protect against trade secrets and client-poaching. But the widespread use of them today belies that initial impetus for non-competes. Today, according to the Treasury Department, fifteen percent of workers without a college degree are covered by non-competes, so there is only a 3% difference in the percentage of workers covered with bachelor's degrees and without them. Among workers making less than \$40k a year, fourteen percent are covered by non-competes.¹⁰ These findings show that these contracts and provisions are not limited to highly compensated executives. In addition, workers who reported access to trade secrets were only 25 percent more likely to have signed a non-compete.¹¹ For those workers that have access to client specific information or interaction with clients, they were seven percent more likely to have signed a non-compete.¹²

The second most common reason given for the utility of non-competes by employers is to protect trade secrets. However, freelance workers, such as fashion models, are unlikely to have access to the trade secrets of their hiring parties. Those who do have access and improperly share them can be held responsible without a non-compete agreement. Additionally, although non-compete agreements are more common in high-paying jobs with access to trade secrets, 12% of workers without a college degree and earning less than \$40,000 a year reported signing a non-compete.¹³ This indicates that companies are not merely using non-competes to protect trade secrets but are relying on them to control workers' mobility and reduce their bargaining power.

IV. Policy Recommendations

The DC Council proposed bill B 23-494 is very well written and would have a positive impact on all workers in the District of Columbia and NELP is happy to lend its assistance to the passage of this important legislation. NELP continues to support the possibility of a

⁹ Two studies have shown that 30-40% of workers received the non-compete after they have accepted the job offer. Starr, Evan, J.J. Prescott, and Norman Bishara, *Noncompetes in the U.S. Labor Force*, University of Michigan Law & Econ Research Paper No. 18-013, 2019 and Marx, Matt, *The Firm Strikes Back: Non-Compete Agreements and the Mobility of Technical Professionals*, American Sociological Review, vol. 76, no. 5, 2011, pp. 695-712.

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

complete ban on non-competes nationwide through its support of the Workforce Mobility Act introduced in October by Senators Todd Young and Chris Murphy.

In addition, the DC Council could make this bill even stronger by increasing the damages for usage of an unlawful non-compete and adding a notice or posting requirement. Currently, the range is set at \$500 to \$1,000 for each violation, and \$1,500 for each employee. Raising those amounts higher would more accurately take into account the damages due to a worker who may have had to sit out of work for a period of time while litigating the issue of the unlawful non-compete. In addition, adding a notice or a posting requirement would be a positive addition and ensure that employers are notifying workers in low wage industries when they plan to introduce a non-compete and inform workers at a worksite about the non-compete law and its applicability in general. Increasing the relief for violations and adding a notice or posting requirement would increase the positive impact of this bill on workers in the District of Columbia.

V. Recent State Legislation in the Arena

I will now review list some of the recent legislation in the non-compete arena.

- Massachusetts recently passed one of the most comprehensive non-compete laws in the country and it went into effect on October 1st of 2018.¹⁴ The Massachusetts law limits non-competes to one year, requires notice for new employees and also restricts the usage of non-competes to not being broader than necessary to protect legitimate business interests.¹⁵
- In August 2016, Illinois Governor Bruce Rauner signed the “Illinois Freedom to Work Act.”¹⁶ This Act prohibits private-sector employers from entering into a covenant not to compete with any of their low-wage employees. The Act defines a low-wage employee as a worker making the greater of the minimum wage or \$13 per hour. It followed an Illinois Appellate District Court decision that held that continued at-will employment was insufficient consideration to support a non-compete under Illinois law.¹⁷ As such, a non-compete must be accompanied by either 1) independent consideration or 2) two or more years of continuous employment.
- Oregon passed a law limiting non-competes to 18 months in duration. In 2020 employers will be required to present non-competes within 30 days of termination of employment. A previous Oregon law limited non-compete provisions to workers

¹⁴ <https://www.masslive.com/expo/news/erry-2018/08/d4240441a67183/what-does-massachusetts-noncom.html>

¹⁵ <https://www.faircompetitionlaw.com/2018/08/06/massachusetts-new-noncompete-law-the-text/>

¹⁶ Kevin Cloutier and Mikela Sutrina, *Illinois Limits Non-Compete Agreements Yet Again*, Labor & Employment Law Blog, September 7, 2016, available at: <https://www.laboremploymentlawblog.com/2016/09/articles/non-competition-covenants/illinois-brings-down-the-hammer-on-non-compete-agreements/> (last visited March 1, 2018).

¹⁷ *Fifield v. Premier Dealer Services, Inc.*, 993 N.E.2d 938 (2013).

over the income level of \$97,000 per year and employers are required to present them before an offer of employment as well.¹⁸

- New Mexico restricted the usage of non-competes among health care workers.¹⁹
- Hawaii prohibited the usage of non-competes in the technology industry.²⁰
- Maryland prohibited non-competes for workers making \$15 per hour or less, however it does not provide for damages or a private right of action, so the method of enforcement is undefined.²¹
- New England states Rhode Island, New Hampshire and Maine all prohibited non-competes for workers in low wage industries this year with varying definitions of what constitutes low wage. The law in Maine has the most comprehensive language, as it covers people at 400% of the federal poverty level and institutes notice requirements.²²

Proposed Legislation

- New York State proposed legislation outlawing non-competes for workers making under \$15 per hour or the minimum wage.²³
- Connecticut proposed a non-compete law prohibiting the usage of non-competes with physicians.²⁴
- New Jersey also proposed a bill that would apply to any persons considered eligible for unemployment.²⁵

VI. Conclusion

Thank you for the opportunity to submit this testimony.

¹⁸ <https://www.oregonlaws.org/ors/653.295>;

<https://www.oregon.gov/boli/TA/Pages/FactSheetsFAQs/Noncompetition.aspx>

¹⁹ <https://law.justia.com/codes/new-mexico/2015/chapter-24/article-1i/section-24-1i-2>

²⁰ http://www.capitol.hawaii.gov/session2015/bills/HB1090_CD1_.htm

²¹ <https://www.jdsupra.com/legalnews/maryland-restricts-noncompete-10130/>

²² <https://www.jdsupra.com/legalnews/noncompete-reform-continues-in-new-18937/>

²³

https://assembly.state.ny.us/leg/?default_fld=&bn=A02504&term=2019&Summary=Y&Actions=Y&Text=Y&Committee%26nbspVotes=Y&Floor%26nbspVotes=Y

²⁴ <https://www.cga.ct.gov/2019/TOB/s/pdf/2019SB-00377-R00-SB.PDF>

²⁵ https://www.njleg.state.nj.us/2012/Bills/A4000/3970_I1.HTM

Testimony of Brent St Amant, Public Witness, Ward 6 Resident
Public Hearing on B23-494
Ban on Non-Compete Agreements Amendment Act of 2019
Friday, December 6, 2019

Thank you, Chairperson Silverman, for holding this hearing and for introducing this bill. My name is Brent St Amant and I appreciate the opportunity to share why I support its passage.

I have had to sign a noncompete agreement as a condition of employment. I believe it stifles competition for wages, benefits, and respect of employees' work-life balance. While I understand the need for companies to protect proprietary information, the practice of employers demanding non-compete contracts that prevent their workers from seeking new employment seems to be increasingly common – but it still unreasonable and unfair.

The marketplace of ideas is best served by free competition for labor. Employees ought to be free to take risks and explore new career opportunities where they can develop valuable skills. This is nearly impossible when the company you signed a non-compete agreement with has thousands of clients in their industry or when this region is the epicenter of your field.

I believe this legislation would greatly improve the lives of District residents – especially those who are just starting their careers and may not fully appreciate the long-term impact of signing a non-compete agreement.

In my case, the non-compete was placed on my desk on my first day – after I had already turned down a different job offer. I would have taken that other position if I had known this company was going to demand such a far-reaching covenant. I did not feel I had the power to negotiate the terms of this agreement in what was my first full-time job after graduating university.

I recently left that employer due to long-standing disagreements with their workplace policies and practices. Since that departure, I have had to turn down new opportunities due to conflicts with the non-compete I signed.

I know this bill won't help my situation – while my pay was well below the threshold you are considering, the agreement was signed prior to this bill's future effective date. Nonetheless, I do not want other people starting their careers to end up in this situation. That is why I support this bill and deeply appreciate your work on this issue.

I hope every member of this committee will support the bill and that every member of the City Council will vote in favor of its passage. I also urge the Chairperson to work closely with the Mayor's office to ensure that she will quickly sign this bill into law.

Thank you.

Testimony of Faith Rokowski

I'd like to begin by thanking Chairperson Silverman and the committee for inviting me.

In October 2017 I started interning at a digital fundraising firm here in DC. I interned there for the remainder of my senior year of college, and in April of 2018, I was offered a full-time job, a position I felt would truly kickstart my goals.

As part of the terms of my offer, I was required to sign a restrictive non-compete agreement. There was no geographic radius, no explanation of what the broad term "engages in the same or competes with" meant, and no opportunity was presented to object to these terms. In fact, when presenting me with my contract, my employer told me that this broad of a non-compete was standard within the industry.

I signed the contract and started my position three days after graduating from college.

My time there was rocky. I dealt with harassment from fellow employees, and a lack of action from management when I reported it. I went to work every day fearing being yelled at or demeaned, worked incredibly long hours, and barely made enough money to pay my bills.

I knew after the election that I wanted to leave and found a new job in May of 2019 at a digital advertising firm. The two companies weren't competitors per se, but it was still enough of an overlap to technically be a violation of my broad non-compete.

If they wanted to, my former employer could have sued me.

But I still took the chance – largely because the new job was offering me a salary more in line with industry average – and came out to a nearly \$25,000 raise.

My old non-compete is technically still in effect until May of this year – meaning that the position I currently hold, a job I desperately wanted and feel very lucky to have – is in a precarious position until then. I even fear that testifying today will encourage my former employer to come after me for my non-compete.

But I got out. Before signing my new contract, I consulted legal websites and forums, read my new contract over and over and over again, and spent days agonizing over case law until I had assured myself that my former employer had likely taken advantage of my youth and naivety.

But I firmly believe that this burden was an unfair one to place on me and so many others like me. I stayed at my first job for that long not because I thought it would get better, but because of the fear of my career crashing down around me before it had started.

During the process of preparing to speak to the Council about this bill, I learned that other former coworkers dealt with much of the same that I did: unfair salaries, general disrespect and harassment from upper level management, and a paralyzing fear to leave. All of us were young, and almost all of us were women or people of color – the same demographics who are often most hurt by extreme pay disparity, workplace abuse, or sexual harassment.

Testimony of Faith Rokowski

We were able to get out because of luck, but so many more people are trapped in abusive environments that *don't* get lucky.

I got out. My former coworkers got out. But the thing is, it shouldn't have been that dramatic, because our careers and exorbitant legal costs shouldn't have been used as leverage for our company to take advantage of us in the first place.

Thank you.

Daniel Essrow
Public Witness
717 Kenyon St. NW
Washington, DC 20010 (Ward 1)
716-417-3394

Testimony on Ban on Non-Compete Agreements Amendment Act of 2019

Thank you for the opportunity to testify today in support of the **Ban on Non-Compete Agreements Amendment Act of 2019**. I also want to thank our expert witnesses and those speaking from personal experience for their compelling testimony on the scope and effects of non-compete agreements.

Non-competes are not a high-profile issue like the minimum wage or paid family leave that draws dozens of public witnesses. **But I wanted to be here today in solidarity with working people who are trapped in crappy jobs or are being paid less than they deserve because of a non-compete agreement.** I want to thank this committee for its work on this issue and I want to attempt to put it in a slightly broader economic context.

Fundamentally, the economy is about power. Who has power and who doesn't determines who wins and who has to fight for scraps. For 40+ years, corporate and wealthy interests have systematically undercut the power of working people—in ways large and small. They've done this by attacking unions, dismantling retirement benefits, fighting minimum wage increases, and forcing workers to sign contracts that include binding arbitration and non-compete clauses. In this environment, someone looking for a job is fundamentally disempowered. They must accept whatever work they can find, at whatever wage, with whatever benefits, and then, on their first day, sign away whatever rights they had left.

But DC is beginning to stem that tide. By raising the minimum wage, enforcing stiff wage theft penalties, mandating paid sick leave, and instituting landmark Paid Family Leave legislation. These policies taken together are helping slowly shift the landscape of power back in favor of working people.

Protecting people's right to freely look for and accept a new job is a critical way to shift a tiny bit of power away from corporate interests and back into the hands of working people. Banning non-compete agreements for most workers—**and making them illegal, not just unenforceable**—will help workers trapped in low-paying or abusive jobs find a path out. It will let people negotiate for the pay they deserve by moving between jobs or leveraging a job offer. It will force employers to compete fairly and openly for talented staff.

As it stands now, employers count on having more resources, more information, and more lawyers than job applicants. Making non-competes plainly illegal with a bright-line salary threshold will allow working people to start a new job without signing away their rights.

Banning non-competes is a critical step. I also want to remind you of the forest around this very important tree. **The right of working people to demand respect on the job and to earn a fair living for their work.** That includes the fundamental right to form a union. The ability to take time off to get healthy or care for a loved one. **And the right to leave a job for a new one with better pay.** When any tree in this forest is cut down, the entire forest is threatened. I applaud you for taking this important step to protect the fundamental right of working people to move freely between jobs. And I look forward to the day where DC workers will no longer feel trapped by non-compete agreements.



**Statement of Randolph Chen
Co-Acting Chief, Social Justice Section - Public Advocacy Division
Office of the Attorney General for the District of Columbia**

Before the

**Committee on Labor and Workforce Development
The Honorable Elissa Silverman, Chairperson**

Public Hearing

on

**Bill 23-0494, the “Ban on Non-Compete Agreements Amendment
Act of 2019”**

**December 6, 2019, 10:00 am
Room 500
John A. Wilson Building
1350 Pennsylvania Avenue, NW
Washington, District of Columbia 20004**

Greetings Chairperson Silverman, Councilmembers, staff, and residents. I am Randolph Chen, Co-Acting Section Chief of the Social Justice Section in the Public Advocacy Division at the Office of the Attorney General (“OAG”), which advocates for the rights of District workers. I am pleased to appear on behalf of Attorney General Karl A. Racine to testify in favor of Bill 23-0494, the “Ban on Non-Compete Agreements Amendment Act of 2019.” This Bill would prohibit employers from imposing on their employees “noncompete” agreements—agreements that restrict employees from being simultaneously or subsequently employed by another employer within a particular geographic region or for a period of time. The Bill’s prohibition would only apply to middle and low-wage workers, defined as those who make an hourly rate less than or equal to three times the District’s minimum wage.

Protecting the rights of District workers is one of Attorney General Racine’s top priorities. In early 2017, the Council granted OAG the authority to enforce the District’s wage laws and provided funding for the OAG’s Social Justice Section to develop a more robust wage theft enforcement practice. We have focused our efforts on protecting low-income District workers through enforcing the District’s wage-and-hour and worker misclassification laws. We have launched over 30 investigations and recovered hundreds of thousands of dollars in judgments and settlements against businesses that have stolen wages from District workers. This Bill would add important protections for District workers and allow OAG to enforce those protections to recover damages on behalf of affected employees as well as civil penalties.

Employers insist that noncompete agreements are necessary as a protective measure—for instance, to prevent an employee who has access to a trade secret from taking that secret to a competitor. However, such a justification is applicable to only a small slice of the D.C. workforce—for example, senior company executives who truly have access to company trade secrets. Conversely, noncompete agreements are rarely if ever appropriate for middle to low-wage workers. Indeed, in OAG’s enforcement work, we have seen many situations where noncompete agreements impose harm on employees without any corresponding justification at all. In these cases, noncompete agreements lopsidedly benefit employers, who gain a more stable labor force at the expense of their employees’ job mobility. These harms are particularly problematic where, as with middle and low-wage workers, employers often hold significantly greater bargaining power and employees seldom have the opportunity to negotiate the terms of their employment.

For example, in July 2018, OAG joined a coalition of state attorneys general in conducting an investigation of several fast food franchises that have branches across the nation, including in the District of Columbia. The investigation regarded the franchises’ use of restrictive employment provisions—that included noncompete agreements—relating to their food service employees, who often work at rates at or around minimum wage and rarely if ever have access to trade secrets or sensitive commercial information. For low-wage workers who already face multiple challenges in making ends meet, these kinds of restrictive provisions only serve to limit job mobility and further depress wages. For instance, a noncompete agreement

would prevent a low-wage food service worker from taking a job at a competitor that offered better pay or benefits. Together with the multistate coalition, OAG won agreements in March 2019 from several of the fast food franchises to cease using similar kinds of restrictive employment provisions that this Bill would prohibit.

In addition, in July 2019, OAG led a multistate coalition in submitting a comment to the Federal Trade Commission (“FTC”) relating to an FTC hearing on “Competition and Consumer Protection in the 21st Century.” In the comment, our office discussed the use of noncompete agreements, particularly with respect to low-wage workers, as a competitive concern that could violate antitrust law. We again reiterated concerns that such restrictive agreements could limit worker mobility and earnings opportunities. Moreover, we also raised a separate concern that noncompete agreements can cause additional harm beyond affected workers. For example, the increased use of noncompete agreements could end up harming local businesses because they effectively deprive other employers from the opportunity to hire an otherwise qualified worker.

OAG supports the Bill’s passage because it protects against these harms. The Bill, in prohibiting the use of noncompete agreements for middle and low-wage District employees, furthers workers’ rights by encouraging job mobility and fair wages; it also cultivates a job market free of one-sided restrictions that weigh in employers’ favor. The Bill is appropriately tailored to only apply to workers who make less than or equal to three times the District’s minimum wage. This limitation appropriately balances business and worker interests by protecting the most vulnerable workers—middle and low-wage workers—who rarely deal with

trade secrets or sensitive commercial information. For these workers, noncompete agreements do little more than hinder their freedom to work and make a fair and living wage. The Bill thus reflects a reasoned balance in specifically protecting working-class residents from being forced to enter into noncompete agreements.

OAG also supports the Bill's express authorization of OAG to enforce its prohibitions and seek damages and civil penalties. As an initial matter, our office has demonstrated that when the Council grants us authority to protect District workers, we deliver results. Since the Council granted OAG authority to enforce the District's wage laws in 2017, our office has developed an increasingly robust wage theft enforcement practice—we have opened dozens of investigations, filed lawsuits, and recovered hundreds of thousands of dollars for District workers. And this Bill would be an additional tool our office could use to fight for District workers. Through allowing damages and civil penalties, the Bill also includes the necessary deterrent to ensure compliance with the law.

Finally, the passage of the Bill is consistent with actions taken by other states to address concerns about abusive noncompete agreements. In May 2019, Washington state passed a similar law that rendered noncompete agreements void and unenforceable against employees making under \$100,000 per year. That same month, Maryland passed a law that both nullified noncompete agreements entered into with employees who made less than \$15/hour and declared that such agreements were against Maryland public policy. New Hampshire, a smaller state with a population close to that of the District's, also passed a law in July 2019 prohibiting the use of

noncompete agreements for workers who make less than 200 percent of the federal minimum wage. In addition, states like California, Oklahoma, and North Dakota have laws that generally nullify noncompete agreements altogether. Other states like Colorado, Illinois, Hawaii, and Massachusetts prohibit the use of noncompete agreements for specific types of workers. Numerous states both large and small, which are home to a diverse array of industries, have passed legislation regulating the use of noncompete agreements. The Bill is consistent with that pattern of regulation.

OAG urges the Council to approve Bill 23-0494, and we look forward to working with the Committee on Labor and Workforce Development to continue protecting the rights of District workers. This concludes my testimony, and I am happy to answer any questions.

Written Testimony of Geneva Kropper

Submitted to the Committee on Labor and Workforce Development

Concerning B23-0494, Ban on Non-Compete Agreements Amendment Act of 2019

December 3, 2019

Chairperson Silverman, thank you for inviting the public to submit testimony concerning B23-0494, the Ban on Non-Compete Agreements Amendment Act of 2019.

The Council of the District of Columbia has long been a national leader in protecting workers from non-compete agreements. Seventeen years ago, the Council passed the Broadcast Industry Contracting Freedom Act of 2002, which prohibited non-compete agreements in the broadcast industry. This legislation was introduced by Chairman Mendelson and passed with the support of the full Council.

The Broadcast Industry Contracting Freedom Act of 2002 was a good start to address a serious problem. Across the District of Columbia, too many workers are subject to harmful non-compete agreements that limit their ability to work, seek higher wages, and advance in their fields. These non-compete agreements are often imposed on young or low-wage workers who do not have the legal resources to fight them. I know — because I was one of these workers.

In September 2017, I was offered a job as a digital strategist at a political fundraising firm in D.C. As part of the terms of my job offer, I was required to sign a restrictive non-compete agreement that broadly forbade me from working for any business that “engages in the same or competes with” my employer for a year after termination of employment.¹ There was no geographic radius set on the non-compete, and the specific type of employer it restricted was not defined outside of the text provided above.

At the time of this job offer, I was 22 years old and just a year removed from my college graduation. It did not occur to me that I could object to the non-compete, negotiate its terms, or ask for written clarification about its parameters. I wanted the job — so I signed the non-compete.

A year passed, and I decided that I wanted to seek a new opportunity after the 2018 election. However, I soon realized that because of my non-compete agreement, I could not work for any digital fundraising firm in Democratic politics. At just 23 years old, I was entirely locked out of my field.

¹ The full text of this agreement has been provided to the Council.

In other states, overly-broad non-compete agreements like the one I signed have been struck down by the courts. If my employer had sued me in D.C. courts to enforce my non-compete, they likely would have lost. However, I did not have the resources to fight a potential legal battle, and I was frightened by the prospect of being sued at the beginning of my career.

The vulnerable position of low and middle-income workers demonstrates why Section 103(a) and Section 103(b) of the proposed legislation are a critical combination. When employers are permitted to compel employees to sign non-competes, the legal enforceability of these agreements becomes irrelevant. Employers have legal insurance, resources, and power. The employees who sign non-compete agreements typically do not.

After an extensive job search, I was offered a position in commercial and non-profit digital marketing. When I gave notice of my departure, the response from my then-current manager was “you know [taking that position] violates your non-compete, right?”

I knew this was wrong. During my job-search process, I had spent many hours researching non-compete agreements, both for the sake of my career and as a developing personal interest. I was certain the position I planned to take did not violate any reasonable interpretation of my non-compete agreement, and I said as much. Management at my then-current firm acquiesced — but it seemed like their question about violating my non-compete had been an attempt to intimidate me into remaining at their company. In this case, my rights were protected because of the time I had spent reading about non-compete law. That is not a fair burden to place on D.C. workers.

As I left the company, I was excited for my new job but pensive about leaving politics. I came to the D.C. area to study government at the University of Maryland, and I deeply wanted to make a difference in the world. Because of the non-compete agreement, I had to put my dreams on hold.

Later, I began organizing my former colleagues to talk to the Council about their experiences with non-compete agreements. Many disclosed that they had been paid far below industry standard — and then barred from seeking fair pay elsewhere because of their non-compete agreements. I also heard first-hand about a former colleague who was fired from the company and forced to sign a non-compete extension as a condition of severance.

The dangers of non-compete agreements also extend beyond the economic realm. Under the status quo, workers with non-compete agreements who face sexual harassment or other workplace abuse can feel trapped in their jobs, unable to find a new position in the same field without violating their non-compete. The proposed legislation would ensure that these workers can escape abusive working conditions and stay in their fields.

The consequences of non-compete agreements affect workers across the economic spectrum. Nationwide research by Dr. Evan Starr of the University of Maryland has found that nearly 40% of workers have signed at least one non-compete in the past.² Among workers making \$40,000 a year or less, nearly 14% are currently bound by a non-compete, and more than 30% have signed a non-compete during their career.³

There is a popular perception that non-compete agreements are only signed by high-earning tech workers and executives. My experience, the experience of my colleagues, and Dr. Starr's data prove otherwise. Across D.C., non-compete agreements are being used to restrict the upward mobility and economic freedom of our city's young and low-wage workers.

Another common misconception about non-compete agreements is that banning these agreements will make it harder for companies to protect their trade secrets or client relationships. The current legislation pending before the Council would allow employers to enforce non-disclosure and non-solicitation agreements, and trade secrets would be protected.

The Ban on Non-Compete Agreements Amendment Act of 2019 would ensure that low and middle-income workers in D.C. have the economic mobility they deserve. The income threshold currently set would have protected me and my colleagues and I urge the Council to retain this threshold if the legislation is revised. I also encourage the Council to consider expanding the scope of the legislation to ensure that all income-eligible workers *currently* working under non-compete agreements are covered, but I otherwise fully support all provisions of the bill and encourage the Council to pass it into law.

² Starr, Evan and Prescott, J.J. and Bishara, Norman D, Noncompetes in the U.S. Labor Force (August 30, 2019). U of Michigan Law & Econ Research Paper No. 18-013. Available at SSRN: <https://ssrn.com/abstract=2625714> or <http://dx.doi.org/10.2139/ssrn.2625714>

³ Ibid.

December 20, 2019

TESTIMONY OF MARCY L. KARIN
in Support of B23-0494
the “Ban on Non-Compete Agreements Amendment Act of 2019”
Before the Committee on Labor and Workforce Development, D.C. Council

Dear Chair Silverman and other Committee Members:

Thank you for introducing B23-0494, the Ban on Non-Compete Agreements Amendment Act of 2019, and for holding a public hearing on this legislation on December 6, 2019. As an employment law scholar and practitioner,¹ I have had the opportunity to research, teach, and offer legal counsel to both employers and employees on issues related to restrictive covenants in the District of Columbia. Based on this work, I share the following preliminary observations in support of this legislation.

First, non-compete agreements have the potential to significantly impact and restrict the upward mobility, safety, and economic security of low-wage workers and their families in the District. While non-compete agreements started as a way to keep high level workers, primarily executives, from taking trade secrets to rival businesses, they are currently used to restrict the activities of workers at all ranges of the income scale and throughout various organizational structures. Unfortunately, requiring people to accept a non-compete restriction to obtain work is an increasingly common phenomenon for low-wage workers. This new reality is problematic for low-wage workers and their families..

Specifically, among other concerns, non-compete agreements may:

- Prevent job mobility;
- Prevent workers from leaving jobs that have poor or unsafe working conditions, including positions where one may be experiencing sexual harassment;
- Prevent workers from negotiating for better work conditions;
- Block economic mobility by keeping workers in low-wage jobs and preventing them from starting their own businesses; and
- Restrict access to additional income by removing reasons for an employer to increase wages and preventing employees from working in second or third jobs in the same industry or area.²

¹ For informational purposes, I am a Ward 2 resident and work in Ward 3 as the Jack & Lovell Olender Professor of Law and Director of the Legislation Clinic at the University of the District of Columbia David A. Clarke School of Law. I teach Employment Law, Employment Discrimination, Gender and Sexual Orientation Under the Law, and the Legislation Clinic. Previously, I worked as the director of a worker’s rights legal clinic at the Arizona State University’s Sandra Day O’Connor College of Law and as an Associate at Arent Fox PLLC.

² These and other concerns have been articulated and explored in a series of law review articles recently. See, e.g., Ayesha Bell Hardaway, *The Paradox of the Right to Contract: Noncompete Agreements*, 39 SEATTLE U. L. REV. 957 (2016) (arguing that non-competes for low-wage workers violate the Thirteenth Amendment); Rachael Argenbright Rioux, *The Necessity for Employer Liability in Unenforceable Non-Compete Agreements*, 86 UMKC L. REV. 995 (2018) (discusses the negative impacts of non-compete agreements on low-wage workers); Jenna L. Brownlee, *To Compete or Not to Compete: Illinois’ Movement to Eliminate Non-Compete Agreements*, 48 LOY. U.

Second, non-compete agreements should not be imposed on people without the education, language, negotiating skills, training, network, and/or bargaining power to understand their terms and conditions, one's capacity to negotiate coverage, and/ or the ability to afford counsel to help.

In response to the increasing requirements on low-wage workers to enter into restrictive covenants and a greater understanding of the potential consequences of doing so, states across the country have proposed legislation to address this new reality. Some states have enacted legislation that bans the use of restrictive covenants altogether. Others have limited their enforceability in any number of ways—by prohibiting the use of restrictive covenants to certain occupations, by creating a threshold salary level below which an agreement would be unenforceable, by limiting them to certain events, or on some other basis.

This legislation goes a long way to help the District join this movement by restricting restrictive covenants in a way that respects and balances the needs of employers and protects the economic security and safety of low-wage workers. Lara Bollinger and I created a chart that compares relevant provisions of several other jurisdictions. I attach that chart to this testimony in hopes of helping the Council weigh various potential options for provisions related to coverage thresholds, notice requirements, and enforceability. If helpful, I am available to answer questions as the bill makes its way through the legislative process.

Thank you again for holding this hearing, calling attention to this growing problem, and consistently exploring whether new legislation is needed to best support our workplaces and our community.

Sincerely,

A handwritten signature in black ink, appearing to read "Marcy L. Karin". The signature is fluid and cursive, with a long horizontal stroke at the end.

Marcy L. Karin

CHI. L.J. 1233 (2017) (discussing the Illinois Freedom to Work Act, which expressly prohibits private sector employers from entering into non-compete agreements with low-wage workers); Jessica Weltge, *Blue Penciling Noncompete Agreements in Arkansas and the Need for a Public Policy Exception*, 2017 ARK. L. NOTES 85 (2017) (discussing mobility restrictions of low-wage employees due to non-compete agreements, among other topics).

STATE PROVISIONS THAT RESTRICT THE USE OF NON-COMPETE AGREEMENTS

Prepared by Lara Bollinger & Marcy Karin, Dec. 2019

This chart compares core provisions of some of the state statutes that ban or otherwise restrict the use of non-compete agreements.

<u>State</u>	<u>Types of Employers</u>	<u>Types of Employees / Occupations Covered</u>	<u>Salary Threshold Below Which Non-Competes are Barred?</u>	<u>Scope of Geographic Restriction</u>	<u>Scope of Time Restriction</u>	<u>Business Necessity Exception?</u>	<u>Void/Unenforceable?</u>	<u>Penalties</u>
<u>California</u> Cal. Bus. & Prof. Code § 16600 (2019).	Not specified.	Not specified.	Not specified.	Not specified.	Not specified.	Yes if related to the sale or dissolution of business. § 16601 & 16602.	Void. § 16600	Not specified.
<u>Colorado</u> Col. Rev. Stat. § 8-2-113.	Not specified.	All except: “Executive and management personnel and officers and employees who constitute professional staff to executive and management personnel.” § 8-2-113(2)(c). Specific physicians. § 8-2-113(3)	Not specified.	Not specified.	Not specified.	Yes if related to the sale of business or trade secrets. § 8-2-113(2)(a)-(b).	Void. § 8-2-113(2)(d).	Not specified.
<u>Connecticut</u> H.B. 7424, 2019 Reg. Sess. (Conn. 2019).	Not specified.	Homemaker, Companion or Home Health Services. § 305.	Not specified.	Any geographic area in the state. § 305.	Any period of time. § 305.	Not specified.	Void and unenforceable. § 305.	Not specified.
<u>Florida</u> Fla. Stat. § 542.15-36 (1980).	Not specified.	Not specified.	Not specified.	“Reasonable.” § 542.335.	Specifies different times to presume reasonableness and unreasonable of a restriction depending on type of party (e.g., independent contractor, former employees,) or type of restriction (e.g., trade secrets). § 542.335(1)(d)-(e).	Yes if supported by a legitimate business interest. § 542.335.	Void and unenforceable. § 542.335. If medical specialist/physician, it must be a legitimate business interest or it is void and unenforceable for 3 years. § 542.336.	Statutory penalties range, including: civil penalties up to \$1 million, criminal penalties for willful violation, and injunctive relief. § 542.21, § 542.335(1)(j).

<u>State</u>	<u>Types of Employers</u>	<u>Types of Employees / Occupations Covered</u>	<u>Salary Threshold Below Which Non-Competes are Barred?</u>	<u>Scope of Geographic Restriction</u>	<u>Scope of Time Restriction</u>	<u>Business Necessity Exception?</u>	<u>Void/Unenforceable?</u>	<u>Penalties</u>
<u>Illinois</u> 820 ILCS 90/ (2017).	Does not include governmental or quasi-governmental bodies. 4 § 90/5.	Low-wage employees. § 90/5.	The greater of (1) the hourly rate equal to the minimum wage required by the applicable federal, state, or local minimum wage law or (2) \$13.00 per hour. § 90/5.	Not specified.	Not specified.	Not specified.	Illegal and void. § 90/10(b).	Not specified.
<u>New Hampshire</u> S.B. 197, 2019 Reg. Sess. (N.H. 2019).	Not specified.	Low-wage employees. § 275:70(a)(II)(a).	Hourly rate less than or equal to 200% of the federal minimum wage. § 275:70-a(I)(b).	Not specified.	Not specified.	Not specified.	Void and Unenforceable § 275:70(a)(II)(b).	Not specified.
<u>Maine</u> Me. Stat. Tit. 26, § 599-A (2019).	Not specified.	Low-wage employees. § 599-A(3)..	Wages at or below 400% of the federal poverty level. § 599-A(3).	“Specified Geographic Area” § 599-A(1)(B).	Certain period of time following termination of employment. § 599-A(1)(B).	Protect trade secrets, employers’ confidential information, or goodwill. § 599-A(2)(A)-(C).	Only necessary if “ the legitimate business interest cannot be adequately protected through an alternative restrictive covenant, including but not limited to a nonsolicitation agreement or a nondisclosure or confidentiality agreement.” § 599-A(2).	Civil fine of at least \$5,000. § 599-A(6).
<u>Maryland</u> S.B. 328, 2019 Reg. Sess. (Md. 2019).	Not specified.	Not specified.	\$15 per hour or \$31,200 annually. § 3-716(A)(1)(I).	Not specified.	Not specified.	Not specified.	Null and void as against public policy. § 3-716(B).	Not specified.

<u>State</u>	<u>Types of Employers</u>	<u>Types of Employees / Occupations Covered</u>	<u>Salary Threshold Below Which Non-Competes are Barred?</u>	<u>Scope of Geographic Restriction</u>	<u>Scope of Time Restriction</u>	<u>Business Necessity Exception?</u>	<u>Void/Unenforceable?</u>	<u>Penalties</u>
<u>Massachusetts</u> Mass. Gen. Laws ch. 149, § 24L (2018).	Not specified.	Employees classified as non-exempt under the Fair Labor Standards Act; undergraduate or graduate students engaged in short-term employment or internships; employees terminated without cause or laid off; employees age 18 or younger. § c. Includes independent contractors § a.	Not specified.	“Reasonable in relation to the interests protected.” Presumption of reasonableness if limited to area where employee provided services or influence in prior 2 years. § (b)(v).	12 months unless the employee has breached fiduciary duty to the employer, then no more than 2 years. § (b)(iv).	“No broader than necessary to protect one or more ... legitimate business interests of the employer.” Trade secrets; Employer's confidential information; Employer's goodwill. § (b)(iii).	Restriction is unenforceable, rest of the contract remains valid. § c.	Not specified.
<u>North Dakota</u> N.D.C.C. § 9-08-06 (2019).	Not specified.	Not specified.	Not specified.	Specific city or part of city related to sale or operation of sold business. § 9-08-06.	Not specified.	Yes if related to the sale or dissolution of business. § 9-08-06.	Void. § 9-08-06.	Not specified.
<u>Oklahoma</u> Ok. Stat. tit. 15, § 217-219 (2019).	Not specified.	Not specified.	Not specified.	County and contiguous counties related to operation of sold or dissolved business. §§ 218-219.	Not specified.	Yes if related to the sale or dissolution of business. §§ 218-219.	Void. § 217	Not specified.
<u>Oregon</u> Or. Rev. Stat. § 653.295 (2020).	Not specified.	Employees other than those engaged in administrative, executive or professional work. § 653.295(1)(b); § 653.20 (3).	Annual salary below median family income for four-person family. § 653.295(1)(d).	Not specified.	18 months. § 653.295(2).	Not specified.	Void and unenforceable. § 653.295(1).	Not specified.

<u>State</u>	<u>Types of Employers</u>	<u>Types of Employees / Occupations Covered</u>	<u>Salary Threshold Below Which Non-Competes are Barred?</u>	<u>Scope of Geographic Restriction</u>	<u>Scope of Time Restriction</u>	<u>Business Necessity Exception?</u>	<u>Void/Unenforceable?</u>	<u>Penalties</u>
<u>Rhode Island</u> 28 R.I. Gen. Laws § 28-58-1.	Employs at least one employee, including the state, public corporations, and charitable organizations. § 28-58-2(4).	Employees classified as non-exempt under the Fair Labor Standards Act; undergraduate or graduate students engaged in short-term employment or internships; employees age 18 or younger; low-wage employees. § 28-58-3(a).	Employee whose average annual earnings are not more than 250% of the federal poverty level. § 28-58-2(7).	Not specified.	Not specified.	Not specified.	This does not render void the remainder of a contract containing an unenforceable noncompetition agreement. § 28-58-3(b).	Not specified.
<u>Utah</u> Utah Code § 34-51-101 (2016).	Broadcasting companies. § 34-51-102(2).	Broadcasting employees. § 34-51-102(1).	\$913 per week or non-exempt per salary basis test of the Fair Labor Standards Act. § 34-51-102(3).	Not specified.	One year maximum. § 34-51-201(2)(b).	Not specified.	Void. § 34-51-201(2)(c).	Employer is responsible for costs and damages related to seeking the enforcement of an unenforceable contract. § 34-51-301.
<u>Washington</u> H.B. 1450, 66th Leg., 2019 Reg. Sess. (Wash. 2019).	Not specified.	Not specified.	Employee: \$100,000 per year. § 3(1)(b). Independent Contractor: \$250,000 per year. § 4(1).	Not specified.	More than 18 months is presumptively unreasonable. § 3(2).	Not specified.	Void and Unenforceable. § 3(1).	The violator must “pay the aggrieved person the greater of his or her actual damages or a statutory penalty of five thousand dollars, plus reasonable attorney's fees, expenses, and costs incurred in the proceeding.” § 9(2).



DC Chamber of Commerce Testimony
To
The Committee on Labor & Workforce Development
on
Bill 23-494, Ban on Non-Compete Agreements Amendment Act of 2019
Friday, December 6, 2019

The D.C. Chamber of Commerce respectfully submits this statement for the record regarding ***Bill 23-494, the Ban on Non-Compete Agreements Amendment Act of 2019***. As introduced, the bill before the committee would impose a broad ban that would prohibit the use of non-compete agreements in the District covering any employee making three times the District minimum wage or less. However, the legislation as drafted is far more expansive than any other policy in our competitive economy and does not adequately insulate the critical information businesses use to maintain their operations and positions in the District marketplace. As such, the DC Chamber of Commerce cannot support the introduced bill and invites your attention to provisions that we have identified with concerns as well as ways in which the proposal currently before you can be improved.

The D.C. Chamber of Commerce represents businesses large and small throughout the District of Columbia and region. At the D.C. Chamber, we work hard to make living, working, playing, and doing business in D.C. a much better proposition for all. And we, at the DC Chamber, support ensuring that to build a competitive city, effective practices are in place to recruit top talent and grow a business. Regrettably, however, Bill 23-494 is not the vehicle in its current form to ensure that this important goal is met.

1. **Explicitly Protect Confidential & Proprietary Information.** It is a known fact that the District operates in a regional competitive economy, with a workforce that draws two-thirds of its employees from the entire metropolitan area. Combined with the depth of employment opportunities and being the hub for net new startups is a positive factor for the city. But as our emerging industries grow and we work to build a stronger and more competitive District of Columbia, to keep our position as the center of employment in the region, we know that businesses need not only a strong economy but talented workers and a stable business climate. Additionally, a challenge for any business is to manage uncertainty and risk which is elevated in our regional

economy and will be impossible to navigate should the committee move forward with B23-494.

We agree that shared economic factors allow for workers and business establishments to move frequently and be flexible. However, information and policies designed to protect trade secrets as defined by the DC Uniform Trade Secrets Act, confidential information, client relations, philanthropy or workforce needs should not be covered by the law. Businesses of all sizes including startups involved in emerging technologies are all vulnerable to computer fraud and theft by hackers or “insider” trade secret stealing cases. A study by Symantec showed that half of the employees who left or lost their jobs in the prior 12 months kept confidential corporate data and 40 percent planned to use that data in their new jobs. There is also significant harm caused by stealing company information for personal gain. For example, an employee of an exchange company copied thousands of files containing source code for an electronic trading platform worth millions with the intention of using this proprietary information to develop their own business. As is the case in neighboring jurisdictions, businesses in the District should be able to enter into employment agreements designed to avoid the theft of valuable trade secrets. *See Hair Club for Men L.L.C. v. Ehson*, No. 1:16-cv-236, 2016 WL 6563046 (E.D. Va. 2016) which found that a former stylist misappropriated Hair Club’s trade secrets; and in *Tulynet FZ L.L.C. v. Nemetisheva*, No. CL-2014-0009553, 2015 WL 10890841 (Va. Cir. Ct. 2015) a case of a former CEO’s business partner who misappropriated confidential and proprietary information related to pricing lists, when the former CEO left to start a rival business. The courts ordered him to pay over \$2.6 million in compensatory damages and \$500,000 in punitive damages.

We would want to ensure that these job creators feel comfortable growing their innovative operations here in the City. It is important that not only a company’s intellectual property is secured but its relationships and propriety information are protected and not prohibited by this Act. This includes but not limited to contact lists, designs, plans, software, pricing information, manufacturing information, confidential information about business opportunities and personnel information. There is already a unified legal framework to protect proprietary information and DC is among the majority of jurisdictions that have adopted this common law¹ however the bill as introduced does not specify that such information would remain protected. Before any action is taken on this measure, it is imperative that the Council clarify in the legislation print that such information will remain protected by the D.C. Uniform

¹ D.C. Official Code §36-401 - §36-410

Trade Secrets Act and actions limited to preventing the disclosure of such protected information will not be banned.

2. **Align the Bill to Best Practices & Federal Labor Standards.** As proposed, B23-494 would apply to more than just low-wage workers in the District. The proposed bar on non-compete would impose the restriction on those earning less than three times the local minimum wage, making D.C. one of the highest income thresholds for jurisdictions with similar statutes and expanding into the middle-class and professional exempt employee categories. Other states include Indiana, Illinois, New Hampshire, Maine, Massachusetts, and Maryland. Most jurisdictions including our neighbors in Maryland limit their statutes to low-wage workers but this proposal would go beyond what is best practice and make the District an outlier in the region. In addition to being far-reaching than any other jurisdiction, the proposed bill would put employers in an impossible situation to track the time of salaried employees creating an administrative burden that currently does not and should not exist for exempt and professional employees. Given that the professional services industry is one of the major sectors in the District of Columbia, should the measure move forward, the threshold would need to adjust to focus on minimum wage workers only and clearly exclude salaried exempt staff.
3. **Protect Business Growth and Acquisitions.** Non compete agreements enhance the value of a company for future sales. When buying a business, obtaining an effective non-competition agreement from the seller is typically a critical component of the deal in order to protect the buyer's post-closing business interests, and it is commonplace for the seller to agree to continue working for the buyer as an employee during a transitional period. In these situations, the buyer-employer should be able to protect the value of its purchase by entering into a reasonable non-competition agreement with the seller-employee. Courts throughout the country are more willing to enforce non-competition agreements entered into in connection with the sale of a business. *See e.g. Hess Newmark Owens Wolf, Inc. v. Owens*, 415 F.3d 630, 634 (7th Cir. 2005) which recognized that "Illinois may be skeptical about covenants executed by salesmen and other employees, but it is quite willing to enforce covenants executed by entrepreneurs in order to form or sell a business." A number of states have even adopted legislation protecting such instances *See, e.g.,* Colorado (COLO. REV. STAT. §8-2-113(2)(a)); South Dakota (S.D. CODIFIED LAWS §§53-9-9); Nevada (NEV. REV. STAT. ANN. §598A.040(5)(a)); Montana (MONT. CODE ANN. §§28-2-704). We strongly recommend that the council adopt language indicating that non-competitive reasonable employment non-competition agreements are allowable when entered into in connection with the sale, partial sale, or acquisition of a company.

By implementing a broad ban without aligning the legislation to consider existing DC statute and best practices would make protecting job providers' intellectual property nearly impossible. Without these changes to the bill, we cannot be supportive.

At the DC Chamber, we are dedicated to ensuring that our city continues to grow and prosper together and that mission includes the promotion of responsible corporate practices. However, such a mission cannot be fulfilled without the partnership and inclusion of the public sector and policymakers. Thank you for the opportunity to comment on Bill 23-494. The DC Chamber looks forward to working with you to find optimal solutions to the challenges facing our city. Should you or your staff have questions or need additional information, please contact Ms. Erika Wadlington, Director of Public Policy & Programs at ewadlington@dcchamber.org or at (202) 347-7201.



December 20, 2019

The Honorable Elissa Silverman
Chairperson, Committee on Labor & Workforce Development
Council of the District of Columbia
1350 Pennsylvania Avenue, NW, Suite 408
Government of the District of Columbia
Washington, D.C. 20004

Dear Chairperson Silverman,

This letter is regarding B23-494, the Ban on Noncompete Agreements Act of 2019. As you know, this bill was referred to the Committee on Labor & Workforce Development and received a public hearing on December 6th. As introduced, this legislation bans the use of non-compete provisions in employment agreements and workplace policies for those employees making up to three times the minimum wage.

While DCHA understands the intent of this legislation, we would recommend that any legislation be in line with neighboring jurisdictions. For example, Maryland recently passed legislation that bans non-compete agreements for workers making \$15 an hour or \$31,200 annually. We recommend that the provisions in this legislation either mirror Maryland or are no more than two times the minimum wage.

I appreciate the opportunity to provide comments on this legislation.

Sincerely,

Justin J. Palmer, MPA
Vice President, Public Policy & External Affairs

The District of Columbia Hospital Association is a unifying force working to advance hospitals and health systems in the District of Columbia by promoting policies and initiatives that strengthen our system of care, preserve access and promote better health outcomes for the patients and communities they serve.

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Department of Employment Services



Public Hearing On

Bill 23-494, the “Ban on Non-Compete Agreements Amendment Act of 2019”

Testimony of
Dr. Unique Morris-Hughes
Director

Before the

Committee on Labor & Workforce Development
Council of the District of Columbia
The Honorable Elissa Silverman, Chairperson

December 6, 2019
10:00 AM
Room 500
John A. Wilson Building
1350 Pennsylvania Avenue, NW
Washington, DC 20004

The Department of Employment Services (DOES) submits the following written statement for the record regarding Bill 23-494, the “Ban on Non-Compete Agreements Amendment Act of 2019.”

The stated purpose of the “Ban on Non-Compete Agreements Amendment Act of 2019” (the “Act”) is to protect District workers who earn up to three times the hourly minimum wage from having to sign a non-compete agreement. The Act would also ban non-compete language in employer policy manuals or handbooks. As of October 2019, three states—California, Oklahoma, and North Dakota—currently prohibit employee non-compete agreements from being entered into or enforced.¹ Other states, including Maryland and New Hampshire, have passed laws exempting low-wage employees from non-compete clauses. In Maryland, low wage workers are defined as those making less than \$15 per hour or \$31,200. In New Hampshire, low wage workers are defined as those who earn less than or equal to two times the minimum applicable wage, whether federal or state, for tipped workers. By comparison, the proposed Act is more expansive, exempting employees whose regular rate of pay is three times the minimum wage.

If this Act is enacted, DOES would be responsible for implementing and administering the legislation as the agency responsible for implementing the Living Wage Act, the Sick and Safe Leave Act, and the Minimum Wage Revision Act. Implementation and administration would require additional funding and the drafting of new regulations. Specifically, DOES would be required to draft regulations that require both investigations and the implementation of random audits to ensure compliance with the proposed Act. In addition to investigatory requirements, DOES would be obligated to develop regulations related to the assessment of

¹ <https://www.faircompetitionlaw.com/wp-content/uploads/2019/10/Noncompetes-BRR-50-State-Survey-Chart-20191019.pdf>

penalties and public guidance for employers on their obligations under the Act. Regulation development to implement similar laws has taken about a year. Additionally, under the Act, employees would be able to recover damages from an employer that violated their rights.

Based on a review of existing District employment data, DOES anticipates that over 200,000 information technology; professional, scientific, and technical services; finance; and other industry workers in the District would be directly impacted by the proposed Act. DOES would be responsible for educating these impacted employers and workers on their rights under the Act, and the remedies available to them. Due to the number of District employees likely to be impacted, the enhanced compliance monitoring in the Act, and the regulatory guidance that would need to be issued, DOES estimates that implementation of this law would require, at a *minimum*, \$2,235,544 as broken down below:

- \$150,000 to provide the public education to both employers and potentially impacted employees;
- \$534,652 to support the hiring of one full time program manager at a grade 14, step 7, for four years to oversee the administration of the new program;
- \$1,011,832 to support the hiring of two full time compliance investigators at a grade 14, step 5, for four years;
- \$489,060 to support the hiring of a full-time attorney at a grade 14, step 2, for four years to work on compliance enforcement; and
- \$50,000 per year to defray the costs of the work of the Office of Administrative Hearings' Administrative Law Judges to hear any cases related to the new Act.

These estimates are conservative and may need to be expanded if, during implementation, DOES determines that the law is impacting a larger number of District employees and employers.

Chairperson Silverman and councilmembers, thank you for the opportunity to submit testimony for the record on Bill 23-494, the “Ban on Non-Compete Agreements Amendment Act of 2019.”

Attachment 7

**Additional background materials
for the record:**

White House Report: *Non-Compete Agreements: Analysis of the Usage, Potential Issues, and State Responses*, May 2016

David J. Balan, *Labor Non-Compete Agreements: Tool for Economic Efficiency, or Means to Extract Value from Workers?*
November 2020

Geneva Kropper, *The Freedom to Leave* (flyer distributed at the Council)

CONTENTS EMBARGOED FOR 6:00 A.M., May 5th, 2016

Non-Compete Agreements: Analysis of the Usage, Potential Issues, and State Responses

May 2016



The U.S. economy has experienced a historic turnaround since the depths of the Great Recession. The unemployment rate has fallen by half since its peak in 2009, and over the last six years, American businesses have created more than 14 million new jobs, the longest streak on record. Despite this remarkable progress, the U.S. economy faces a number of longer-run challenges, some of which go back several decades. In at least part of the economy, evidence suggests that competition for consumers and workers is declining, and the number of new firms each year is experiencing a downward trend. In addition to this trend, there has been a decrease in ‘business dynamism’—the so-called churn of firms and who is working for whom in the labor market—since the 1970s.

One factor driving these issues may be institutional changes in labor markets, such as greater restrictions on a worker’s ability to move between jobs. To address these and other issues that limit competition in the marketplace, the President has directed executive departments and agencies to propose new ways of promoting competition and providing consumers and workers with information they need to make informed choices, in an effort to improve competitive markets and empower consumers’ and workers’ voices across the country.

Building on these efforts, this document provides a starting place for further investigation of the problematic usage of one institutional factor that has the potential to hold back wages—non-compete agreements. These agreements currently impact nearly a fifth of U.S. workers, including a large number of low-wage workers. This brief delineates issues regarding misuse of non-compete agreements and describes a sampling of state laws and legislation to address the potentially high costs of unnecessary non-competes to workers and the economy. It draws on a recently released report from the U.S. Treasury Office of Economic Policy--[*Non-Compete Contracts: Economic Effects and Policy Implications*](#)—which provides an overview of the nascent research on non-competes’ prevalence, enforcement, and effects.

Introduction

Non-compete agreements, or “non-competes,” are contracts that ban workers at a certain company from going to work for a competing employer within a certain period of time after leaving a job. The main rationale for these agreements is to encourage innovation by preventing workers with ‘trade secrets’ from transferring technical and intellectual property of companies to rival firms, even when there are trade secret laws to protect companies. These agreements may also encourage greater employer investments in worker training because they may reduce fear that workers will take skills gained to a competitor.

Workers’ value comes in part from the skills and experiences gained on the job. Non-competes can reduce workers’ ability to use job switching or the threat of job switching to negotiate for better conditions and higher wages, reflecting their value to employers. Furthermore, non-competes could result in unemployment if workers must leave a job and are unable to find a new job that meets the requirements of their non-compete contract.

In addition to reducing job mobility and worker bargaining power, non-competes can negatively impact other companies by constricting the labor pool from which to hire. Non-competes may also prevent workers from launching new companies. Some critics also argue that non-competes can actually stifle innovation by reducing the diffusion of skills and ideas between companies within a region, which can in turn impact economic growth. Non-compete agreements may also have a detrimental effect on consumer well-being by restricting consumer choice.

Research suggests that 18 percent, or 30 million, American workers are currently covered by non-compete agreements. Even more workers, roughly 37 percent, report having worked under a non-compete agreement at some point during their career. A 2013 study commissioned by the Wall Street Journal signals either a rise in the prevalence of non-competes, or significant growth in their enforcement. The law firm Beck Reed Riden LLP found a 61 percent rise from 2002 to 2013 in the number of employees getting sued by former companies for breach of non-compete agreements.¹

Non-compete clauses are found not only in the contracts of senior executives or other highly compensated employees, but also for comparatively low-skill occupations. Approximately 15 percent of workers without a college degree are currently subject to non-compete agreements, and 14 percent of individuals earning less than \$40,000 are subject to them. Recent media coverage has raised awareness of the usage and enforcement of non-competes among low-wage occupations including fast-food employees, warehouse workers, and camp counselors.

Based on the impacts of unnecessary non-competes for workers, consumers, and the broader economy, several states have passed, and many others are currently weighing reforms to the ways non-compete agreements are regulated. Federal legislation has also been proposed to limit the use of non-compete agreements in low-wage fields where they are less likely to have valid uses. Continued state interest and a growing understanding of the prevalence of non-compete agreements suggest that the time is ripe to consider how government can best ensure these agreements are used appropriately.

In the large majority of states, non-compete agreements are enforceable for workers across all income brackets, and many states do not have restrictions around the geographic or temporal limitations of non-competes. Non-compete agreements are also prevalent in states where the courts generally do not enforce them. For example, in California, which does not generally enforce non-compete agreements, 22 percent of workers report that they have signed a non-compete. Survey research shows that many workers are not aware of the lack of enforcement in these states, suggesting that even unenforced non-compete agreements may have deleterious effects.

In the coming months, as part of the Administration's efforts to support competition in consumer product and labor markets, the White House, Treasury, and the Department of Labor will convene a group of experts in labor law, economics, government and business to facilitate discussion on non-compete agreements and their consequences. The goal will be to identify key areas where implementation and enforcement of non-competes may present issues, to examine promising practices in states, and put forward a set of best practices and call to action for state reform. By facilitating a dialogue between academic experts and those with practical expertise, we aim to identify policies that could be used to promote a fair and dynamic labor market, while remaining cognizant of real world challenges to reform. We also aim to prompt further research exploring the use and the effects of non-compete agreements.

¹ Wall Street Journal. "Litigation Over Noncompete Clauses Is Rising."
<http://www.wsj.com/articles/SB10001424127887323446404579011501388418552>

Summary of US Treasury Department Report on Non-Compete Contracts Prevalence and Economic Effects

Use and Misuse of Non-Compete Contracts

The main economically and societally beneficial uses of non-competes are to protect trade secrets, which can promote innovation, and to incentivize employers to invest in worker training because of reduced probability of exit from the firm.

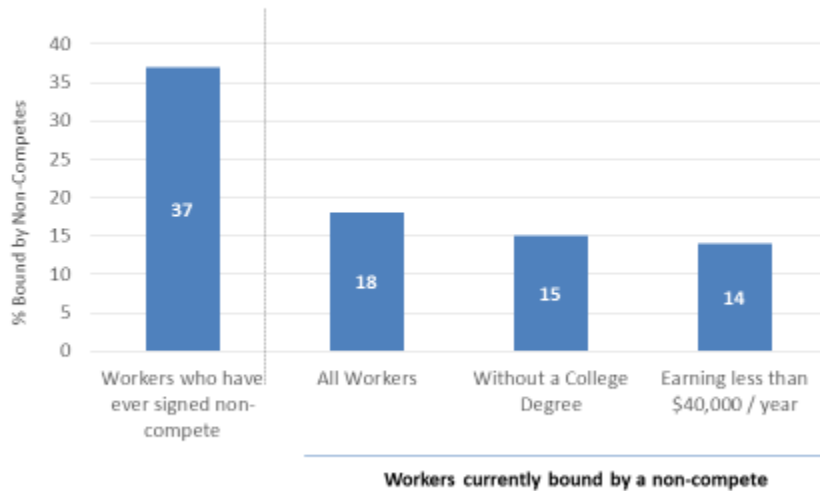
However, evidence indicates that non-competes are also being used in instances where the benefit is likely to be low (e.g., where workers report they do not have trade secrets), but the cost is still high to the worker. For example:

- Only 24 percent of workers report that they possess trade secrets. Moreover, fewer than half of workers who have non-competes report possessing trade secrets, suggesting that trade secrets do not explain the majority of non-compete activity.²
- If protection of trade secrets were the main explanation for non-compete agreements, then one would expect such agreements to be highly concentrated among workers with advanced education and occupations entrusted with trade secrets. However, 15 percent of workers without a four-year college degree are subject to non-competes, and 14 percent of workers earning less than \$40,000 have non-competes. This is true even though workers without four-year degrees are half as likely to possess trade secrets as those with four-year degrees, and workers earning less than \$40,000 possess trade secrets at less than half the rate of their higher-earning counterparts.³
- While engineering and computer/mathematical occupations have the highest non-compete prevalence at slightly more than one-third, occupations like personal services and installation and repair also include many workers with non-competes, at about 18 percent.

² US Treasury Department, “Non-compete Contracts: Economic Effects and Policy Implications”, March 2016.

³ Starr, Evan, Norman Bishara and JJ Prescott. 2015. “Noncompetes in the U.S. Labor Force.”

Nearly 1/6 of workers earning less than \$40,000 per year are bound by non-competes



When entry-level workers in low-wage jobs are asked to sign two-year non-competes, the distributional impacts are particularly concerning.⁴ Non-competes can also become overly burdensome when they apply too broadly in terms of geography or time. Without restricting non-competes to only apply in a specific region, or for a limited time period, job-seekers may be forced to leave their industry in order to make a living in a way that does not conflict with their non-compete agreement.

In addition, regardless of whether they promote the protection of trade secrets, the agreements can sometimes be implemented in ways that create confusion or lack of transparency for workers.

- Many workers do not realize when they accept a job that they have signed a non-compete, or they do not understand its implications.
- Many workers are asked to sign a non-compete only after accepting a job offer. One lower-bound estimate is that 37 percent of workers are in this position.
- Many firms ask workers to sign non-competes that are entirely or partly unenforceable in certain jurisdictions, suggesting that firms may be relying on a lack of worker knowledge. For instance, California workers are bound by non-competes at a rate slightly higher than the national average (19 percent) despite the fact that, with limited exceptions, non-competes are not enforced in that state.

Evidence on the Effects of Non-Compete Contracts

Although non-competes can play a beneficial role when used in a limited way, evidence suggests that in certain cases, non-competes can reduce the welfare of workers and hamper the efficiency of the economy as a whole by depressing wages, limiting mobility, and inhibiting innovation.

⁴ US Treasury Department, see 1.

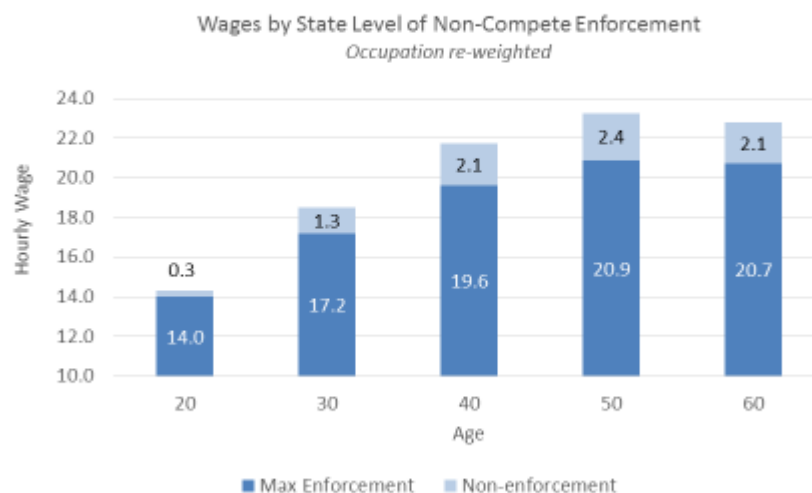
Effects of non-competes on wages

Worker bargaining power is reduced after a non-compete is signed, possibly leading to lower wages. When workers are legally prevented from accepting competitors' offers, those workers have less leverage in wage negotiations and fewer opportunities to develop their careers outside of their current firm.

The Treasury report indicates that stricter non-compete enforcement is associated with both lower wage growth and lower initial wages, finding that an increase in one standard deviation in non-compete enforcement reduces wages by about 1.4 percent. Recent work by Starr and coauthors finds broadly similar results.⁵

Given the potential for interaction between non-competes and on-the-job training, Treasury also analyzes the impact of stricter non-compete enforcement as workers age. If non-competes promote training, one would expect states with stronger enforcement to see faster wage growth as workers age and gain the tenure and experience that is typically associated with higher rates of training. As shown in the charts below, the analysis suggests that states with higher levels of non-compete enforcement see lower wages in general, and that wage disparities between high and low enforcements states actually grow as workers age.⁶

Workers in states with lower levels of non-compete enforcement on average have higher wages



Source: 2014 Current Population Survey, Starr et al. (2015), and Treasury calculations. All variables, with the exception of enforcement index and age, are held constant at their means

⁵ Treasury uses the 2014 merged outgoing rotation groups of the Current Population Survey (CPS), which provide a cross section of population-representative workers. Merged with this data is the Starr-Bishara index of non-compete enforceability by state (generously provided by Evan Starr), as well as the fraction of workers with non-competes by major occupation from Starr, Bishara, and Prescott (2015).

⁶ When interpreting any of the results just described, it should be remembered that we are not exploiting variation over time in non-compete enforcement; rather, the wage estimates are derived from variation across states. Even after controlling for available worker-level variables, states may differ in ways that are both relevant to wage growth and non-compete enforcement. As such, the results shown here should be seen as merely suggestive.

Effects of non-competes on labor market dynamism

The broad geographic and time scope of non-compete contracts can limit the mobility of workers in a long-lasting way, harming both the workers and the overall efficiency of labor markets. When lower paid, entry-level workers are prohibited from taking related employment for some time, they may lack the necessary skills to apply for other jobs, weakening their prospects for future employment and even their labor force attachment.

A study from Marx, Strumsky, and Fleming shows that worker job mobility fell by 8 percent when non-competes were made enforceable, with the effect even larger for workers with more narrowly-focused skills. However, other authors dispute these findings, arguing that the inadvertent legalization was not retroactive and that some states were inappropriately labeled as “non-enforcing.” In separate work, Marx finds that workers who do switch jobs are more likely to leave their industry if they are covered by a non-compete, with the attendant “reduced compensation, atrophy of their skills, and estrangement from their professional networks” that would be expected to occur.⁷

Effects of non-competes on innovation, entrepreneurship, and regional economic growth

When firms in a given industry are clustered, it makes it easier for their workers to share expertise and discoveries, some of which may not be protected by trade secret or intellectual property legal provisions. Economists refer to geographic clustering effects of factors like a large, deep pool of skilled workers, a more competitive market of suppliers, and information spillovers across workers and firms as “agglomeration effects.”

While not necessarily in the interest of an individual firm, more rapid dissemination of ideas and technology improvements can have significant positive impacts for the larger regional economy in terms of innovation, entrepreneurship, and attracting more businesses and jobs to a region. Non-competes that stifle mobility of workers who can disseminate knowledge and ideas to new startups or companies moving to a region can limit the process that leads to agglomeration economies. Overly broad non-compete provisions could prevent potential entrepreneurs from starting new businesses in similar sectors to their current employer, even if they relocate.

Potential issues presented by non-compete agreements

While we are still learning more about non-competes and their impact, the available evidence suggests that they can be used or enforced in ways that favor the interests of the firm over the worker.

Because of the potential issues presented by some non-competes, there is a growing movement in states to take action to limit the misuse of non-compete agreements. Several states are banning non-compete agreements outright for certain sectors and occupations. This year, Hawaii banned non-compete agreements for technology jobs, and New Mexico banned them for health care jobs. Others have taken steps to limit the scope of non-competes. Oregon recently banned non-compete agreements longer than 18 months, while Utah limited the agreements to one year.

⁷ See Marx, Strumsky, and Fleming (2009) and Marx (2011).

California's legislature has rendered non-compete contracts generally unenforceable in their state. Some researchers have suggested that California, and Silicon Valley in particular, have benefited from this action, though compelling evidence is difficult to obtain⁸.

At the federal level, legislation has been proposed to limit the use of non-compete agreements below a certain income threshold where they are less likely to have valid uses.

Over the coming months, the White House, Treasury and Labor will continue to explore these areas and possible solutions in engagement with states, businesses and experts. Below, we have listed seven areas that highlight how workers may be disadvantaged by non-competes, and how some states and state legislatures are attempting to address this issue.

1. Workers who are unlikely to possess trade secrets (in particular, low wage workers) are nonetheless compelled to sign non-competes.

Fourteen percent of workers earning less than \$40,000 have signed non-competes, although those workers possess trade secrets at less than half the rate of their higher-earning counterparts.⁹ When an employer requires low-wage employees to sign non-competes, it can effectively limit the ability of their workers to bargain for higher pay by making it harder for them to find new jobs. This can cause particular hardship for lower-skill workers who may not have marketable skills outside of their past employment. For example, a national sandwich chain required its employees to sign an expansive non-compete agreement that would ban them from working at just about any other fast-food restaurant.

Examples of Actions States or State Legislators Have Taken to Address this Issue: Because non-competes are less likely to have the social benefit of protecting trade secrets when applied to low-wage workers, some states have proposed, and Oregon has passed, legislation restricting the enforceability of non-competes for employees under a certain income threshold. In New Jersey and Maryland, bills were proposed, although they did not make it out of committee, that would render non-competes unenforceable for any workers eligible to receive unemployment compensation.¹⁰

State legislators in Washington and Idaho have introduced bills that would limit the reach of non-competes by designating certain workers who are more likely to have inside knowledge and trade secrets given their positions as “key employees,” or by rendering void “unreasonable” competition agreements.

⁸ For example, see Gilson, Ronald J. 1999. “The Legal Infrastructure of High Technology Industrial Districts: Silicon Valley, Route 128, and Covenants Not to Compete.” *New York University Law Review* 74 (3): 575–629.

⁹ See Starr, Bishara and Prescott (2015).

¹⁰ http://www.njleg.state.nj.us/2012/Bills/A4000/3970_11.HTM;
http://mgaleg.maryland.gov/2013RS/fnotes/bil_0001/sb0051.pdf

State Examples

- **Oregon.** (*Rev. Stat. 653.295*): Non-competes are voidable and may not be enforced by Oregon courts unless several conditions are met. Examples of those conditions include, with limited exceptions, (1) when the employee's gross salary and commissions, calculated on an annual basis, at the time of the employee's termination equal more than the median family income for a family of four as calculated by the Census Bureau for the most recent year available at the time of the employee's termination, and (2) when particular compensation is paid to the employee during the period in which the employee is restricted from working.
- **Washington.** Proposed House Bill 2931 would render "unreasonable and void" employment noncompetition agreements if the employee is a seasonal or temporary employee, if the employee was terminated without just cause or laid-off by action of the employer, The bill also would also render void and unenforceable non-compete agreements that restrict employees from competing for more than one year after termination of employment, and those that apply to employees who are not executives. In addition, the bill would make noncompetition agreements involving independent contractors void and unenforceable. However, the bill is delayed for legislative consideration until at least next year.
- **Idaho.** (*Idaho Code Section 44-2701*): In 2008, Idaho passed a law that restricts non-competes to "key employees." "Key employees" are those who "by reason of the employer's investment of time, money, trust, exposure to the public, or exposure to technologies, intellectual property, business plans, business processes and methods of operation, customers, vendors or other business relationships during the course of employment, have gained a high level of inside knowledge, influence, credibility, notoriety, fame, reputation or public persona as a representative or spokesperson of the employer, and as a result, have the ability to harm or threaten an employer's legitimate business interests."

2. Workers are asked to sign a non-compete only after accepting a job offer, when they have already declined other offers and thus have less leverage to bargain.

The Treasury report notes that at least 37 percent of workers are asked to sign non-compete agreements after accepting a job offer. In cases where job offers have already been accepted, workers often have less leverage to bargain, in part because they may have already turned down other job offers. However, in many states, even if a worker was not made aware of a requirement to enter a non-compete agreement when she was hired, courts have enforced a covenant signed after employment commenced.

A separate survey, exclusively focused on members of the Institute of Electrical and Electronics Engineers, reports that “...barely 3 in 10 workers reported that they were told about the non-compete in their job offer. In nearly 70% of cases, the worker was asked to sign the non-compete after accepting the offer – and, consequently, after having turned down (all) other offers. Nearly half the time, the non-compete was not presented to employees until or after the first day at work.”¹¹

Examples of Actions States or State Legislators Have Taken to Address this Issue: In New Hampshire and Oregon, non-compete agreements may be rendered void for lack of consideration when employers fail to include them in the original terms of employment. Requiring that non-compete contracts be provided along with job offers and not after an offer is one possible solution to protect workers. In the case of internal promotion, states could require that employers provide employees with non-competes before the employee begins the new position.

State Examples

- **Oregon.** (*Rev. Stat. 653.295*): In 2015, Oregon passed a law requiring firms to make clear in offer letters if employees will be expected to sign non-compete agreements. The non-compete must be provided at least 2 weeks before employment or with bona fide advancement.
- **New Hampshire.** (*Senate Bill 351*): In 2014, New Hampshire passed a law that requires that non-compete agreements that are executed as a condition of employment should be provided to potential employees prior to the acceptance of an offer of employment. Otherwise, the non-compete will not be enforceable against the employee.

3. Non-Competes, Their Implications, And Their Enforceability Are Often Unclear To Workers

Many workers report that they do not realize when they accept a job that they have signed a non-compete, or that they do not understand its implications.¹² Workers are often poorly informed about the existence and details of their non-competes, as well the relevant legal implications. Additionally, in states like California where non-competes are unenforceable, workers may be unaware about their legal enforceability. States could consider taking steps to ensure that important details on non-competes, like the duration and geographic scope of the contract, be clearly explained to workers.

Starr, Bishara, and Prescott (2015) find that only 10 percent of workers with non-competes report bargaining over their non-compete, with 38 percent of the non-bargainers not realizing that they could negotiate.

¹¹ Marx, Matt, and Lee Fleming. 2012. “Non-compete Agreements: Barriers to Entry...and Exit?” In *Innovation Policy and the Economy*, Volume 12, 39-64. Chicago: University of Chicago Press.

¹² Starr, Evan, Norman Bishara and JJ Prescott. 2015. “Noncompetes in the U.S. Labor Force.”

4. Employers Often Write Non-Compete Agreements That Are Overly Broad Or Unenforceable

Some firms ask workers to sign non-competes that are entirely or partly unenforceable in certain jurisdictions. For instance, California workers are asked to enter into non-competes at a rate slightly higher than the national average (19 percent), despite the fact that, with limited exceptions, non-competes are not enforced in that state.

Given the well-documented worker confusion about these contracts (as stated in Starr, Bishara and Prescott's findings above), employers can exert a chilling effect on worker behavior even when their contracts are unenforceable.

There are three main approaches that states are taking to address unenforceable or overly broad contracts, which vary greatly in terms of the incentives they provide employers.

- "Equitable Reform." The majority (about 30) of states are implementing equitable reform approaches, which are the most lenient on employers that require workers to enter into partially unenforceable contracts. In these states, courts allow employers to rewrite non-compete contracts to bring the contracts in line with state law.
- "Blue Pencil" Doctrine. Some states are implementing a "blue pencil" doctrine, which entails striking offensive clauses from non-compete contracts if doing so renders the remaining language enforceable under the state's law.
- "Red Pencil" Doctrine. Lastly, some states provide disincentives for employers to write non-compete contracts that are unenforceable by refusing to enforce and making void a non-compete contract that contains any unenforceable provisions. This practice is known as "red pencil" doctrine, and it can have the effect of increasing employers' incentive to write a contract that is fully enforceable. Research from the litigation firm Beck, Reed, and Riden LLP's 50 state non-compete survey indicates that three states—Nebraska, Virginia, and Wisconsin—are using this approach.

Legend:

- Not enforced
- Undecided
- Red pencil
- Blue pencil
- Reformation

State Examples of “Red Pencil” Doctrine

- ## 5. Employers Requiring Non-Competes Often Do Not Provide “Consideration” That Is Above And Beyond Continued Employment

In the majority of states, when a non-compete is offered to an existing employee after the original offer of employment, continued employment is sufficient consideration for a non-compete to be enforceable. “Consideration” in this context refers to a benefit received by the signatory of a contract for a non-compete such as increased pay or more training.¹³ Even for states that recognize continued employment, questions often arise about how long employment must continue to count as sufficient consideration. In addition, in the case where a worker with a non-compete is searching for a new job, the non-compete combined with a lack of severance pay can create hardship for that individual.

Examples of Actions States are Taking to Address this Issue: Currently, some states require that firms provide some “consideration” above and beyond continued employment such as pay raises, training, and promotions to workers who sign a non-compete after they have already worked for a firm for some amount of time. Just 11 states do not view continued employment as sufficient consideration” for the signing of a non-compete in this circumstance, and in DC, Illinois and Mississippi continued employment only counts as consideration if it is for a certain period of time.¹⁴

A study by Evan Starr finds that when states require firms to offer substantial consideration along with a non-compete (e.g., promotions, training, and higher wages), both training and wage outcomes for workers can be improved.

State Examples

- **Wyoming.** In Wyoming, a court found that continued employment alone does not provide the necessary consideration to support a covenant not to compete entered into after the employment relationship has already begun. Instead, separate consideration, such as a change in the terms and conditions of employment, must be given contemporaneously with the making of the covenant. This requirement apparently applies whether the employment is at-will or not (*Hopper v. All Pet Animal Clinic, Inc.*, 861 P.2d 531, 540 (Wyo. 1993)).
- **Illinois.** In Illinois, continued employment for a “substantial period of time” is sufficient consideration for a non-compete agreement. A substantial period of time is generally two years. For example, in the case of *Brown & Brown, Inc. v. Mudron*, the court held that seven months of continued employment was insufficient consideration for a non-compete agreement. (*Brown & Brown, Inc. v. Mudron*, 887 N.E.2d 437 (Ill. App. Ct. 2008)).

6. In Some Cases, Non-Competes Can Prevent Workers From Finding New Employment Even After Being Fired Without Cause

In several states, non-competes are enforceable even for workers fired without cause (e.g., a layoff). Worker bargaining power can be particularly negatively affected when employers have the ability to unilaterally determine whether the worker may continue to be employed

¹³ See Beck Reed Riden LLP.

¹⁴ See Beck Reed Riden LLP.

anywhere in his or her occupation. The requirement of having been fired “without cause” would prevent workers from easily evading a non-compete obligation through behavior calculated to force an employer to discharge them.

Examples of Actions States are Taking to Address this Issue: While very few states have legislation prohibiting the enforcement of non-competes when an employee is fired without cause, in some states, courts have found that there is no “legitimate business interest” in a non-compete when the employer initiates the termination without cause. In this case, the non-compete is rendered unenforceable.

State Examples

- **Montana.** The Montana Supreme Court has found that it is difficult to establish a legitimate business interest for enforcement of a non-compete when the employer initiates the termination without cause. A 2011 Montana Supreme Court decision stated that a Montana employer— as in several other states — ordinarily will not be permitted to enforce a non-compete provision in an employment agreement where the employer was solely responsible for ending the employment relationship. Importantly, the court noted that circumstances may exist that could provide an employer with a legitimate business reason to enforce a non-compete such as in cases where the employee misappropriated trade secrets. *Wrigg v. Junkermier, Clark, Campanella, Stevens, P.C., Case No. DA 11-0147, 2011 MT 290 (Nov. 22, 2011).*
- **New York.** In *Arakelian v. Omnicare Inc.* 735 F. Supp. 2d 22, 41 (S.D.N.Y. 2010), the court affirmed that New York courts will not enforce non-compete agreements if the termination was involuntary stating that, “[e]nforcing a noncompetition provision when the employee has been discharged without cause would be ‘unconscionable’ because it would destroy the mutuality of obligation on which a covenant not to compete is based” (internal quotations omitted).

7. In Some Sectors, Non-Competes Can Have A Detrimental Effect On Health And Well-Being By Restricting Consumer Choice

In some instances, non-competes through imposing a restriction on free trade can interfere with consumers ability to acquire critical goods and services. For example, in the case of consumer choice for health care services (i.e. physicians, nurses, psychologists, social workers and other medical professionals), non-competes have the potential to interfere with the quality of care.

Little is known regarding the ubiquity of non-competes throughout differing job categories within the health care service sector. For physicians, it is plausible that there may be “legitimate business interests” that hospitals and service providers seek to protect. However, more attention on lower-wage segments of the industry, particularly within the home health care workers space, may

provide much needed insight into a sub-sector that is poised to grow substantially over the next decade. These workers are less likely to possess knowledge of trade secrets and pose little to no competitive risk.

Examples of Actions States Are Taking to Address this Issue: Several states will not enforce non-competes where a “public interest” exists in the consumption of critical goods and services. Depending on the state, courts have recognized the importance of preserving the physician-patient relationship and have exempted them from being bound by a non-compete agreement (Delaware, Illinois, Tennessee, Texas, and Massachusetts). Yet in many states, no physician exemption exists. These states generally move toward limitations on enforceability, and in some cases, outright exemption.

State Examples

- **Delaware.** Delaware statute limits enforcement of non-competes against physicians, stating that “Any covenant not to compete provision of an employment, partnership or corporate agreement between and/or among physicians which restricts the right of a physician to practice medicine in a particular locale and/or for a defined period of time, upon the termination of the principal agreement of which the said provision is a part, shall be void...” The statute also expressly provides for reasonable damages provisions (6 DEL. CODE § 2707)
- **Colorado.** Colorado statute similarly states that, “Any covenant not to compete provision of an employment, partnership, or corporate agreement between physicians which restricts the right of a physician to practice medicine, as defined in section 12-36-106, C.R.S., upon termination of such agreement, shall be void...” (COLO. REV. STAT. § 8-2-113(3))
- **Texas.** Texas code allows non-competes to be enforced against physicians only in narrow circumstances. Among other things, the covenant must (1) allow the physician access to his/her list of patients seen or treated within one year of termination of the contract or employment; (2) allow the physician access to patient medical records upon authorization of the patient; and (3) provide that the physician will not be prohibited from providing continuing care and treatment to a specific patient or patients during the course of an acute illness after the contract or employment has been terminated. (TEX. BUS. & COM.CODE § 15.50(b)-(c)).

Conclusion

In some cases, non-compete agreements can play an important role in protecting businesses and promoting innovation. They can also encourage employers to invest in training for their employees. However, as detailed in this report, non-competes can impose substantial costs on workers, consumers, and the economy more generally. This report informs future discussions and potential recommendations for reform by providing an overview of the research on the prevalence of non-

competes, evidence of their effects, and examples of actions states are taking to limit the use and enforcement of unnecessary non-competes.

There is more work to be done. The Administration will identify key areas where implementation and enforcement of non-competes may present issues, examine promising practices in states, and identify the best approaches for policy reform. Researchers must continue to assess and identify promising policy reforms and the potential impact of those reforms including unintended consequences. Ultimately, most of the power is in the hands of State legislators and policymakers in their ability to adopt institutional reforms that promote the use and enforcement of non-competes in instances that appropriately weigh their costs and benefits and in ways that provide workers appropriate levels of transparency about their rights.

Labor Non-Compete Agreements: Tool for Economic Efficiency, or Means to Extract Value from Workers?

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Abstract: A number of theoretical arguments have been offered in favor of non-compete provisions in labor agreements. While there has been considerable empirical research on the effects of those provisions, there has been little direct analysis of the arguments themselves. In this article I lay out and evaluate three commonly-heard arguments, namely: (1) that voluntary agreement to a non-compete justifies a strong inference that they are beneficial for both firms and workers and that they are economically efficient; (2A) that non-compete agreements facilitate beneficial knowledge transfer from firms to workers; and (2B) that non-compete agreements encourage beneficial firm-sponsored investment in workers' human capital. These arguments, though not entirely without merit, mostly do not survive close scrutiny. The weakness of the arguments, combined with the large body of empirical evidence which mostly shows the effects of non-competes to be negative, is sufficient to conclude that they are likely harmful on balance, and to conclude more strongly that they are unlikely to be highly beneficial. In addition, non-competes may cause additional harms that are not measured in conventional economic research, such as making it more difficult for workers to escape exploitative or abusive employers.

¹ David J. Balan is an employee of the Federal Trade Commission. The views expressed in this paper are solely those of the author. This article is soon to be included in the Washington Center for Equitable Growth working paper series.

Introduction:

Non-compete provisions in labor agreements have become widespread in the United States.² In recent years, empirical researchers have begun to study the effects of non-competes on wages, job mobility, innovation, and other economic metrics. This research agenda is quite new, and much remains to be learned. The evidence that we have so far is somewhat mixed, but broadly speaking it shows non-competes to be harmful and not beneficial, and it more strongly indicates that non-competes are not highly beneficial such that restricting them would cause major economic harm.³

This empirical evidence must be interpreted in light of the strength of the theoretical arguments for or against non-competes. If there were strong theoretical arguments in their favor, the empirical evidence accumulated to date may not be sufficient to convincingly demonstrate that non-competes are harmful. But if the theoretical arguments in their favor are weak, or if there are even strong theoretical arguments against them, then the theory and the empirical evidence would both point in the same direction, strongly indicating that they are likely to be harmful and that even if they are beneficial those benefits are unlikely to be very large.⁴

While the empirical literature has justifiably received a lot of attention, there has been little organized discussion about the theoretical arguments. The arguments in favor of non-competes are

² See Evan Starr, J.J. Prescott, and Norman Bishara, “Noncompetes in the US Labor Force,” *forthcoming in Journal of Law and Economics* (2020); and Alexander J.S. Colvin and Heidi Shierholz, “Noncompete Agreements,” *Report of the Economic Policy Institute* (2019).

³ For excellent surveys of this empirical literature, see U.S. Department of the Treasury, Office of Economic Policy (2016) “Non-compete Contracts: Economic Effects and Policy Implications” and Evan Starr, “The Use, Abuse, and Enforceability of Non-Compete and No-Poach Agreements: A Brief Review of the Theory, Evidence, and Recent Reform Efforts,” *Economic Innovation Group February 2019 Issue Brief*. See also Evan Starr and Michael Lipsitz, “Low-Wage Workers and the Enforceability of Non-Compete Agreements,” *forthcoming in Management Science* (2020). Interestingly, the only paper of which I am aware that shows clear benefits of non-competes involves CEOs. See Omesh Kini, Ryan Williams, and David Yin, “CEO Non-Compete Agreements, Job Risk, and Compensation” *forthcoming in Review of Financial Studies* (2020). So while non-competes may be beneficial for workers at the very highest end of the labor market, they appear not to be so for everyone else.

⁴ To use Bayesian terms, if the theoretical arguments in favor of non-competes are strong, then the priors are strong that non-competes have large economic benefits, and it would take a large amount of contrary evidence to overturn those priors. But if those arguments are weak, and/or if there are strong arguments that non-competes are harmful, then the priors are strong that non-competes are harmful, and it would take a large amount of contrary evidence to overturn *those* priors. This article argues that the theoretical arguments in favor of non-competes are in fact weak, supporting a prior that non-competes are likely to be harmful and that even if they are beneficial they are very unlikely to be so beneficial that restricting them would do major economic harm. The empirical evidence that we have mostly supports those priors. That is, there is a consonance rather than a tension between the theory and the empirical evidence.

often presented casually and informally, and the research literature contains little systematic critical evaluation of them.⁵ The purpose of this article is to provide such an evaluation.

There are three major arguments that are commonly offered in favor of non-competes: (1) that voluntary agreement to the provisions justifies a strong inference that they are beneficial for both firms and workers, and hence economically efficient; (2A) that non-compete agreements facilitate efficient knowledge transfer from firms to workers; and (2B) that non-compete agreements encourage valuable firm-sponsored investment in workers' human capital. The structure of this article is to list these arguments and then respond to them one by one.

To summarize my conclusions, all three of these arguments sound plausible and have some limited merit, but all three largely fail upon close inspection. The weakness of these arguments, combined with the empirical evidence discussed above, constitutes reason to believe that non-competes are likely harmful and strong reason to doubt that they are highly beneficial. I now discuss each argument in turn.

Argument #1: If Both Parties Voluntarily Agreed to the Non-Compete, It Must be Efficient:

Argument #1 begins with the simple and intuitive premise that people can generally be assumed to act in their own best interest, so if both the worker and the firm voluntarily agree to a non-compete then doing so must make them both better off, otherwise one or both would not have agreed. And if the non-compete makes both parties better off, then it follows that banning non-competes would make them both worse off.

Spelled out in more detail, the argument goes as follows. Suppose that a worker and a firm negotiate over employment terms. Each side exploits their bargaining position as best they can,⁶ so the terms that arise from that negotiation will be the very best ones that the worker can get, and

⁵ That said, points similar to some of the ones made in this article can be found in Eric A. Posner, "The Antitrust Challenge to Covenants Not to Compete in Employment Contracts," *Antitrust Law Journal* 83 (2020), pp. 165-200. See also U.S. Department of the Treasury, Office of Economic Policy (2016) "Non-compete Contracts: Economic Effects and Policy Implications"

⁶ The economic theory of bargaining distinguishes between bargaining "leverage" (the side that "needs" a deal less has more leverage and so gets better terms) and bargaining "power" (the side that is better able to capture the surplus arising from a deal has more power and so gets a better deal). Here I informally use the term bargaining "position" to capture both of these (the more favorable the combination of leverage and power that a side has, the better a deal it will receive). For a discussion of the distinction between bargaining leverage and bargaining power and its relevance for evaluating non-competes, see David J. Balan, "Labor Practices Can Be An Antitrust Problem Even When Labor Markets Are Competitive," *CPI Antitrust Chronicle* (June 2020).

also the very best ones that the firm can get. Now suppose that the firm proposes adding a non-compete provision to the previously negotiated terms.⁷ This restriction on the worker's outside opportunities makes the firm better off, and it makes the worker worse off.

It might appear that the firm, if it had a sufficiently strong bargaining position, could compel the worker to accept the non-compete even if it makes the worker worse off. But the logic of Argument #1 says that this is incorrect. The reasoning is as follows. Recall that in the initial negotiation, each side got the very best terms that they could. But for that to be true, it must be true that each side left no advantage unexploited, for to leave an advantage unexploited would mean that they could have gotten better terms but didn't. That is, the negotiated terms reflect the full exhaustion of each side's bargaining advantages. This in turn means that neither side has any *remaining* advantages that can be used to extract additional concessions from the other, which means that the firm has no means by which to compel the worker to accept the non-compete.⁸

If the firm cannot compel the worker to accept the non-compete, then the only alternative is to *compensate* the worker by an amount sufficient to induce them to agree.⁹ Given this, the firm has a choice: either forego the non-compete or pay the necessary compensation. Paying the compensation is worthwhile for the firm if and only if the value that the firm gains from restricting the worker's outside employment options exceeds the amount that the worker must be paid to accept it, which is closely related to how much the worker dislikes it. So if we observe a non-compete, it means that the firm values having it more than the worker values avoiding it, which means that

⁷ In this stylized example, I assume that the worker and the firm first decide that they are going to form a match, and then they negotiate over whether to include a non-compete. In reality, some job matches will only occur if the non-compete is included. But even then the same basic logic applies: the worker can command certain terms if they don't accept the non-compete (likely from an alternative employer), and the firm cannot force the worker to accept terms that are worse than those. Also, in the example I assume that the terms are first negotiated without a non-compete, and then the worker and the firm decide whether to add a non-compete. This is merely a pedagogical device; the logic would work the same way if all terms were negotiated at once.

⁸ A number of authors have made versions of this argument. Perhaps the clearest is an online article by David D. Friedman (<http://www.daviddfriedman.com/Academic/non-comp/Non-Competition.html>) entitled "Non-Competition Agreements: Some Alternative Explanations" (1991). See also Maureen B. Callahan, "Post-Employment Restraint Agreements: A Reassessment," *University of Chicago Law Review* 52 (1985), pp. 703-728.

⁹ There is likely not a single compensation amount that would cause both sides to prefer having a non-compete to not having it. Rather, there is range of compensation amounts running from the lowest compensation that the worker would accept to the highest compensation that the firm would pay. The specific compensation that will be arrived at from within that range will depend on the exact nature of the bargaining between the worker and the firm. In the text I assume that this specific level of compensation, however it is arrived at and wherever it lies within that range, is the compensation that the firm "must" pay the worker in exchange for agreeing to a non-compete.

its social benefit exceeds its social cost, and therefore that it is not only privately beneficial but also economically efficient in the sense of increasing total economic welfare.¹⁰

Responses to Argument #1:

The logic behind Argument #1 is sound; given the premises, the argument is correct.¹¹ The problem is that the premises are unsound. To see why, begin by supposing that, contrary to Argument #1, the firm has some way to *impose* the non-compete on the worker (i.e., to induce the worker to accept it *without* compensation).¹² If the firm could do that, it would be in its interest to do so, as the firm benefits from restricting the worker's outside opportunities.¹³ In that case, the non-compete would be a means for the firm to extract value from the worker, rather than it being mutually beneficial. Moreover, the harm to the worker from the non-compete can be greater than the benefit to the firm, making it no longer economically efficient.

For this reason, Argument #1 depends crucially on the premise that imposing a non-compete on the worker without compensation is impossible. That is, the argument requires that the worker's formal agreement to the non-compete provision can never be obtained unless the provision truly makes the worker better off. This premise is rather obviously incorrect. The remainder of this

¹⁰ This argument has the striking implication that the relative bargaining position of the worker vs. the firm is irrelevant and therefore no inquiry regarding it is necessary in evaluating the efficiency of the non-compete. If the worker has a weak bargaining position, that will mean that the worker will negotiate unfavorable terms, but it remains the case that the worker cannot be compelled to accept worse terms than those.

¹¹ Even given its premises, Argument #1 can fail if the non-compete has harmful effects on third parties, as then the fact that it is mutually beneficial to the parties that agreed to it does not mean that it is economically efficient overall (this is closely related to the economics of exclusive dealing contracts, where exclusives that are beneficial to all parties that agreed to them are harmful to parties that did not, including rival firms and consumers). Possible harmed third parties include owners, workers, and customers of firms that would have been started or made more productive by the unimpeded flow of workers between them. This possibility is sometimes acknowledged even by supporters of non-competes, and some of the debate about non-competes is about the magnitude of these third-party effects. While this is an important issue, in this article I focus on other, less widely discussed problems with Argument #1.

¹² In the main text I assume that the firm can impose a non-compete on the worker without any compensation at all. The same argument would apply, in an attenuated form, if the firm needed to pay some compensation, but less than would be required for the non-compete to make the worker better off.

¹³ Put in terms of a standard economic model of bargaining known as the Nash Bargaining model, when the worker's outside opportunities are worse, the worker values the existing job more. That imbues the existing job match with greater "surplus" than it had before, and this surplus is divided between the worker and the firm. The fact that the firm captures a portion of this surplus is what gives it an incentive to impose a non-compete, and that incentive is stronger the larger is the fraction of the surplus that the firm can capture. See David J. Balan, "Labor Practices Can Be An Antitrust Problem Even When Labor Markets Are Competitive," *CPI Antitrust Chronicle* (June 2020) for a discussion of why firms are likely to be able to capture the large majority of that surplus.

section describes ways in which firms can obtain formal agreement to non-competes that are harmful to workers, as a means of extracting value from them.¹⁴ These include:

- The firm can mislead the worker about the existence of the non-compete. If the non-compete is buried in the fine print of a complicated employment contract, the worker may “agree” to it without ever knowing that it was there. Similarly, the worker could see the non-compete language, but not understand what it means, either in the literal sense of not having a factually accurate understanding of what they are agreeing to or in the psychological sense of not regarding as salient an abstract restraint that might be relevant only in the distant future.¹⁵
- In some cases the worker is not told that the non-compete is part of the employment contract until they have already started the job. But by that point it is more difficult to refuse. The worker may have already turned down other job offers, so that quitting would mean starting a new job search with the attendant costs, delays, distress, and lost income. Therefore the worker might agree to a non-compete that they would not have agreed to on the day that they accepted the job.¹⁶
- Suppose the worker agrees to a non-compete in exchange for compensation in the form of a promise of improved employment terms (such as a higher wage) at some future time. Now suppose that the firm does not deliver on that promise. What recourse does that worker have? One natural recourse is to quit, *but that is the very thing that the non-compete deters the worker from doing*.¹⁷ That is, the firm may be able to avoid delivering the compensation promised to the worker in exchange for agreeing to the non-compete

¹⁴ The discussion in the main text assumes that there is no ambiguity about the breadth of the non-compete. If it is at all open to dispute, then firms gain an additional advantage by exploiting the large asymmetry between the firm and the worker in the ability to bear the costs, financial and otherwise, of resolving the ambiguity in court. It could be argued that the worker, anticipating this disadvantage, would require compensation for bearing it in the initial terms. But this requires an unrealistic level of “meta-rationality.”

¹⁵ Note that even if it is not understood by or salient to the worker, that is not true for the *firm*. The firm fully understands what it has to gain from the non-compete. It is this asymmetry between the worker and the firm that makes it possible for both sides to “agree” to an employment term that is not mutually beneficial.

¹⁶ The possibility that a firm might exploit the reluctance of the worker to quit once they have accepted the job is not limited to non-competes. In principle, the firm could do this with any employment term, including wages. However, the comprehension/salience point described above likely applies here as well. A worker who is told on Day 1 that they will not receive the promised wage may be more likely to quit than a worker who is told of the existence of a non-compete, and if they do not quit they are more likely to be a disgruntled employee. This gives the firm the incentive to modify opaque terms instead of salient ones.

¹⁷ There are other factors that give firms an incentive to deliver on their promises, including contracts and reputation effects. But the ability of the worker to quit is a major one, perhaps the most important one in many instances.

precisely because the non-compete itself decreases the cost of reneging. This is a fundamental point: the compensation is what makes the worker agree to the non-compete, but the non-compete may cause the worker not to receive the compensation.¹⁸

- The discussion of Argument #1 above was about negotiating over the inclusion of a non-compete provision in a labor agreement. But in many cases, no such negotiation is possible; the non-compete is simply firm policy, required of all workers without exception. It might appear obvious that if firms can literally impose non-competes on workers, then they can use non-competes as a means to extract value from workers. However, this does not directly follow from standard economic theory. Many standard economic models have firms that post non-negotiable terms (e.g., the price of cereal at the supermarket), and there is nothing unusual about a model in which firms post non-negotiable employment terms. But this does not mean that firms can have whatever terms they want. They are still constrained by competition, which requires them to offer terms favorable enough to make workers want to work for the firm. Moreover, competition should work to eliminate terms that are inefficient (i.e., that harm workers by more than they benefit the firm). The idea is that if most firms required an inefficient non-compete, one or a few firms could out-compete them by not requiring it, instead offering terms that are at least equally attractive to the worker but more profitable for the firm.¹⁹ These firms would be more profitable than the firms that do require a non-compete, either displacing them or forcing them to follow suit.

Despite the above argument, if inefficient non-competes are widespread in an industry it is likely to be difficult for competition to dislodge them.²⁰ In order for that to happen, the firms that do not require a non-compete would have to make that policy a large and salient part of their worker recruitment message, otherwise it won't work. But firms can cap-

¹⁸ Perhaps the worker, anticipating this, will refuse to sign the non-compete in the first place. But that requires a degree of "meta-rationality" that is implausible even for relatively sophisticated workers.

¹⁹ To see why, suppose the firm's competitive position is such that it can impose an employment term that causes \$1 of disutility to the worker. In that case, the firm has the option of simply lowering the wage by \$1, making the gain to the firm equal to the harm to the worker. It would have an incentive to require a non-compete instead of reducing the wage by \$1 if the non-compete was efficient, because then the firm would gain more than \$1. But it would not require the non-compete if it was inefficient, because then the firm would gain less than \$1, making it less profitable than simply lowering the wage.

²⁰ This point is different from the ones above, as it depends on the assumption that non-competes are already widespread in an industry. The other arguments do not depend on this assumption, and apply regardless of how common non-competes are.

ture only a limited amount of the attention of prospective employees, and it is likely that other recruiting messages would be a better use of that limited attention, particularly if the non-compete is not highly salient for workers. In addition, if one or a few firms did recruit based on a “no non-competes” message, the workers that they would attract would not be a random sample of workers. Rather, they would be the workers who care the most about avoiding non-competes, and those workers may be undesirable in other ways, such as being more likely to quit. In sum, once inefficient non-competes have become widespread in an industry, they are likely to persist because the competitive pressure to eliminate them, while present, may not be sufficiently strong.

In the above arguments, no distinction was made between low- and high-wage workers. It is sometimes suggested that non-competes are a problem for the former but not for the latter, who are more sophisticated and for whom the efficiency justifications (discussed below) are more likely to apply. There may be some truth to this; to cite a recent well-known case, requiring sandwich makers at Jimmy Johns to sign a broad non-compete provision likely exploits some disadvantages that are specific to low-wage workers, and it certainly lacks any plausible efficiency justification.²¹ However, the reasons to doubt Argument #1 are not confined to low-wage workers. All four of the points discussed above apply at least to some extent to higher-wage workers, particularly the last two.

Argument #2: Non-Competes Facilitate Beneficial Economic Activity:

As noted above, an implication of Argument #1 is that the mere fact of the existence of a non-compete is sufficient to show that it is mutually beneficial for the worker and the firm and that it is economically efficient. If that is true, then any discussion of the benefits of non-competes is not about *whether* those benefits exist and are sufficiently large to render non-competes economically efficient, *because they simply must be*. The only discussion is about what exactly those benefits are. But if Argument #1 is incorrect, then it is at least *possible* that non-competes are not sufficiently beneficial to be economically efficient, and are instead largely a means by which firms extract surplus from workers.

²¹ https://illinoisattorneygeneral.gov/pressroom/2016_12/20161207.html

Just because this is possible does not necessarily mean that it is true. So inquiry into the benefits of non-competes, both theoretical and empirical, is still necessary.²² Below I discuss the two most commonly argued efficiency justifications for non-competes, namely: (A) that they facilitate valuable knowledge sharing within firms; and (B) that they facilitate valuable worker training. While these are not completely without merit, I argue that they are both weak. These arguments, combined with the empirical evidence discussed above, supports the conclusion that non-competes are likely to be harmful, and are very unlikely to be highly beneficial.

Argument #2(A): Non-Competes Facilitate Knowledge Transfer:

Suppose a firm has some knowledge (e.g., a trade secret or a manufacturing process or a customer list) that, if shared with a worker, would make that worker more productive and more valuable to the firm. In that case, sharing the knowledge is economically efficient. But if that knowledge is also valuable to competitors, then competitors will be willing to offer a worker in possession of that knowledge a wage that reflects its value. This means that the original firm will either lose the worker (and have the knowledge fall into the hands of the competitor) or it will have to match the higher wage. This may make the firm worse off than if it had never shared the knowledge in the first place. If so, then the firm might design the job so that the knowledge sharing will not occur, even though sharing is efficient. In the extreme case, the firm might eliminate the job altogether. Or it might cause the firm not to develop the knowledge in the first place. But if there was a non-compete agreement in place to protect the knowledge, then the firm would have the appropriate incentive to develop and share the knowledge.²³

Responses to Argument #2(A):

This is the stronger of the two arguments. It is not difficult to imagine situations where a firm has knowledge that workers must have in order to be fully productive, that competitors would pay a

²² The fact that firms impose non-competes on low-skill workers such as sandwich makers when there is clearly no efficiency justification for doing so is grounds for additional skepticism regarding efficiency claims that are more facially plausible.

²³ A number of authors have made versions of this argument. See Jonathan M. Barnett and Ted Sichelman, “The Case for Noncompetes,” *University of Chicago Law Review*, 87 (2020), pp. 953-1049; and Brandon S. Long, “Protecting Employer Investment in Training: Noncompetes vs. Repayment Agreements,” *Duke Law Journal* (2005) 54, pp. 1295-1320.

lot for, and that firms cannot otherwise protect. However, there are a number of factors that limit the strength of this argument:

- In order for this argument to hold, it must be true that the firm really will forbear from sharing the knowledge if it cannot use a non-compete. That is, there must be a more efficient way to run the business (with sharing), and another, less efficient way to run it (without sharing), and the less efficient way must be more profitable than the more efficient way if the firm cannot use a non-compete.²⁴ If this is not true, then the sharing will occur with or without a non-compete, and so banning non-competes, while harmful to the firm's profits, will not hurt economic efficiency.²⁵
- According to Argument #2(A), the possibility that knowledge might escape the firm is harmful to efficiency, because it can cause the firm to not efficiently share the knowledge within the firm. But when knowledge *does* escape a firm, and flows to other firms, that is often a *good* thing, because the receiving firms can do efficient things with the knowledge as well. So there is a tradeoff. Non-competes provide an incentive to efficiently develop and share knowledge within the firm, but the absence of non-competes causes more sharing of information across firms. This tradeoff is very similar to the one that lies at the heart of stronger vs. weaker intellectual property protections: stronger IP means stronger incentives to innovate, and weaker IP means more sharing and cross-pollination of knowledge.

It is worth noting that there is a widely held view among economists and IP experts (though not a consensus) that IP protection in the U.S. is too strong, not too weak. That is, it probably should be *easier* to spread ideas than it currently is, even at the cost of some reduction in the incentive to innovate. And if this is true of IP, it may be true of non-competes as well; if non-competes were weaker or did not exist, the benefit of

²⁴ In the text I assume that there are two discrete ways of organizing the job. In reality there may be a continuum of ways, but the basic point still applies.

²⁵ It is also possible that the ban would hurt profits so much that the firm could not operate at all, and would therefore go out of business.

spreading knowledge across firms may exceed the harm from less efficient development and sharing of information sharing within the firm.²⁶

The experience of California is relevant here. In CA, non-competes are legally unenforceable. And yet CA is a worldwide center of innovation. While it is possible that CA is innovative despite non-competes and not because of them, at a minimum the experience of CA shows that a policy banning or limiting non-competes would not be severely damaging to innovation. In fact, the absence of non-competes might be one of the *causes* of California's success,^{27,28} as it may cause beneficial knowledge sharing similar to what might be achieved through weaker IP.

- In addition to interfering with the beneficial flow of knowledge across firms, non-competes also interfere with the efficient flow of *people* across firms. Not every worker/firm match is the right one. Sometimes it was a mistake from the beginning, and sometimes it was the right one at the time but is no longer. The normal way to improve upon an sub-optimal match is for the worker to switch jobs. But non-competes impede this switching, as it is more difficult for the worker to quit because they are barred by the non-compete from the best available alternative jobs.²⁹ So workers are either stuck in sub-optimal matches, or they are forced to take a (likely inferior) job that is not prohibited by the non-compete or even to leave the workforce entirely. Non-competes interfering with better matches between workers and firms may be a significant source of inefficiency.³⁰

²⁶ This is an example of a situation, discussed in footnote #11 above, where a non-compete can be inefficient not because the firm imposed it on the worker without compensation, but because it harms third-parties that did not agree to it.

²⁷ For versions of this argument, see Orly Lobel, "Noncompetes, Human Capital Policy & Regional Competition," *Journal of Corporation Law* 45 (2020), pp. 931-951; and Orly Lobel, "Exit, Voice & Innovation: How Human Capital Policy Impacts Equality (& How Inequality Hurts Growth)" *24th Annual Frankel Lecture, University of San Diego School of Law Legal Studies Research Paper Series* No. 19-428 (2019).

²⁸ It is important to note, however, that many labor contracts in California contain non-compete provisions, even though they are unenforceable according to state law. It is therefore possible that some workers *believe* that they are constrained by the non-compete even though they are not, in which case their behavior may be constrained by them due to an *in terrorem* effect. For this reason, the policy regime in California is not (as a practical matter) a complete ban on non-competes, which complicates the interpretation of California's success. See Evan Starr, J.J. Prescott, and Norman Bishara, "The Behavioral Effects of (Unenforceable) Contracts," *forthcoming in the Journal of Law, Economics, and Organization* (2020).

²⁹ If the match is sufficiently bad, the firm may fire the worker. But there are a number of reasons why the firm might allow a sub-optimal match to persist.

³⁰ If the worker is more efficient with another firm, it is theoretically possible that there could be a mutually beneficial exchange in which the worker pays the firm in exchange for release from the non-compete. But there are many practical barriers to this happening.

- Even when non-competes do enhance efficiency, they are only justified if they are the least restrictive way to achieve those efficiency benefits. If the knowledge can be protected by patents, or by NDAs, or by retention bonuses, or by any other less-restrictive means, then the justification goes away. If the “knowledge” takes the form of access to customer lists, it can be protected by non-solicitation agreements. That said, some knowledge really is very valuable and secret but cannot be patented, and non-disclosure agreements (as well as non-solicitation agreements) have the disadvantage that it is difficult to prove that they were violated, whereas it’s easy to prove that a non-compete agreement was violated.

Given the above arguments, it is possible that non-competes facilitate efficient information sharing. But it is a very narrow path. It must be true that the firm will share the information if and only if it is protected by a non-compete, the benefits of greater information sharing must exceed the benefits from a freer flow of both information and people across firms, and the non-compete must be the least restrictive way of achieving the sharing.

Argument #2(B): Non-Competes Facilitate Worker Training:

Firms sometimes engage in costly investment in worker training and skills. But they may be less likely to do so if those workers can use that training to attract better outside job offers. If training the worker either means losing that worker or having to pay a higher wage to retain that worker, the firm may not provide the training in the first place, even if doing so is economically efficient. But if there was a non-compete agreement in place, then the firm would have the appropriate incentives to provide the training.³¹

Responses to Argument #2(B):

- A similar point to one made about Argument #2(A) above applies here as well. The argument does not work if the training is inherent in the job. For example, if hospital nurses gain skills that make them more attractive to outside employers, and those skills arise simply from the experience of being a hospital nurse, then the firm has no choice but to provide that “training,” and will do so with or without a non-compete. And even if the

³¹ A number of authors have made versions of this argument. See Brandon S. Long, “Protecting Employer Investment in Training: Noncompetes vs. Repayment Agreements,” *Duke Law Journal* (2005) 54, pp. 1295-1320.

training is formal training and not on-the-job training, it may be so necessary for the job that the firm has no choice but to provide it even if it will make the worker more attractive to outside employers. Only training for which this is *not* true will be facilitated by a non-compete. As above, there must be a version of the job that provides training, another version of the job that does not, and the firm must prefer the version that provides training if and only if it is protected by a non-compete.

- Labor economists distinguish between industry-specific human capital (HC) and firm-specific HC. (There is also a concept of “general” HC that is useful across industries, but for our purposes this can just be folded into the concept of industry-specific HC.) Firm-specific HC is defined as HC that makes the worker more valuable at the current firm but not at other firms. Non-competes do not cause firms to impart more firm-specific HC, because by definition firm-specific HC is not useful to any competitor; providing it to the worker does not raise the worker’s outside wage, and so will not put the firm in a position where they have to either lose the worker or match a higher outside wage offer. To the contrary, firm-specific HC tends to bind workers to their firms, because it makes the existing match more valuable relative to alternative matches.

Industry-specific HC, in contrast, is valuable to other firms in the industry as well as to the original firm.³² In the simplest labor economics models, this type of HC is not paid for by the firm at all. Precisely because the HC increases the worker’s value to outside firms, the benefit of that HC accrues to the worker and not to the firm, and so only the worker is willing to pay for it, either directly in the form of education or indirectly in the form of a lower wage for a period of time (or in the case of many internships, a zero wage) in exchange for the training.

Given this, it seems possible that firms would pay for industry-specific HC if it could be protected by a non-compete. But this does not follow. Even if that industry-specific HC could be protected by a non-compete, the firm would still prefer not to pay for it. And in the simplest models of labor market competition, it wouldn’t have to; any such HC would

³² In the real world, the distinction between the types of human capital is not so clear. For example, going to McDonald’s University presumably increases the trainee’s value as a manager at any fast food restaurant (industry-specific), but probably increases their value at McDonald’s the most because the practices being taught are the exact ones used at McDonald’s (firm-specific).

still be paid for by the worker in the form of lower wages. That is, in the simplest model a non-compete removes a barrier to the firm paying for industry-specific HC training, but it still won't cause that to actually happen.

If we complicate slightly the model of labor market competition, there can be circumstances in which firms *do* impart industry-specific HC at their own expense. Minimum wage laws can limit the extent to which workers can be made to pay for their own HC in the form of lower wages. Credit constraints or behavioral factors may limit workers' willingness or ability to accept a job with lower wages in exchange for the promise that valuable industry-specific HC will be imparted. To the extent that these frictions mean that firms do provide industry-specific HC, it is possible that this will be facilitated by non-competes. And it is even possible that without the non-competes, some jobs will be eliminated altogether.

Given the above arguments, it is possible that non-competes facilitate HC investment. But it is a very narrow path. It must be a type of HC that the firm can withhold, and would withhold absent a non-compete. It must not be firm-specific HC. And there must be sufficient frictions that the firm actually pays for some industry-specific HC, contrary to the simplest model where it would be paid for by the worker.

Discussion:

Both theoretical discussions like the one above and empirical research are conducted in the context of standard economic analysis, attempting to understand the effect of non-competes on conventional metrics such as wages, job mobility, or innovation. And as noted, there is strong reason to believe that non-competes are mostly harmful when considered in these terms, and very little reason to believe that they are highly beneficial. But these terms are incomplete. They do not capture other, potentially more serious worker harms that are not typically studied by economists. A worker who is stuck in a bad job match might merely be less productive or less happy than they otherwise would be. But they might also be a target for genuine exploitation, degradation, or abuse. A worker who is known by a predatory manager or co-worker to be stuck is likely to be mistreated, because they have no choice but to accept it. There are many reasons why a worker might be stuck, and a non-compete adds an additional one: a worker trying to muster the

courage to quit might be reminded of the non-compete that they signed and threatened with legal action if they violate it. It is not altogether an exaggeration to call this a human rights issue.³³

Even if non-competes are harmful, the question remains of what should be done about them.³⁴ One possible approach would be to treat them as an antitrust problem. It is not obvious that this is the correct approach; non-competes could be harmful without necessarily being within the purview of antitrust (though the very term “non-compete” should be a red flag). Or perhaps they are an antitrust problem, but only in situations where a lack of labor market competition is what caused them to be imposed on workers. In a companion article, I argue that non-competes can be reasonably regarded as an antitrust problem even if the labor market is highly competitive at the time that job matches are initially formed (i.e., that the worker had many similar job offers to the one that they accepted).³⁵

Conclusion:

Defenders of labor non-competes often claim that they were voluntarily agreed to, and so they must be both mutually beneficial and economically efficient. In this article I argue that this claim rests on faulty premises, and that firms can have both means and motive to impose non-competes involuntarily on workers, making them a means of extracting value from workers rather than a tool for economic efficiency. I also argue that the most commonly argued efficiency justifications for non-competes (that they facilitate efficient knowledge transfer within firms and that they facilitate worker training), while not completely without merit, are badly flawed. These arguments, combined with the substantial body of empirical literature that mostly finds non-competes to be harmful, as well as the experience of California that has flourished as a center of

³³ Even aside from these concrete harms, non-competes also represent a limitation on human freedom. The ability of a person to leave a bad situation has value in and of itself. Policy makers may choose to make a normative judgment that gives weight to this, for which they may be willing to sacrifice some economic efficiency. However, that tradeoff would only arise if non-competes were in fact efficient, which as discussed above is likely not the case.

³⁴ A common argument against any policy action limiting non-competes is that it would constitute a paternalistic violation of freedom of contract between two willing parties. But whatever one’s view on the appropriateness of paternalistic government interventions, it is important to note that of the four points listed in response to Argument #1 above, only the first one depends on some lack of capability on the part of the worker. The other three are ways that a worker could impose a non-compete on a fully knowledgeable and rational worker.

³⁵ See David J. Balan, “Labor Practices Can Be An Antitrust Problem Even When Labor Markets Are Competitive,” *CPI Antitrust Chronicle* (June 2020). See also Rohit Chopra and Lina M. Khan, “The Case for ‘Unfair Methods of Competition’ Rulemaking,” *University of Chicago Law Review* 87 (2020) pp. 357-379 for an argument for combating non-competes using the FTC’s antitrust rulemaking authority.

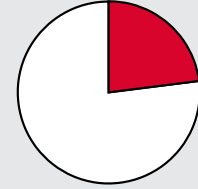
innovation despite not enforcing non-competes, is sufficient to conclude that non-competes are likely to be harmful, and that even if they are beneficial, they are very unlikely to be so beneficial that restricting them would cause major economic harm. In addition, non-competes may cause harms that are not commonly measured by economists, such as increasing worker vulnerability to exploitation and abuse.

The Freedom to Leave

Protecting workers by banning non-compete agreements
in the District of Columbia

1 What are non-compete agreements?

Non-compete agreements are contracts working people must sign as a condition of their employment that ban them from working for competitors for a set period of time after leaving their jobs.



In Washington D.C., an estimated **23% of workers** are currently bound by non-compete agreements.¹

2 What are the effects of non-compete agreements?

In states and industries where non-compete agreements are enforced, workers experience:

- ✗ Lower wages
- ✗ Fewer job offers
- ✗ Reduced mobility between jobs
- ✗ Limited opportunities for entrepreneurship

These negative effects extend beyond workers who have signed non-competes, **affecting entire regions and industries where non-competes are enforced.**⁴

3 Who is bound by non-compete agreements?

Non-compete agreements affect working people at all points on the economic spectrum. **Nearly 40% of Americans report being bound by a non-compete agreement at some point during their careers.**² Among workers paid less than \$40,000 annually, 14% are currently working under non-compete agreements.³

4 What can we do about it?

In 2002, D.C. passed the Broadcast Industry Contracting Freedom Act of 2002, banning non-compete agreements for broadcasters.⁵

Now, it's time to protect all workers and ban non-compete agreements in the District of Columbia.

1. Preliminary research on the District of Columbia workforce collected by Dr. Evan Starr, Assistant Professor, University of Maryland Robert H. Smith School of Business.

2. Office of Economic Policy, U.S. Department of the Treasury, "Non-compete Contracts: Economic Effects and Policy Implications,"- March 2016, https://home.treasury.gov/system/files/226/Non_Compete_Contracts_Economic_Effects_and_Policy_Implications_MAR2016.pdf.

3. Ibid.

4. Starr, Evan and Frake, Justin and Agarwal, Rajshree, Mobility Constraint Externalities (June 30, 2018). Forthcoming at Organization Science. Available at SSRN: <https://ssrn.com/abstract=3027715> or <http://dx.doi.org/10.2139/ssrn.3027715>

5. Broadcast Industry Contracting Freedom Act of 2002, Mar. 27, 2003, D.C. Law 14-258, § 3, 50 DCR 246, <https://code.dccouncil.us/dc/council/code/sections/32-572.html>.

Attachment 8

Amendment (withdrawn), Fiscal
Impact Statement, and Legal
sufficiency determination



Councilmember David Grosso

AN AMENDMENT
IN THE COUNCIL OF THE DISTRICT OF COLUMBIA

1

Date: November 19, 2020

Offered By: Councilmember David Grosso

To: B23-494, the “Ban on Non-Compete Agreements Amendment Act of 2020”

Version: Committee Print

Amendment:

Sec. 101. Definitions, line 48, subsection (2) is amended to read as follows:

“(2) “Employee” means any individual who annually earns less than \$75,000 and performs work in the District of Columbia on behalf of an employer or who is a prospective employee who an employer reasonably anticipates will earn less than \$75,000 and perform work on behalf of the employer in the District of Columbia, except that this term shall not include:

(A) Any individual who, without payment and without expectation of any gain, directly or indirectly, volunteers to engage in the activities of an educational, charitable, religious, or nonprofit organization;

(B) Any lay member elected or appointed to office within the discipline of any religious organization and engaged in religious functions; or

(C) Any individual employed as a casual babysitter, in or about the residence of the employer.”

Rationale

Including an income-based ban will bring this measure in-line with surrounding jurisdictions. Maryland has a non-compete ban for employees who earn less than \$15 per hour or \$31,200 annually. Virginia’s ban applies to employees who average weekly earnings are less than the state-wide average weekly wage, which is currently approximately \$60,000 per year.

According to the United States Bureau of Labor Statistics Occupational Employment Statistics Wage Estimates from May 2019, the median occupational wage estimate in the District of Columbia is \$74,340. This amendment rounds that figure up to \$75,000 as the income cap for the ban on non-compete agreements, covering half of all employees in the District of Columbia.

COUNCIL OF THE DISTRICT OF COLUMBIA
Office of the Budget Director



FISCAL IMPACT STATEMENT

TO: The Honorable Phil Mendelson
Chairman, Council of the District of Columbia

FROM: Jennifer Budoff, Budget Director

DATE: November 18, 2020

SHORT TITLE: B23-494, Ban on Non-Compete Agreements Amendment Act of 2020

TYPE: Amendment #1

REQUESTING OFFICE: Councilmember David Grosso

Conclusion

This amendment is estimated to have an annual cost of \$71,000, and funds are not sufficient in the budget and financial plan to implement the underlying bill.

Background

This amendment would modify the definition of “Employee” to require that they earn less than \$75,000 annually.

Though this amendment would reduce the number of employees to which the ban would apply, and could theoretically reduce the number of complaints, the amendment would also make enforcement more complicated. Income would need to be investigated and verified, and investigation was not included in the estimated cost of the underlying bill. A grade 9 investigator and supplies are estimated to cost about \$71,000 annually, \$284,000 over the four-year financial plan.

(\$ thousands)	FY 2021	FY 2022	FY 2023	FY 2024	Total
Investigator (grade 9)	\$ 68	\$ 68	\$ 68	\$ 68	\$ 272
Computer/Supplies	\$ 3	\$ 3	\$ 3	\$ 3	\$ 12
Total Costs	\$ 71	\$ 71	\$ 71	\$ 71	\$ 284



OFFICE OF THE GENERAL COUNSEL

Council of the District of Columbia
1350 Pennsylvania Avenue NW, Suite 4
Washington, DC 20004
(202) 724-8026

MEMORANDUM

TO: Councilmember David Grosso

FROM: Nicole L. Streeter, General Counsel *NLS*

DATE: November 11, 2020

**RE: Legal Sufficiency Determination for Amendment
1 to the Ban on Non-Compete Agreements
Amendment Act of 2020, Bill 23-494**

The amendment is legally and technically sufficient for Council consideration.

The amendment would amend the definition of the term “employee” in title I of the Ban on Non-Compete Agreements Amendment Act of 2020 (“Act”) to require that an individual earn less than \$75,000 annually to be covered under the Act.

I am available if you have questions.

Attachment 9

Fiscal Impact Statement for B23-0494


Government of the District of Columbia
Office of the Chief Financial Officer



Jeffrey S. DeWitt
Chief Financial Officer

MEMORANDUM

TO: The Honorable Phil Mendelson
Chairman, Council of the District of Columbia

FROM: Jeffrey S. DeWitt
Chief Financial Officer 

DATE: November 19, 2020

SUBJECT: Fiscal Impact Statement – Ban on Non-Compete Agreements
Amendment Act of 2020

REFERENCE: Bill 23-494, Draft Committee Print provided to the Office of Revenue
Analysis on November 5, 2020

Conclusion

Funds are not sufficient in the fiscal year 2021 through fiscal year 2024 budget and financial plan to implement the bill. The bill will cost approximately \$207,000 in fiscal year 2021 and \$730,000 over the four-year financial plan.

Background

The bill prohibits employers from requiring employees to enter into any “non-compete agreement,” defined as an agreement restricting the employee’s ability to hold another job or provide services to another entity either simultaneously or subsequent to employment, or to prohibit the employee from having his or her own business. Any such agreements entered into after the bill’s applicability date would be void and unenforceable in court. No workplace policies may include non-compete agreements. Employers must inform employees of the ban on non-compete agreements within 90 days of the bill’s applicability data, and, subsequently for new hires, within seven days of hire.

The Mayor and the Office of the Attorney General (OAG) may enforce the provisions of the bill and may require employers to submit records showing compliance with the bill. Employees who are asked to sign a non-compete agreement or suffer retaliation from an employer for activities addressed by prohibited non-compete agreements may file a complaint with the Mayor or take action in civil court. Employers have the right to appeal any violations determined by the Mayor to the Office

The Honorable Phil Mendelson

FIS: "Ban on Non-Compete Agreements Amendment Act of 2020," Bill 23-494, Draft Committee Print provided to the Office of Revenue Analysis on November 5, 2020

of Administrative Hearings (OAH). The Mayor may assess administrative penalties of \$350 to \$1,000 for each violation (including not less than \$1,000 for retaliation against employees) and such fees are to be deposited in the Wage Theft Prevention Fund¹. Additionally, employees may receive \$500 to \$1,000 from employers (but up to \$1,500 if the employer requested a prohibited non-compete agreement) for each initial violation and not less than \$3,000 per employee for subsequent violations. When an employer is found to have retaliated against an employee, it must pay relief of \$1,000 to \$2,500 for an initial violation and \$3,000 for each subsequent violation.

Financial Plan Impact

Funds are not sufficient in the fiscal year 2021 through fiscal year 2024 budget and financial plan to implement the bill. The bill costs \$207,000 in fiscal year 2021 and a total of \$730,000 over the four-year financial plan.

The Department of Employment Services' (DOES) Office of Wage Hour Compliance will be responsible for writing rules to implement the bill, promoting the bill's protections to employees, and investigating complaints received about employers violating the non-compete ban. DOES will require \$100,000 over two years to implement a public education campaign informing employees of the new legal protections. DOES will also require a new program manager to oversee the administration of compliance with the new ban as well as associated equipment and non-personal services costs. DOES will require \$10,000 annually to expand its memorandum of understanding for OAH's work if employers request a hearing on any violations found by DOES.

OAG does not require any new resources under the bill. If OAG decides to pursue any cases of violations of the ban it can do so with existing resources.

Ban on Non-compete Agreements Amendment Act of 2020 Bill 23-494 Implementation Costs for DOES Fiscal Year 2021 – Fiscal Year 2024 (\$ thousands)					
	FY 2021	FY 2022	FY 2023	FY 2024	Total
Public education campaign	\$50	\$50	\$0	\$0	\$100
Salary and fringe, Program Manager	\$144	\$144	\$145	\$145	\$578
MOU with OAH	\$10	\$10	\$10	\$10	\$40
Equipment and other NPS	\$3	\$3	\$3	\$3	\$12
Total Costs	\$207	\$207	\$158	\$158	\$730

¹ D.C. Official Code § 32-1307.01.

Attachment 10

Legal sufficiency determination for
B23-0494



OFFICE OF THE GENERAL COUNSEL

Council of the District of Columbia
1350 Pennsylvania Avenue NW, Suite 4
Washington, DC 20004
(202) 724-8026

MEMORANDUM

TO: Councilmember Elissa Silverman

FROM: Nicole L. Streeter, General Counsel *NLS*

DATE: November 17, 2020

RE: Legal sufficiency determination for Ban on Non-Compete Agreements Amendment Act of 2020, Bill 23-494.

The measure is legally and technically sufficient for Council consideration.

Title I of this measure would prohibit an employer¹ from requiring an employee² to sign an agreement that contains a non-compete provision; render void any non-compete provision³ in an agreement entered into between an employer and employee after the applicability date of title I; prohibit an employer from having a workplace policy that would prohibit an

¹ The measure defines “employer” to mean “an individual, partnership, general contractor, subcontractor, association, corporation, or business trust operating in the District, or any person or group of persons acting directly or indirectly in the interest of an employer operating in the District in relation to an employee, including a prospective employer, but does not mean the District of Columbia government or the United States government.”

² The measure defines “employee” to mean “any individual who performs work in the District of Columbia on behalf of an employer and any prospective employee who an employer reasonably anticipates will perform work on behalf of the employer in the District of Columbia,” excluding certain volunteers and babysitters.

³ The measure defines “non-compete provision” to mean “a provision of a written agreement between an employer and an employee that prohibits the employee from being simultaneously or subsequently employed by another person, performing work or providing services for pay for another person, or operating the employee’s own business. The term ‘non-compete provision’ does not include:

(A) An otherwise lawful provision that restricts the employee from disclosing the employer’s confidential, proprietary, or sensitive information, or a trade secret, as that term is defined in section 2(4) of the Uniform Trade Secrets Act of 1988, effective March 16, 1989 (D.C. Law 7-216; D.C. Official Code § 36-401(4)); or

(B) An otherwise lawful provision contained within or executed contemporaneously with an agreement between the seller of a business and one or more buyers of that business wherein the seller agrees not to compete with the buyer’s business.”

Legal Sufficiency Determination

Bill 23-494

Page 2 of 2

employee from being employed by another person, performing work or providing services for pay for another person, or operating the employee's own business; prohibit an employer from retaliating against an employee who makes a protected disclosure related to a non-compete provision or workplace policy that title I prohibits; and require employers to provide notice to employees that no employer may require an employee to agree to a non-compete policy or agreement under District law.

Title I would further authorize the Mayor and Attorney General to administer and enforce title I consistent with their respective powers and rights under section 6(a)-(c) of An Act To provide for the payment and collection of wages in the District of Columbia, approved August 3, 1956 (70 Stat. 976; D.C. Official Code § 32-1306(a)-(c)). It also specifies administrative penalties the Mayor may seek from violators of title I. A person aggrieved by a violation of title I would be permitted to pursue relief from the employer by filing an administrative complaint for civil action. In either proceeding, an aggrieved employee would be entitled to specified statutory damages. Title I further authorizes the Mayor to issue rules to implement it, including rules related to the keeping and preservation of records related to compliance with the title.

The measure would also amend section 7a of An Act To provide for the payment and collection of wages in the District of Columbia, effective February 26, 2015 (D.C. Law 20-157; D.C. Official Code § 32-1307.01), to require penalties collected from employers pursuant to title I to be deposited into the Wage Theft Prevention Fund, and it would repeal the Broadcast Industry Contracting Freedom Act of 2002, effective March 27, 2004 (D.C. Law 14-258; D.C. Official Code § 32-571 *et seq.*).

I am available if you have any questions.

Attachment 11

Comparative Print of B23-0494

**Comparative Print
B23-0494
Committee on Labor and Workforce Development
November 19, 2020**

TITLE 32.

**Chapter 5A. Freedom to Contract Within the Broadcast Industry.
The Broadcast Industry Contracting Freedom Act of 2002
§ 32-571 et seq. (recodified from § 32-531 et seq.)**

~~§ 32-571. Definitions.~~

~~For the purposes of this chapter, the term “broadcasting industry employment contract” means an employment contract executed, extended, or renewed after January 1, 2003 between a person, other than a sales representative, and a legal entity that owns or operates one or more television stations or networks, one or more radio stations or networks, one or more cable stations or networks, or one or more satellite-based services similar to a broadcast station or network, or any other entity that provides broadcasting services such as news, weather, traffic, sports, or entertainment programming.~~

~~§ 32-572. Unenforceability of broadcasting industry contract provisions restricting employment after expiration of contract or termination of employment.~~

~~A broadcasting industry employment contract provision that requires an employee or prospective employee to refrain from obtaining similar employment with another broadcasting industry employer following expiration of the contract or upon termination of employment shall be unenforceable.~~

~~§ 32-573. Penalty.~~

~~Any broadcasting industry employer who violates § 32-572 shall be liable for damages, attorney’s fees, and costs.~~

Chapter 13. Wages and Workplace Fraud.

**An Act To provide for the payment and collection of wages in the District of Columbia
§ 32-1307.01. Wage Theft Prevention Fund.**

(a) There is established as a special fund the Wage Theft Prevention Fund (“Fund”), which shall be administered by the Department of Employment Services in accordance with subsection (c) of this section.

(b) The Fund shall consist of the revenue from the following sources recovered under § 32-1307: section 7 and section 103(a)-(b) of the Ban on Non-Compete Agreements Amendment Act of 2020, as approved by the Committee on Labor and Workforce Development on November 19, 2020 (Committee Print of Bill 23-494) (“Ban on Non-Compete Agreements Act”):

- (1) Civil fines; and
- (2) Administrative penalties.

(c) The Fund shall be used to enforce the provisions of ~~this chapter, the Minimum Wage Revision Act, the Sick and Safe Leave Act, and the Living Wage Act~~ this act, title I of the Ban

on Non-Compete Agreements Act, the Living Wage Act, the Minimum Wage Revision Act, and the Sick and Safe Leave Act.

(d)(1) The money deposited into the Fund, and interest earned, shall not revert to the unrestricted fund balance of the General Fund of the District of Columbia at the end of a fiscal year, or at any other time.

(2) Subject to authorization in an approved budget and financial plan, any funds appropriated in the Fund shall be continually available without regard to fiscal year limitation.

New legal provisions are as follows:

TITLE I. BAN ON NON-COMPETE AGREEMENTS

Sec. 101. Definitions.

For the purposes of this title, the term:

(1) “An Act” means An Act To provide for the payment and collection of wages in the District of Columbia, approved August 3, 1956 (70 Stat. 976; D.C. Official Code § 32-1301 *et seq.*).

(2) “Employee” means any individual who performs work in the District of Columbia on behalf of an employer and any prospective employee who an employer reasonably anticipates will perform work on behalf of the employer in the District of Columbia, except that this term shall not include:

(A) Any individual who, without payment and without expectation of any gain, directly or indirectly, volunteers to engage in the activities of an educational, charitable, religious, or nonprofit organization;

(B) Any lay member elected or appointed to office within the discipline of any religious organization and engaged in religious functions; or

(C) Any individual employed as a casual babysitter, in or about the residence of the employer.

(3) “Employer” means an individual, partnership, general contractor, subcontractor, association, corporation, or business trust operating in the District, or any person or group of persons acting directly or indirectly in the interest of an employer operating in the District in relation to an employee, including a prospective employer, but does not mean the District of Columbia government or the United States government.

(4) “Non-compete provision” means a provision of a written agreement between an employer and an employee that prohibits the employee from being simultaneously or subsequently employed by another person, performing work or providing services for pay for another person, or operating the employee’s own business. The term “non-compete provision” does not include:

(A) An otherwise lawful provision that restricts the employee from disclosing the employer’s confidential, proprietary, or sensitive information, or a trade secret, as that term is defined in section 2(4) of the Uniform Trade Secrets Act of 1988, effective March 16, 1989 (D.C. Law 7-216; D.C. Official Code § 36-401(4)); or

(B) An otherwise lawful provision contained within or executed contemporaneously with an agreement between the seller of a business and one or more buyers of that business wherein the seller agrees not to compete with the buyer’s business.

(5) “Retaliate” means to take an adverse action, including a threat, verbal

warning, written warning, reduction of work hours, suspension, or termination against one or more employees.

(6) “Workplace policy” means the rules and restrictions, whether written or as a matter of practice, implemented by an employer to govern the conduct of the employer’s employees.

Sec. 102. Non-compete rights and restrictions.

(a) No employer may require or request that an employee sign an agreement that includes a non-compete provision.

(b) A non-compete provision contained in an agreement that was entered into on or after the applicability date of this title between an employee and an employer shall be void as a matter of law and unenforceable.

(c) No employer may have a workplace policy that prohibits an employee from:

- (1) Being employed by another person;
- (2) Performing work or providing services for pay for another person; or
- (3) Operating the employee’s own business.

(d) No employer may retaliate or threaten to retaliate against an employee for:

- (1) The employee’s refusal to agree to a non-compete provision;
- (2) The employee’s alleged failure to comply with a non-compete provision or a workplace policy made unlawful by this title;
- (3) Asking, informing, or complaining about the existence, applicability, or validity of a non-compete provision or a workplace policy that the employee reasonably believes is prohibited under this title to any of the following:

- (A) An employer, including the employee’s employer;
- (B) A coworker;
- (C) The employee’s lawyer or agent; or
- (D) A governmental entity; or

(4) Requesting from the employer the information required to be provided to the employee pursuant to subsection (e) of this section.

(e)(1) An employer shall provide an employee who works for the employer with the text of paragraph (2) of this subsection in writing, no later than:

- (A) Ninety calendar days after the applicability date of this title;
- (B) Seven calendar days after an individual becomes an employee of the employer; and

(C) Fourteen calendar days after the employer receives a written request for such statement from the employee.

(2) “No employer operating in the District of Columbia may request or require any employee working in the District of Columbia to agree to a non-compete policy or agreement, in accordance with the Ban on Non-Compete Agreements Amendment Act of 2020.”.

Sec. 103. Relief and penalties.

(a)(1) The Mayor and Attorney General shall administer and enforce this title consistent with their respective powers and rights under section 6(a)-(c) of An Act, approved August 3, 1956 (70 Stat. 976; D.C. Official Code § 32-1306(a)-(c)).

(2)(A) Any records an employer maintains pursuant to the requirements of regulations issued to implement this title shall be open and made available for inspection or transcription by the Mayor, the Mayor’s authorized representative, or the Office of the Attorney General upon demand at any reasonable time. An employer shall furnish to the Mayor, the

Mayor's authorized representative, or the Office of the Attorney General on demand a sworn statement of records and information upon forms prescribed or approved by the Mayor or Attorney General.

(B) No employer may be found to be in violation of subparagraph (A) of this paragraph unless the employer had an opportunity to challenge the Mayor or Attorney General's demand before a judge, including an administrative law judge.

(b)(1) The Mayor may assess an administrative penalty of no less than \$350 and no more than \$1,000 for each violation of this title; except, that each violation of section 102(d) assessed against an employer shall be for not less than \$1,000.

(2) The Mayor may not collect an administrative penalty under this subsection unless the Mayor has provided the employer alleged to have violated this title notification of the violation, notification of the amount of the administrative penalty to be imposed, and an opportunity to request a formal hearing held pursuant to the Administrative Procedure Act, approved October 21, 1968 (82 Stat. 1203; D.C. Official Code § 2-501 *et seq.*), and section 8a(e) of An Act, effective February 26, 2015 (D.C. Law 20-157; D.C. Official Code § 32-1308.01(e)).

(c)(1) A person aggrieved by a violation of this title may pursue relief by filing:

(A) An administrative complaint with the Mayor setting forth facts minimally sufficient to allege a violation of this title; or

(B) A civil action in a court of competent jurisdiction. In such action, a plaintiff shall carry the burden of proof by a preponderance of evidence.

(2)(A)(i) The procedures set forth in section 8a(c),(d),(e)-(m) of An Act, effective February 26, 2015 (D.C. Law 20-157; D.C. Official Code § 32-1308.01(c),(d),(e)-(m)), shall govern the conciliation, resolution, and enforcement of an administrative complaint filed pursuant to paragraph (1)(A) of this subsection; provided, that section 8a(e)(4)-(5) of An Act, effective February 26, 2015 (D.C. Law 20-157; D.C. Official Code § 32-1308.01(e)(4)-(5)), shall not apply.

(ii) Appeals of any administrative order issued under this title shall be made to the District of Columbia Court of Appeals.

(B) Section 8 of An Act, approved August 3, 1956 (70 Stat. 976; D.C. Official Code § 32-1308), shall apply to any civil action filed pursuant to paragraph (1)(B) of this subsection.

(d) Upon investigation by the Mayor pursuant to subsection (a) of this section or in an action to enforce this title pursuant to subsection (c) of this section, an employer found to have violated section 102 shall be liable for relief payable to an employee as follows:

(1)(A) An employer that violates section 102(a), (c), or (e) shall be liable for each violation to each employee subjected to the violation for monetary relief in an amount not less than \$500 and not greater than \$1,000.

(B) For any subsequent violation of section 102(a), (c), or (e), an employer that has been found liable pursuant to subparagraph (A) of this paragraph shall be liable for relief in an amount not less than \$3,000 to each affected employee.

(2)(A) An employer that attempts to enforce a non-compete provision that is unenforceable or void as provided in section 102(b) shall be liable to each employee against whom the employer attempted to enforce the non-compete provision for relief in an amount not less than \$1,500.

(B) For any subsequent violation of section 102(b), an employer that has been found liable pursuant to subparagraph (A) of this paragraph shall be liable for relief in an amount not less than \$3,000 to each affected employee.

(3)(A) An employer that retaliates against an employee in violation of section 102(d) shall be liable for each instance of retaliation to each employee subject to the retaliation in an amount not less than \$1,000 and not more than \$2,500.

(B) For any subsequent violation of section 102(d), an employer that has been found liable pursuant to subparagraph (A) of this paragraph shall be liable for relief in an amount not less than \$3,000 to each affected employee.

Sec. 104. Rules.

The Mayor, pursuant to Title I of the District of Columbia Administrative Procedure Act, approved October 21, 1968 (82 Stat. 1204; D.C. Official Code § 2-501 *et seq.*), shall issue rules to implement the provisions of this title, including rules requiring employers to keep, preserve, and retain records related to compliance with this title.

Attachment 12

Committee Print of B23-0494

7 A BILL
8
9

10 _____
11
12
13 IN THE COUNCIL OF THE DISTRICT OF COLUMBIA
14
15 _____
16
17

18 To ban non-compete provisions in employment contracts and employer policies, to protect
19 employees from being required to sign non-compete agreements, to make void and
20 unenforceable non-compete provisions entered into after the applicability date of this act,
21 to prohibit an employer from retaliating or threatening to retaliate against an employee
22 for refusing to agree to a non-compete provision, the failure to comply with the
23 employer's non-compete provision or policy, or inquiring about the employee's rights or
24 informing another person or entity about a possible violation of title I of this act, to
25 require that employers inform employees of title I of this act, to require that the Mayor
26 and the Attorney General administer and enforce title I of this act consistent with their
27 respective powers and rights under An Act To provide for the payment and collection of
28 wages in the District of Columbia and the District's Administrative Procedure Act, to
29 authorize the Mayor to collect administrative penalties for violations of title I of this act,
30 to authorize employees to bring administrative complaints and civil actions against
31 employers for violations of title I of the act, to provide statutory penalties for violations
32 of title I of this act; to amend An Act To provide for the payment and collection of wages
33 in the District of Columbia to provide that revenue from administrative penalties
34 recovered under title I of this act shall be deposited into the Wage Theft Prevention Fund
35 and used to enforce the provisions of title I of this act and other employee protection
36 laws; and to repeal the Broadcast Industry Contracting Freedom Act of 2002.
37

38 BE IT ENACTED BY THE COUNCIL OF THE DISTRICT OF COLUMBIA, That this
39
40 act may be cited as the "Ban on Non-Compete Agreements Amendment Act of 2020".
41

42 TITLE I. BAN ON NON-COMPETE AGREEMENTS

43 Sec. 101. Definitions.

44 For the purposes of this title, the term:

(1) “An Act” means An Act To provide for the payment and collection of wages in the District of Columbia, approved August 3, 1956 (70 Stat. 976; D.C. Official Code § 32-1301 *et seq.*).

(2) “Employee” means any individual who performs work in the District of Columbia on behalf of an employer and any prospective employee who an employer reasonably anticipates will perform work on behalf of the employer in the District of Columbia, except that this term shall not include:

(A) Any individual who, without payment and without expectation of any gain, directly or indirectly, volunteers to engage in the activities of an educational, charitable, religious, or nonprofit organization;

(B) Any lay member elected or appointed to office within the discipline of any religious organization and engaged in religious functions; or

(C) Any individual employed as a casual babysitter, in or about the residence of the employer.

(3) “Employer” means an individual, partnership, general contractor, subcontractor, association, corporation, or business trust operating in the District, or any person or group of persons acting directly or indirectly in the interest of an employer operating in the District in relation to an employee, including a prospective employer, but does not mean the District of Columbia government or the United States government.

(4) “Non-compete provision” means a provision of a written agreement between an employer and an employee that prohibits the employee from being simultaneously or subsequently employed by another person, performing work or providing services for pay for

another person, or operating the employee's own business. The term "non-compete provision" does not include:

(A) An otherwise lawful provision that restricts the employee from disclosing the employer's confidential, proprietary, or sensitive information, or a trade secret, as that term is defined in section 2(4) of the Uniform Trade Secrets Act of 1988, effective March 16, 1989 (D.C. Law 7-216; D.C. Official Code § 36-401(4)); or

(B) An otherwise lawful provision contained within or executed contemporaneously with an agreement between the seller of a business and one or more buyers of that business wherein the seller agrees not to compete with the buyer's business.

(5) "Retaliate" means to take an adverse action, including a threat, verbal warning, written warning, reduction of work hours, suspension, or termination against one or more employees.

(6) "Workplace policy" means the rules and restrictions, whether written or as a matter of practice, implemented by an employer to govern the conduct of the employer's employees.

Sec. 102. Non-compete rights and restrictions.

(a) No employer may require or request that an employee sign an agreement that includes a non-compete provision.

(b) A non-compete provision contained in an agreement that was entered into on or after the applicability date of this title between an employee and an employer shall be void as a matter of law and unenforceable.

(c) No employer may have a workplace policy that prohibits an employee from:

(1) Being employed by another person;

(2) Performing work or providing services for pay for another person; or

(3) Operating the employee's own business.

(d) No employer may retaliate or threaten to retaliate against an employee for:

(1) The employee's refusal to agree to a non-compete provision;

(2) The employee's alleged failure to comply with a non-compete provision or a workplace policy made unlawful by this title;

(3) Asking, informing, or complaining about the existence, applicability, or validity of a non-compete provision or a workplace policy that the employee reasonably believes is prohibited under this title to any of the following:

(A) An employer, including the employee's employer;

(B) A coworker;

(C) The employee's lawyer or agent; or

(D) A governmental entity; or

(4) Requesting from the employer the information required to be provided to the employee pursuant to subsection (e) of this section.

(e)(1) An employer shall provide an employee who works for the employer with the text of paragraph (2) of this subsection in writing, no later than:

(A) Ninety calendar days after the applicability date of this title;

(B) Seven calendar days after an individual becomes an employee of the employer; and

(C) Fourteen calendar days after the employer receives a written request for such statement from the employee.

(2) “No employer operating in the District of Columbia may request or require any employee working in the District of Columbia to agree to a non-compete policy or agreement, in accordance with the Ban on Non-Compete Agreements Amendment Act of 2020.”.

Sec. 103. Relief and penalties.

(a)(1) The Mayor and Attorney General shall administer and enforce this title consistent with their respective powers and rights under section 6(a)-(c) of An Act, approved August 3, 1956 (70 Stat. 976; D.C. Official Code § 32-1306(a)-(c)).

(2)(A) Any records an employer maintains pursuant to the requirements of regulations issued to implement this title shall be open and made available for inspection or transcription by the Mayor, the Mayor’s authorized representative, or the Office of the Attorney General upon demand at any reasonable time. An employer shall furnish to the Mayor, the Mayor's authorized representative, or the Office of the Attorney General on demand a sworn statement of records and information upon forms prescribed or approved by the Mayor or Attorney General.

(B) No employer may be found to be in violation of subparagraph (A) of this paragraph unless the employer had an opportunity to challenge the Mayor or Attorney General's demand before a judge, including an administrative law judge.

(b)(1) The Mayor may assess an administrative penalty of no less than \$350 and no more than \$1,000 for each violation of this title; except, that each violation of section 102(d) assessed against an employer shall be for not less than \$1,000.

(2) The Mayor may not collect an administrative penalty under this subsection unless the Mayor has provided the employer alleged to have violated this title notification of the violation, notification of the amount of the administrative penalty to be imposed, and an

135 opportunity to request a formal hearing held pursuant to the Administrative Procedure Act,
136 approved October 21, 1968 (82 Stat. 1203; D.C. Official Code § 2-501 *et seq.*), and section 8a(e)
137 of An Act, effective February 26, 2015 (D.C. Law 20-157; D.C. Official Code § 32-1308.01(e)).

138 (c)(1) A person aggrieved by a violation of this title may pursue relief by filing:

139 (A) An administrative complaint with the Mayor setting forth facts
140 minimally sufficient to allege a violation of this title; or

141 (B) A civil action in a court of competent jurisdiction. In such action, a
142 plaintiff shall carry the burden of proof by a preponderance of evidence.

143 (2)(A)(i) The procedures set forth in section 8a(c),(d),(e)-(m) of An Act, effective
144 February 26, 2015 (D.C. Law 20-157; D.C. Official Code § 32-1308.01(c),(d),(e)-(m)), shall
145 govern the conciliation, resolution, and enforcement of an administrative complaint filed
146 pursuant to paragraph (1)(A) of this subsection; provided, that section 8a(e)(4)-(5) of An Act,
147 effective February 26, 2015 (D.C. Law 20-157; D.C. Official Code § 32-1308.01(e)(4)-(5)), shall
148 not apply.

149 (ii) Appeals of any administrative order issued under this
150 title shall be made to the District of Columbia Court of Appeals.

151 (B) Section 8 of An Act, approved August 3, 1956 (70 Stat. 976; D.C.
152 Official Code § 32-1308), shall apply to any civil action filed pursuant to paragraph (1)(B) of
153 this subsection.

154 (d) Upon investigation by the Mayor pursuant to subsection (a) of this section or in an
155 action to enforce this title pursuant to subsection (c) of this section, an employer found to have
156 violated section 102 shall be liable for relief payable to an employee as follows:

(1)(A) An employer that violates section 102(a), (c), or (e) shall be liable for each violation to each employee subjected to the violation for monetary relief in an amount not less than \$500 and not greater than \$1,000.

(B) For any subsequent violation of section 102(a), (c), or (e), an employer that has been found liable pursuant to subparagraph (A) of this paragraph shall be liable for relief in an amount not less than \$3,000 to each affected employee.

(2)(A) An employer that attempts to enforce a non-compete provision that is unenforceable or void as provided in section 102(b) shall be liable to each employee against whom the employer attempted to enforce the non-compete provision for relief in an amount not less than \$1,500.

(B) For any subsequent violation of section 102(b), an employer that has been found liable pursuant to subparagraph (A) of this paragraph shall be liable for relief in an amount not less than \$3,000 to each affected employee.

(3)(A) An employer that retaliates against an employee in violation of section 102(d) shall be liable for each instance of retaliation to each employee subject to the retaliation in an amount not less than \$1,000 and not more than \$2,500.

(B) For any subsequent violation of section 102(d), an employer that has been found liable pursuant to subparagraph (A) of this paragraph shall be liable for relief in an amount not less than \$3,000 to each affected employee.

Sec. 104. Rules.

The Mayor, pursuant to Title I of the District of Columbia Administrative Procedure Act, approved October 21, 1968 (82 Stat. 1204; D.C. Official Code § 2-501 *et seq.*), shall issue rules

to implement the provisions of this title, including rules requiring employers to keep, preserve, and retain records related to compliance with this title.

TITLE II. BAN ON NON-COMPETE AGREEMENTS; WAGE THEFT PREVENTION FUND

Sec. 201. Section 7a of An Act To provide for the payment and collection of wages in the District of Columbia, effective February 26, 2015 (D.C. Law 20-157; D.C. Official Code § 32-1307.01), is amended as follows:

(a) Subsection (b) is amended by striking the phrase “section 7” and inserting the phrase “section 7 and section 103(a)-(b) of the Ban on Non-Compete Agreements Amendment Act of 2020, as approved by the Committee on Labor and Workforce Development on November 19, 2020 (Committee Print of Bill 23-494) (“Ban on Non-Compete Agreements Act”)” in its place.

(b) Subsection (c) is amended by striking the phrase “this act, the Minimum Wage Revision Act, the Sick and Safe Leave Act, and the Living Wage Act” and inserting the phrase “this act, title I of the Ban on Non-Compete Agreements Act, the Living Wage Act, the Minimum Wage Revision Act, and the Sick and Safe Leave Act” in its place.

TITLE III. REPEALER; APPLICABILITY; FISCAL IMPACT STATEMENT; EFFECTIVE DATE

Sec. 301. The Broadcast Industry Contracting Freedom Act of 2002, effective March 27, 2004 (D.C. Law 14-258; D.C. Official Code § 32-571 *et seq.*) is repealed.

Sec. 302. Applicability.

(a) This act shall apply upon the date of inclusion of its fiscal effect in an approved budget and financial plan.

(b) The Chief Financial Officer shall certify the date of the inclusion of the fiscal effect in an approved budget and financial plan, and provide notice to the Budget Director of the Council of the certification.

(c)(1) The Budget Director shall cause the notice of the certification to be published in the District of Columbia Register.

(2) The date of publication of the notice of the certification shall not affect the applicability of this act.

Sec. 303. Fiscal impact statement.

The Council adopts the fiscal impact statement in the committee report as the fiscal impact statement required by section 4a of the General Legislative Procedures Act of 1975, approved October 16, 2006 (120 Stat. 2038; D.C. Official Code § 1-301.47a).

Sec. 304. Effective date.

This act shall take effect following approval by the Mayor (or in the event of veto by the Mayor, action by the Council to override the veto), a 30-day period of congressional review as provided in section 602(c)(1) of the District of Columbia Home Rule Act, approved December 24, 1973 (87 Stat. 813; D.C. Official Code § 1-206.02(c)(1)), and publication in the District of Columbia Register.