

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: June 16, 2022

SUBJECT: Report on B24-256, the “Non-Compete Clarification Amendment Act of 2022”



The Committee on Labor and Workforce Development, to which B24-256, the “Non-Compete Clarification Amendment Act of 2021” was referred, reports **favorably** thereon with amendments, and recommends its approval by the Council.

CONTENTS

I. BACKGROUND AND NEED	1
II. LEGISLATIVE CHRONOLOGY	15
III. POSITION OF THE EXECUTIVE.....	15
IV. HEARING RECORD AND SUMMARY OF TESTIMONY.....	15
VI. IMPACT ON EXISTING LAW	28
VII. FISCAL IMPACT STATEMENT.....	29
VIII. SECTION BY SECTION ANALYSIS	29
IX. COMMITTEE ACTION	30

I. BACKGROUND AND NEED

Executive Summary

Councilmember Silverman introduced B24-256, originally titled the “Non-Compete Conflict of Interest Clarification Amendment Act of 2021,” May 21, 2021, to amend the Ban on Non-Compete Agreements Amendment Act of 2020 (D.C. Law 23-209) (hereinafter called the “Total Ban”).

The Total Ban barred the use of non-compete agreements in the District, with only a narrow exception for medical specialists.¹ The law stated that District employers could not restrict their

¹ Non-compete agreements vary in scope and content, but traditionally they are a contract between an employer and an employee stating that the employee will not work for competitors for a defined period of time and in a specific geographic region after that worker leaves their employer. The 2020 legislation barred employers’ use of these contracts to restrict where employees could “moonlight” or the jobs they took after leaving their employment. It also forbade the use of a non-compete term in an employer’s policy manual. Council of the District of Columbia, Committee on Labor and Workforce Development, “Committee Report on Bill 23-494, the Ban on Non-Compete Agreements Amendment Act of 2020,” November 19, 2020 (hereinafter, “2020 Non-Compete Ban Report”).

employees from simultaneously holding a second job or from leaving their job to work for a competing business.

After the Total Ban was passed, affected employers raised further policy and practical questions about it. Councilmember Silverman then introduced Bill 24-256 to clarify any perceived ambiguity regarding simultaneous employment. Businesses interested in the legislation asked the Committee to further amend the law to allow non-compete agreements for certain workers. In addition, Councilmember Brooke Pinto drafted a proposal, which was not formally introduced as a bill, to substantially revise the Total Ban (see “Councilmember Pinto’s Proposal” below).

In the spirit of comity, Councilmember Silverman instructed the Committee staff to come to a reasonable compromise, working with the concerned interests who approached the committee. Upon thorough review of the submitted testimony, conversations with business and community members, consultation with subject matter experts, and a review of non-compete restrictions across the country, the Committee recommends a narrow allowance for non-compete agreements with only those employees who have annual total compensation of at least \$250,000, provided that the agreements last no more than one year and adhere to certain drafting requirements including clear disclosure to employees.

Procedural Background

Although the Total Ban became DC law on March 16, 2021, its initial applicability date was set to October 1, 2021, the date when its implementation costs were expected to be fully funded in the District’s budget. After its enactment but before the law applied, business community members (the “Working Group”) reached out to Councilmember Silverman seeking legislation clarifications to the law.² Chairperson Silverman introduced B24-256 on May 21, 2021 to make permanent changes to the Total Ban. A public hearing was held on July 14, 2021, and discussions with the business community continued through 2021 and into 2022. The demands of the pandemic, given the Committee also oversees the Department of Employment Services and the city’s unemployment compensation program, contributed to a slower than ideal timeline. The applicability date of the Total Ban was postponed in emergency and temporary legislation while the present bill was considered.³

² These businesses and associations formed the “Working Group”: Natalie Ludaway, Crowell & Moring, LLP; Andrew Flagel and Mondy Kumbula-Fraser, Consortium of Universities of the Metropolitan Washington Area; Tim Nelson, the Maryland DC Delaware Broadcasters Association; Janene Jackson, Holland & Knight, LLP; and Kevin Wrege, DC Chamber of Commerce. In October 2021, via email, Crowell & Moring, LLP, notified the Committee that it had withdrawn from participation.

³ B24-683, the Ban on Non-Compete Agreements Applicability Emergency Amendment Act of 2022; the Ban on Non-Compete Agreements Applicability Temporary Amendment Act of 2022; PR24-0603, the Ban on Non-Compete Agreements Applicability Emergency Declaration Resolution of 2022; PR24-786, the Ban on Non-Compete Agreements Applicability Congressional Review Emergency Declaration Resolution of 2022; and B24-844, the Ban on Non-Compete Agreements Applicability Congressional Review Emergency Amendment Act of 2022.

The Bill As Introduced

As introduced, B24-256 focused only on clarifying the Total Ban’s restrictions around simultaneous employment. The Total Ban had stated, “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.”

Employers informed the Committee that this meant their individual conflict-of-interest policies would violate the law. Representatives from associations such as the Consortium of Universities of the Metropolitan Washington Area (the “Consortium”) and the Maryland DC Delaware Broadcasters Association (the “Broadcasters Association”) said that they could not comply with the Total Ban due to certain federal regulations that applied to their industries. The Broadcasters Association said that restrictions on their conflict-of-interest requirements could run afoul of Federal Communications Commission (“FCC”) regulations on paid advertising. Their conflict-of-interest policies were necessary, they said, so they could proactively identify and manage the risks that could come from an employee receiving payment for promotional reasons. The Consortium said that federal research grant agreements, some with underlying regulations, required member institutions to identify and manage any conflicts that could interfere with proper administration of federally-funded research studies. Colleges and universities also sought to prevent their admissions officers from capitalizing on access to internal institutional information by working for prospective applicants on the side. This could result in more favorable admissions for wealthy applicants. Committee staff noted to these groups that, in many of the examples provided, federal laws would supersede District law, allowing these employers to meet federal requirements. Nevertheless, the businesses sought further changes to make it easier to comply with both laws and to avoid the scrutiny that could come if a misinformed employee reported them to the government for investigation.

B24-256, as introduced, allowed employers to maintain “bona fide conflict of interest policies” that could bar employees from performing certain outside work. Specifically, it would allow an employer to impose this restriction where the employee was accepting money if “the employer reasonably believes that the employee’s acceptance” of it “will cause the employer to conduct its business in an unethical manner; or violate applicable local, state, or federal laws or rules.” (internal formatting removed). As detailed below, the Working Group and others who submitted testimony fretted that these two exceptions did not address all of the potential scenarios they faced, and the legislation was expanded to include those additional situations.

POLICY CONSIDERATIONS

Witnesses testified from a range of perspectives on two main issues: (A) restrictions on simultaneous employment and (B) post-employment restrictions. This section summarizes the main viewpoints and the Committee’s policy choices. A more detailed summary of all testimony is included in Section IV of this report.

A. Simultaneous Employment

The Total Ban prohibited all restrictions against simultaneous employment. But the clear majority of witnesses to address this issue favored revisions that would clarify this prohibition, so that employers could restrict an employee's ability to hold other employment simultaneously. Witnesses persuasively explained how the Total Ban could unduly interfere with the employer's expectation of undivided loyalty from employees in the context of various industries including higher education and professional sports.

Andrew Flagel of the Consortium explained that a college or university needs to prevent its faculty from outside work that would interfere with employees' duty to the primary institution. He provided the example of a tenured faculty member who received tenure at second institution, failing to fulfill the duties of their job. But Marcy Karin, a tenured law professor specializing in employment law, said that the Total Ban's language should not be altered. If a faculty exception were added to the law, she said, it could result in faculty members no longer being able to perform service in government, non-profits, or think tanks because their home institution did not approve it. However, the Consortium explained that it was also concerned about executive employees of its institutions taking outside consulting jobs in their field not fulfilling their obligations to the primary employer. The Consortium insisted that its members only used these policies to identify and proactively manage potential conflicts rather than bar faculty from external opportunities that could enhance their value to the institution.

The Consortium distinguished "conflict of commitment" provisions in university handbooks from other employers' "conflict of interest" policies. A "conflict of commitment" provision or policy is a limitation usually imposed by a college or university employer on a faculty (or full-time staff) member that is intended to ensure that the employer and its objectives are not undermined by an external obligation or activity engaged in by the faculty member.⁴ The American Association of University Professors says, "A 'conflict of commitment' arises whenever a faculty member's or administrator's outside consulting and other activities have the potential to interfere with their primary duties, including teaching, research, time with students, or other service and administrative obligations to the university." The Consortium said that its conflict of commitment restrictions generally resulted in conversations between the employee and the employer about how the employee would structure their work in order to accomplish everything. While universities use conflict-of-commitment policies to prevent paid and unpaid interferences with the faculty member's commitment to their employer, the non-compete ban only implicates paid work such as employment or starting one's own business.

Other business representatives, such as the Broadcasters' Association, were closely aligned with the Consortium and the Working Group's recommendations regarding conflicts of interest.⁵ The Broadcasters wanted to restrict employees with access to confidential and proprietary

⁴ For example, Cornell University maintains policies with both conflict of interest and conflict of commitment limitations. See: <https://policy.cornell.edu/policy-library/conflicts-interest-and-commitment-excluding-financial-conflict-interest-related>

⁵ See, for example, testimony of Linwood Jolly, Vice President, Business Development, Codice.

information from holding second jobs where they might reveal that information to a competitor. In addition, they wanted to limit their employees from outside work that could run afoul of FCC regulations requiring transparency around endorsements and advertising. They also sought to prevent “brand-identifiable” employees from having a second job that would “dilute” the value the employer derived from having exclusive use of the employee’s talents. In written testimony, Comcast also supported a conflict-of-interest exception to prevent their employees from holding second jobs. Comcast emphasized their desire to prevent “uniquely talented, highly-educated and highly-compensated, talent who gain access to contacts and resources due to being an NBC News producer, reporter, correspondent, and/or on-air host[.]” from simultaneous employment. By way of example, they said that the legislation “would allow Chuck Todd (on-air host of Meet the Press) to simultaneously work as an on-air host of a CBS News program; causing confusion for the audience and conflict of duty issues by his work with a competitor.”

Betsy Philpott, Vice President and General Counsel for the Washington Nationals Baseball Club, testified in favor of permitting non-compete provisions that have been collectively bargained. The collective bargaining agreement between the Major League Baseball clubs and the Major League Baseball Players Association requires those parties to use a uniform player contract that prohibits the employee from working for more than one team at a time. This term directly conflicted with the limitation in the original bill that employers could not prevent employees from holding a second job. The members of a collective bargaining unit have more leverage to negotiate fair employment terms than employees without such representation; therefore, it is reasonable to permit those agreements to control the terms of the parties’ relationship.⁶

Following the hearing, Sandeep Vaheesan from the Open Markets Institute provided additional background for the Committee on District law surrounding an employee’s “duty of loyalty.”⁷ In summary, the DC Court of Appeals recognizes that an employee owes a duty of loyalty to their employer. Courts engage in a fact-specific analysis to resolve a dispute about whether an employee breached this duty. In summary, an employee is expected to exercise good faith, perform their job within the scope of their employment, and behave honestly.

Several particular revisions were made to the bill’s text to ensure that businesses’ conflict of interest scenarios were included. The terms “confidential” and “proprietary” information have been standardized in the committee print so employers who want to protect these business secrets are assured that they are within the law to do so. The reference to “ethics” in the bill as introduced was replaced with the allowance for a conflict of interest that would violate “established rules” regarding such conflicts within that particular industry or profession. Instead of protecting against a conflict that would cause the employer to violate the law, the language is broadened to include a conflict that would cause the employer to violate a law, contract or grant agreement.

In most of the cases detailed by the businesses, amendments allowing conflict of interest restrictions on employees would simply maintain the status quo that existed in those workplaces.

⁶ White House Task Force on Worker Organizing and Empowerment, US Department of Labor, “How Unions Advance Equity for Underserved Populations,” available online at: https://www.dol.gov/sites/dolgov/files/general/labortaskforce/docs/508_union-fs-1.pdf.

⁷ Email to the Committee, July 27, 2021 9:30 PM.

However, with the complexity of these additional exceptions, it could become difficult for an employee to understand whether their employer had such a policy. Therefore, the Committee print now requires employers who rely on any of these exceptions to provide it in writing to the employee.

B. Post-Employment Restrictions

The Total Ban prohibited all non-compete restrictions on the employee's work after the employment relationship ends. Although this issue was not addressed in the introduced version of B24-256, a considerable number of employer representatives expressed concerns with or opposition to the ban on post-employment non-compete agreements. Yet there was a diversity of views among employers and no consensus about the circumstances when non-compete agreements should be allowed.

On the other side, labor economists reiterated the role of non-compete agreements in suppressing wages and stifling competition among businesses, which had prompted the Council to unanimously enact the Total Ban in the first place. Further, individual employees testified from personal experience about non-compete agreements that limited the growth of their careers or trapped them in toxic workplaces. The Committee remains convinced that post-employment non-compete agreements generally cannot be justified in light of the harms inflicted upon employees and the broader economy.

The Committee print attempts to balance these views to advance a beneficial policy that will satisfy some but not all employers. As a compromise, the Committee print generally bans non-compete agreements but makes an exception for highly compensated employees, as further explained in the section immediately below. The remaining sections outline the Committee's reasoning on other issues.

Highly Compensated Employees

Again, in the spirit of comity, the Committee crafted a reasonable compromise to address business community concerns about retention of talent. In recognition of the District's strong interest in keeping talented and high-paid workers within its jurisdiction together with the testimony about the potential harms to workers and the assets that non-compete agreements help businesses protect, the Committee print of the bill allows the use of non-compete agreements with only those whose total compensation is at least \$250,000 per year.⁸

In the November 19, 2020 committee report on the Ban on Non-Compete Agreements Amendment Act of 2019, the Committee wrote that limiting the ban to only protect lower-income workers would overlook the fact that even those at higher incomes were harmed by the use of non-competes:⁹

⁸ Section 101(11)(b) of the bill details that this minimum qualifying compensation will increase annually beginning on January 1, 2024, according to the Consumer Price Index published by the Bureau of Labor Statistics of the United States Department of Labor.

⁹ 2020 Non-Compete Report.

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. Hawaii, for example, implemented a ban on non-competes for the technology industry in order to protect and grow that sector. 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.

Higher salary alone does not mean an individual is better equipped to negotiate a non-compete or other terms of employment. In certain fields, such as medicine and information technology, workers just entering the job market can command salaries above \$100,000. In one study, only one out of six tech workers – whose average salary in DC is \$139,000- tried to bargain with their employer over non-compete terms.¹⁰

Many businesses that testified at the July 14, 2021 hearing said that only non-compete agreements could provide them with the level of protection they needed with high-level employees with access to business strategy and other highly valuable information. This committee has pointed out that non-solicitation and non-disclosure agreements are better suited and narrowly tailored to protecting trade secrets and other confidential information than non-compete agreements.¹¹ However, employers expressed concern that it could be difficult to prove that a competitor obtained specific information from a departed employee. Their preferred approach was to simply prevent the employee from working in the same geographic region or with a competitor.

The Committee considered limiting the duration of the non-compete period and requiring employers to pay employees who had signed non-competes for as long as they were out of the workforce. The higher an employee’s income, the better they can weather the challenge of being out of work, either because they have greater personal savings or can travel outside the geographic parameters of a non-compete to work. These workers are also more likely to have the skills to negotiate employment terms that are fair to them, to be able to afford to hire someone qualified to advise them, or to be capable of temporarily relocating for work without having to fully uproot their life in DC.

In her proposal, Councilmember Brooke Pinto suggested allowing non-compete agreements only if their employers paid “garden leave,” which is akin to severance or compensation for the covered employee while they are taken out of the labor market. In the end, Councilmember Silverman decided against an additional requirement of “garden leave,” which would add an expense for employers.

¹⁰ Marx, Matt. *The firm strikes back: non-compete agreements and the mobility of technical professionals*, 76 Am. Soc. Rev. 695, 706 (2011), available online at: https://scholar.google.com/citations?view_op=view_citation&hl=en&user=rXhhLccAAAAJ&citation_for_view=rXhhLccAAAAJ:ZeXyd9-uunAC; <https://hired.com/salaries/washington-d-c>.

¹¹ 2020 Non-Compete Ban Report, p. 3.

Massachusetts and Oregon non-compete laws require the employer must pay their former employee at least 50 percent of their final salary for the entire period of competition.¹² Several witnesses rejected the idea that paying for the duration of a non-compete would address the negative consequences of that employee being unable to work. Najah Farley from the National Employment Law Project (NELP) pointed out that employees can lose skills while unemployed, making them less attractive hires. She also explained that most workers receive pay raises when changing jobs; however, an employee who had been subject to a non-compete agreement would have less leverage to negotiate fair compensation with their new employer if they were doing so after a period of not working.¹³ While a garden leave requirement would address the financial pressure that an unemployed person might experience, it would not address the broader depression of wages that can occur when non-compete agreements are used within a region or mitigate the stigma against hiring unemployed workers that can keep them out of the workforce. Moreover, if the revised DC law required garden leave to be paid, these cases would be more complex and expensive for the Department of Employment Services (DOES) to resolve. Employers are therefore not required to pay garden leave under the terms of their non-compete agreements, but the parties are free to negotiate over and include this term if desired.

In the hearing, witnesses like Ms. Geneva Kropper detailed how employers can use overbroad, technically unlawful terms in these agreements, exploiting the workers' unfamiliarity with the law to intimidate them into complying with the non-compete. Dan Essrow and Daniel Perez from the Non-Profit Employees Union supported a total ban on non-compete agreements because this would be the clearest for workers to understand. In their experience working with union members, employees at all levels struggled to decipher legal requirements that applied to them. They also supported full freedom of employees to leave jobs where they felt stagnated or unsafe, pointing out that the harms of non-competes were exacerbated for women and minority groups. An outright ban would also be easier for worker advocates and the agency enforcing the law to apply, since it would require no review of annual wages.¹⁴ Dr. Evan Starr explained that non-competes bind employers, too, because they impede businesses that might want to recruit workers who have signed non-competes.¹⁵

Therefore, to be valid and enforceable, non-compete agreements permitted under this law must adhere to certain procedural and drafting requirements. A valid non-compete agreement must specify the “functional scope of the competitive restriction,” meaning the services, roles, industry, or competitors being restricted; the geographical limitation of the work restriction; and period of

¹² “Massachusetts Noncompetition Agreement Act,” Mass. General Laws c.149 § 24L; Or. Rev. Stat. § 653.295 (2020).

¹³ David Stephen also expressed concern that low-income people would be disadvantaged at getting a new job after being out of the workforce.

¹⁴ 2020 Non-Compete Ban Report, p.2, “It is simpler, fairer, more practical, and more enforceable to have a complete ban on non-competes.”

¹⁵ See also 2020 Non-Compete Ban Report, Attachment 6, Testimony of Randolph Chen, Co-Acting Chief, Social Justice Section - Public Advocacy Division, Office of the Attorney General for the District of Columbia.

non-competition no longer than twelve months.¹⁶ In addition, the employer must provide the non-compete provision to the employee in writing at least 14 days before the agreement is to be executed. A provision or agreement that does not satisfy these basic requirements will be void and unenforceable as a matter of law, without the employee needing to seek a remedy in court.¹⁷ The requirements in this legislation are the basic requirements for non-compete agreements to be valid. Parties are free to negotiate additional lawful terms in the agreement, such as garden leave provisions; however, the agreements must otherwise comply with existing statutory and common law governing such contracts.

Non-compete agreement are not always executed at the start of an employee's tenure; they may be requested by an employer while the individual is an employee or when that employee leaves their job. The bill is drafted to allow an employer to look to the employee's expected earnings to determine whether to execute a non-compete agreement with a new employee or someone with irregular earnings. An employer might be unable to use a non-compete with an employee when they are first hired, but if that individual then earns enough to put total compensation over the threshold, the employer could propose a non-compete agreement. Employers that want to use non-compete agreements with these employees during their tenure must reasonably anticipate that the employee signing the non-compete agreement will satisfy the minimum qualifying annual compensation amount in the law. If a departing employee's total compensation for the last year does not meet the \$250,000 total compensation threshold, any non-compete provision the employee agreed to is void and unenforceable against them.

The DC Broadcast Industry Contracting Freedom Act

The District has banned the use of non-compete agreements with broadcast industry employees, other than salespeople, since passing the Broadcast Industry Contracting Freedom Act of 2002.¹⁸ According to the Screen Actors' Guild - Academy of Film Television and Radio Artists (SAG-AFTRA), which represents on-air and other broadcast talent, the DC bill was part of a sustained national effort by unionized broadcast employees to eliminate the use of these agreements.¹⁹ The District's law frees broadcast employees to move to higher-paying jobs in the DC market without having to uproot their families. Alongside the DC law, broadcast industry non-compete bans currently exist in Arizona, Connecticut, Illinois, Massachusetts, Maine, New York,

¹⁶ Employers, like hospitals, that employee medical specialists earning \$250,00 or more will be allowed sign non-compete agreements lasting up to two years. Non-competes are statutorily of limited duration in other states. Utah and Massachusetts limit non-competes to twelve months; Oregon recently amended their law down to 12 months from 18.

¹⁷ Courts 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, provided an employer can show that the agreement is protecting a legitimate business interest. This is due to the burden a non-compete places on an individual's livelihood. See generally Kelly, Catherine Pastrokos, American Bar Association, "Non-Compete Agreements: What Every Company and Employee Should Know," July 26, 2016.

¹⁸ B14-812, the Broadcast Industry Contracting Freedom Act of 2002, was approved unanimously by the Council and enacted as D.C. Law 14-258 on March 27, 2003; see DC Code §32-571 et seq.

¹⁹ Email to Committee from Mary Cavallaro, Chief Broadcast Officer, SAG-AFTRA, December 14, 2021 4:27 PM.

and Washington. The union points out that these states have some of the largest, most competitive, and valuable media markets in the country.

In testimony at the July 14, 2021 hearing, the Broadcasters Association told the Committee that their members wanted to prevent salespeople who had access to client lists and specialized sales practices from leaving to work for a competing business. Together with the Working Group, they also sought to prevent high-level executives and managerial employees from engaging in competition.²⁰ This would reverse two decades of District law. The Broadcasters Association objected to being treated differently under the revised legislation than executives in other industries; however, this differential treatment is not a function of the current bill but rather has been the status quo since 2003.

The Broadcasters Association noted in a post-hearing submission to the Committee that broadcast companies had left DC because of the burden of taxes and regulation.²¹ First, they noted that Fox 5 moved from DC to Maryland. However, the Committee learned that in that case, the state of Maryland incentivized the move with benefits valued at more than \$1.5 million.²² WTOP relocated in 2020 but said in 2018 that “property taxes were not a significant factor in WTOP’s decision, as they were fairly comparable in DC and Chevy Chase.”²³ Recently, television and media company Nexstar announced plans to expand their local television news offerings in the DC area, including with an office on Wisconsin Avenue.²⁴

Medical Specialists

Medical Specialists were a last-minute exception to the Total Ban in response to concerns raised by Committee members at the mark-up. As detailed in the Committee Report, the DC Hospital Association (the “Hospital Association”) objected to the Total Ban and Committee members entertained those concerns. Councilmember Grosso also said he planned to introduce a broad exception to the bill during the mark-up. However, he declined to do so after Chair Silverman indicated that she was willing to continue discussions with the Hospital Association and potentially address their concerns. Following the Committee’s approval of the Committee print, Councilmember Silverman did just that. As a result, at the December 1, 2020 Legislative Meeting, Councilmember Silverman introduced an Amendment in the Nature of a Substitute carving out

²⁰ Email to the Committee from Tim Nelson, Broadcasters Association, February 10, 2022 1:50 PM.

²¹ Email to the Committee from Tim Nelson, Broadcasters Association, July 16, 2021 12:46 PM.

²² Washington Business Journal, “Montgomery County finalizes incentive package to lure Fox 5 to Bethesda,” Nov. 27, 2019, available at: <https://www.bizjournals.com/washington/news/2019/11/27/montgomery-county-finalizes-incentive-package-to.html>

²³ The DC Line, “When DC broadcasters move to the suburbs, what’s lost?” September 7, 2018, available at: <https://thedcline.org/2018/09/07/when-dc-broadcasters-move-to-the-suburbs-whats-lost/>

²⁴ Washington Business Journal, “Nexstar to dramatically expand local TV news operations in D.C. area,” May 26 2022, available at: <https://www.bizjournals.com/washington/news/2022/05/26/nexstar-dc-news-now-wdcw-wdvm.html>.

“medical specialists” from the ban on non-compete agreements.²⁵ No other amendments were circulated or introduced.

Justin Palmer from the Hospital Association testified in support of retaining the Total Ban’s exception as drafted. In subsequent discussions about the “highly compensated employee” definition, the Hospital Association voiced its concern about the one-year limitation on non-compete agreements. The Committee’s proposed changes to the Total Ban should simplify hospitals’ application of the law. Previously, hospital employers would have to consider whether an employee met licensing, work experience, and income requirements before they could use a non-compete agreement with them. Government investigations would also have to engage in this inquiry. Under the revised legislation, these entities can start their analysis by considering the total compensation for a given employee to determine if the exception applies. Those meeting the threshold will then only be eligible for non-competes that last longer than one year if they meet the criteria for being a “medical specialist,” which is a licensed physician in a medical setting.

Long-Term Incentives

Businesses also asked the Council to allow non-competition requirements when used in long-term incentive plans, irrespective of the employee’s underlying salary or position in the company.²⁶ Long-term incentive plans (LTIPs) pay employees a combination of cash and equity compensation when they achieve a certain number of years of tenure or other benchmarks. However, some of these perks are only paid out if that employee does not engage in “competitive activity.”

The character of equity compensation varies according to the position, company, or industry offering it. It could mean the option to purchase stocks, either at full price or at a discounted rate, phantom shares issued before a company goes public, or an entitlement to stock upon achieving certain benchmarks (for ex., years of tenure). However, an exception from the definition of non-compete provision would create a dangerous loophole to the legislation’s otherwise broad protections. Employers could exploit this exception in employment agreements to intimidate employees into not working for a competitor, even if the contract in question was not valid. Employers that want to use non-competition terms in long-term incentive plans will be required to limit the use of those provisions to just those circumstances permitted by the legislation. In other scenarios, the employer can still provide those incentive awards to employees but must do so without restrictions on the employee’s ability to work for a competitor.

Councilmember Pinto’s Proposal

At the hearing, several witnesses mentioned alternative legislative language proposed by Councilmember Brooke Pinto, saying it better addressed their concerns than the bill as introduced. The alternative legislation was not introduced at the Council, but was circulated amongst business groups and shared with the Committee. It contained exceptions for conflicts of interest that were

²⁵ “Medical specialists” was defined as: “an individual who performs work in the District on behalf of an employer engaged primarily in the delivery of medical services and who: (A) Holds a license to practice medicine; (B) Is a physician; (C) Has completed a medical residency; and (D) Has total compensation of at least \$250,000 per year.”

²⁶ Email to the Committee from Janene Jackson, Holland & Knight, LLP, May 16, 2022 4:41 PM.

substantially similar to the draft language in the committee print of the legislation.²⁷ The proposal would allow non-compete agreements with any employee with access to certain valuable employer information earning \$80,000 a year or more, provided that no non-competes lasted more than 6 months.²⁸ It also retained the exception for medical specialists that appeared in the Total Ban. The draft bill also stipulated that employers pay employees “garden leave” for the entire post-employment period when the non-compete prevented them from working.²⁹ Employers using such agreements would be allowed to subtract from the post-employment payments any signing bonus that had been made to the employee. The proposal also included a narrowed definition of “employee” that aligned with the Working Group’s preferred definition. The Chairperson and Committee staff met with Councilmember Pinto and her staff on numerous occasions in 2021 and 2022 to consider the many complex and interrelated issues raised by witnesses and the Working Group.

Tech Workers

Testimony at the hearing was mixed on whether technology companies had unique needs for non-compete agreements. Some witnesses said that non-compete agreements were necessary to protect confidential or proprietary information from improper disclosure and to assure investors that new companies could succeed.³⁰ However, California has banned non-compete agreements since before the rise of Silicon Valley and, in 2015, Hawaii outlawed the use of non-competes specifically with tech workers. Dr. Starr’s own study showed that quarterly earnings and job mobility increased following Hawaii’s enactment of their ban. Ms. Kropper testified about her experience as an entry-level worker at a digital fundraising company where a non-compete agreement threatened her livelihood.

At the hearing, Councilmember Silverman commented that with the high cost of living in Bay Area, jurisdictions such as DC were becoming more appealing to tech workers who might otherwise flock to Silicon Valley. She explained that, for example, ice cream vendors locate in the middle of a beach in order to maximize access to customers. They do not locate on either end of the beach to distance from each other- they centrally locate to mutually thrive. She proposed that the District will have a more entrepreneurial environment, attracting small 1 to 5 person companies rather than appealing to corporate giants such as Amazon. She concluded by pointing out that the high risk at start-ups was not only felt by those working to recruit funders, but also workers who should not be restrained from pursuing their livelihood.

²⁷ The draft’s list of protected employer information was condensed into the final bill’s defined terms of “confidential employer information” and “proprietary employer information.”

²⁸ Email to the Committee from the office of Councilmember Brooke Pinto, September 23, 2021.

²⁹ For employees earning at least \$80,000 and up to \$150,000 annually, their former employer would be required to pay garden leave at 100 percent of the employee’s wages while employed. Employees earning \$150,000 or more would be required to pay at least \$150,000 per year, subject to other negotiated terms.

³⁰ See, for example, testimony of Kevin Wrege, DC Chamber of Commerce, and Laura Miller Brooks, Federal City Council.

COMMITTEE PRINT:

The Committee print makes two major substantive changes to the Total Ban. First, it allows employers to prohibit simultaneous employment that would create a bona fide conflict of interest. Second, it broadens the exception in which an employer and employee may agree to a non-compete provision, by permitting non-compete provisions for employees with annual compensation of at least \$250,000 with a maximum duration of one year. In addition, the Committee print adds new statutory definitions and other clarifying changes. B24-256 has been drafted to overwrite Title I of B23-494, leaving Titles II and III of the underlying law intact.

As described in detail below, the Committee print substantially changes the definitions section of the Total Ban by adding new defined terms and refining existing definitions. Again, the Committee sees this as an effort at compromise with impacted industry groups.

The definition of “broadcast employee” is adopted from the Broadcast Industry Contracting Freedom Act of 2002 which excludes salespeople from its definition. Broadcast industry employers of salespeople can ask those earning the minimum qualifying annual compensation to sign non-compete agreements without running afoul of the law.

The definition of “covered employee” has been updated to conform with other District laws such as the Universal Paid Leave Act. It considers anyone who spends more than 50 percent of their work time for their employer working in the District or not more than 50 percent of their working time in another jurisdiction.

“Compensation” is defined to encompass all of the cash or cash equivalent payments made directly to employee. In crafting this definition, the Committee considered input from the Broadcasters Association who explained that highly compensated employees often receive a mix of base salary, cash bonuses, equity & other long-term incentive grants, and commissions. Additionally, the definition calls out “cash incentives” and “restricted stock units” as being one of the types of monetary remuneration that will make up “compensation” for an employee, in recognition of employers using long-term incentives with their employees. The only value excluded from the definition are those employer costs incurred on behalf of employee, such as life insurance premiums, conference travel, meals, the value of which parties may not both know or which can be subjective.

The phrases “confidential employer information” and “proprietary employer information” are defined to distinguish information protected because it may otherwise violate individuals’ privacy (“confidential”) from information the employer has made their own by creating or modifying it (“proprietary”). The examples of “proprietary employer information” are taken directly from requests by members of the business community that they be able to keep their customer lists, price lists, trade secrets, and more from being disclosed by their employees.

As described earlier, the definition of a “conflict of commitment” was drafted in consultation with the Consortium and is limited to employment by postsecondary institutions. While the District of Columbia does license postsecondary institutions to operate within its jurisdiction, many of them are exempt from the requirement because they were federally chartered

predating Home Rule in DC. Therefore, to capture them all, the law says that a “higher education institution” is any postsecondary educational institution accredited by the United States Department of Education.

An “employee” is defined to include individuals hired but who have not yet begun work; it excludes partners, who are employers, and also incorporates the existing statutory exclusion for a “casual babysitter.” The clarification was suggested by Greater Washington Society of CPAs. It does not include anyone engaged as a volunteer, contractor, or board member.

The Working Group pointed out that the Total Ban did not specify the responsibilities of partners; this legislation clarifies that partners are “employers.”

Highly compensated employees will now include “medical specialists” who, under the Total Ban, were the only District employees with whom employers could use non-compete agreements. Expanding this exception will streamline enforcement since the investigating entities can look first to the individual’s compensation to determine if they are covered or not. Only then will they have to consider if the subset defined term “medical specialist” applies to the worker. The “minimum qualifying annual compensation” upon the law’s enactment is \$250,000 and beginning in January 2024, will be adjusted upward according to the Consumer Price Index as regionally anchored.

“Medical specialist” is updated from the Total Ban to mean a subcategory of highly compensated employees licensed and practicing as physicians in medical settings.

The Total Ban adopted the current administrative complaint process and Executive and Attorney General enforcement powers authorized by District labor laws. Revisions in this bill include the same range of applicable penalties and relief (\$350-\$2,000) that, in the original bill, applied for violations against covered employees and medical specialists. This legislation adds similar protections for highly compensated employees. However, employers of highly compensated employees will not be penalized if they rescind a job offer or negotiate non-compete terms a highly-compensated employee. Highly compensated employees are protected from adverse action by their employer only after they have already executed a non-compete agreement with their employer.

The Total Ban previously required the agency to issue rules to implement the law, including rules related to the preservation of employer records. This amendment clarifies that the agency rulemaking must also specifically address annual changes to the minimum qualifying compensation amount.

The introduced version of the legislation required the implementing agency to revise the mandatory “Notice of Hire” form that employers provide to their employees with language referencing the ban on non-compete agreements. This requirement was eliminated in the final draft.

II. LEGISLATIVE CHRONOLOGY

May 21, 2021	Introduced by Councilmember Silverman
June 1, 2021	Referred to Committee on Labor and Workforce Development
May 28, 2021	Notice of Intent to Act published in the District of Columbia Register
June 25, 2021	Notice of Public Hearing published in the District of Columbia Register
July 14, 2021	Public Hearing on B24-256
June 16, 2022	Consideration and vote on B24-256 by the Committee on Labor and Workforce Development

III. POSITION OF THE EXECUTIVE

In written testimony submitted to the Committee for the record, upon reviewing the bill as introduced, Department of Employment Services (DOES) Director Unique Morris-Hughes said changes to the Total Ban would require additional funding for her agency. For example, Director Morris-Hughes thought the agency would need to promote a current staff member to a Supervisory Program Analyst position and hire a new Program Analyst. The Director pointed out that the estimate might change if, during implementation, DOES determined that more than 200,000 District employees were impacted.

IV. HEARING RECORD AND SUMMARY OF TESTIMONY

The Committee on Labor and Workforce Development held a virtual public roundtable on July 14, 2021 at 1:00 pm. Councilmembers Silverman, Henderson, and Pinto attended the hearing. Testimony was received from 27 individuals and entities and is summarized below.

A. Hearing Testimony

Evan Starr, PhD, Associate Professor, University of Michigan School of Management and Organization

Dr. Starr said he has been researching non-competes for more than six years and also testified at the hearing on the initial bill. He addressed the concerns that employers could suffer a disadvantage if their employees can take valuable knowledge from one employer to a competitor and that workers at higher levels might benefit from signing non-competes when properly represented in the negotiations.

On the issue of worker impacts, he first said Hawaii banned non-competes in 2015 for their technology sector workers and as a result, job mobility rose among high tech workers by 11% and wages rose by 4%, demonstrating that those workers were being hurt by the use of non-competes.

Second, he said that, even though non-compete agreements are signed between two parties, they implicate third parties. Specifically, other firms that might want to hire workers who have signed non-competes, and the startups those employees might open are frustrated because workers who are otherwise qualified are bound by non-competes. He described a study by Liyan Shi which concluded that a ban is optimal for every employee, including executives, because it allows them to be more productive for society versus being inhibited by a non-compete agreement. Dr. Starr's own study considered what happened in labor markets with a lot of non-compete agreements and found slower moving labor market wages, fewer job offers, and lower job satisfaction, including effects on those who did not sign non-competes.

On employer impacts, Dr. Starr said the benefit of employees' moving (such as in California) attributed to rise of Silicon Valley and increased innovation with ideas free to be shared and developed. The availability of other legal protections like nondisclosure agreements or trade secrets call into question the need for non-compete agreements as well. He also mentioned the challenge of putting a threshold wage level for non-competes since it would need to change over time and for commissioned employees with fluctuating wages. Dr. Starr concluded by observing that employees already have a fiduciary duty to their employer and that many employers already utilize conflict of interest provisions, so the simultaneous employment issue can be addressed with existing tools.

Councilmember Pinto asked Dr. Starr about the fiduciary obligation employees have and how it applied to the existing law. He stated that, as a non-lawyer, he was only familiar with the general principle of the "duty of loyalty" that the employee could not work against their employer but that the existing non-compete law didn't interfere with it. She wanted to know if the duty of loyalty would apply where an employee went to work for an employer's direct competitor, such as in the testimony the Broadcasters provided. Dr. Starr indicated his understanding of the "duty of loyalty" restricts sabotage, not simultaneous employment. Councilmember Pinto contrasted the case of a driver working for both Uber and Lyft, where the employee likely isn't highly identifiable or privy to their employer's valuable sensitive information, with an employee working in the broadcast industry. Councilmember Henderson asked Dr. Starr at what income level non-competes would harm workers less. He said that research shows non-competes are used at all levels. Even though employers often want to use non-competes, he pointed out, they are also harmed by not being able to recruit workers and sometimes even go to court to argue that another business's non-compete is not enforceable.

Sandeep Vaheesan, Legal Director, Open Markets Institute

Mr. Vaheesan began by noting that his organization, OMI, was part of a coalition of labor and public interest groups that petitioned the Federal Trade Commission to ban non-compete agreements nationwide. Mr. Vaheesan's testimony focused on two specific issues: workers' general inability to bargain over non-compete clauses and the common justifications for these contracts, which he characterized as "specious."

He said that non-compete clauses are adhesive contracts presented to workers on a take it-or-leave it basis. Mr. Vaheesan said that only a small fraction of workers can, or believe they can, resist or

try to negotiate these contractual provisions (only ten percent tried to negotiate in one study, and only one in six tech workers in another study). In his view, workers also believe that questioning or objecting to a non-compete clause could lead to the revocation of a job offer or termination. Also, large chain companies may dominate an industry to disempower employees relative to their employers.

Mr. Vaheesan said that employers and their representatives assert that non-competes are necessary for protecting trade secrets, customer lists, and other valuable information, even though less restrictive alternatives exist to prevent unauthorized disclosures. Alternatives include copyright and trade-secret laws, in addition to targeted non-solicitation agreements to ensure that information is protected. If non-compete agreements are used with the sole purpose of retaining employees, Mr. Vaheesan believes there are other measures to ensure a loyal workforce, including regular raises, promotions, bonuses, and fair working conditions. Employers could also utilize fixed-term employment contracts, such as those commonly used in professional sports. He said that non-competes are overbroad because they restrain worker mobility with the aim of protecting employer information regardless of whether that information is outdated or trivial; yet non-competes are also too narrow or poorly targeted because they do not prevent unauthorized disclosures to competitors, one of the reasons employers use them.

Given these considerations, Mr. Vaheesan believes that the Council should not amend the current law on non-compete clauses to carve out additional workers. If amendments are made, any existing exemptions should be eliminated and the ban extended to all workers.

Councilmember Pinto asked for examples of employers that had utilized alternatives to non-compete agreements. He said that targeted bans based on income or occupation resulted in greater compensation for workers. When asked about whether his research showed how non-competes impacted workers at different levels of compensation, Mr. Vaheesan said that he had observed in others' research that non-competes reduce the wages of all workers, even CEOs.

Andrew Flagel, President and CEO, Consortium of Universities of the Washington Metropolitan Area

Dr. Flagel presented on behalf of nine DC colleges and universities, having over 10,000 employees serving over 300,000 students each year. He thanked the Committee Chairperson for introducing the measure and for postponing the law's applicability date, and commended Councilmember Pinto's input regarding potential revisions to the law.

Dr. Flagel stated that the Consortium's members strongly support outside employment opportunities for their employees. He referred to the proposed DC law as "the country's most extensive ban on both simultaneous and subsequent employment." He said that the law's text would bar the Consortium's member institutions from preventing and managing potential conflicts and, as a result, put at risk millions of dollars in federal and private research grants to those institutions.

Dr. Flagel urged the Committee to ensure that the law addressed conflict of interest and conflict of commitment concerns. He argued that universities must be able to preclude administrators, such

as coaches, admissions officers, and financial aid officers, from taking outside employment that creates ethical and equity concerns. For example, universities should be able to prohibit admissions officers from working as a consultant with wealthy students, which would disadvantage lower-income students.

Dr. Flagel highlighted the Consortium's concerns regarding tenured faculty. Under the existing law, he said DC would be the only place in the country where universities could not preclude faculty from being tenured at more than one university simultaneously. Tenured faculty have job security, competitive compensation, and limited oversight, he said, in exchange for the expectation of a full-time commitment to their institutions and their students. Dr. Flagel said that this was why the Consortium supported Councilmember Pinto's recommendation to fully exempt full-time faculty from the ban.

Betsy Philpott, Vice President & General Counsel, Washington Nationals

Ms. Philpott characterized her testimony as addressing unintended effects of the legislation for the sports industry.

She said it is "critically important that teams have the ability to limit some employees who have access to confidential, sensitive or proprietary business information from using such information while working simultaneously for a competing team." Ms. Philpott noted that the concern about simultaneous employment clauses was limited to a very small portion of the Nationals' employees. Ms. Philpott gave the example of a baseball scout employee who was hired to analyze the promise of various baseball players and worked within the team to make sure they had a roster of the best talent. If they can't restrain that employee, she said, then their business would be harmed and it would harm fans' perception of the industry. In addition, Major League Baseball teams are bound by collective bargaining agreements and must use model contracts from Major League Baseball that have been agreed to in those negotiations. In closing, Ms. Philpott requested that the Committee use the language Councilmember Pinto proposed.

Councilmember Pinto asked Ms. Philpott about the "duty of loyalty," and Ms. Philpott spoke about the harm that can result if someone with a second job unwittingly discloses or uses confidential or proprietary information. She also said that a cheating scandal can harm the entire sports industry. In response to Councilmember Henderson's question about whether industry or employee type exemptions were preferred, Ms. Philpott said later that the Nationals preferred a key employee exception.

Tim Nelson, Counsel, Maryland-DC-Delaware Broadcasters Association

According to Mr. Nelson, the MDCD Broadcasters Association's 35 local television and 175 radio station members, 14 physically located in DC, support what they believe was the policy rationale of the underlying bill: "to ensure that District employees are not overly limited in their ability to find work, to permit people to make a good living, including to work multiple jobs if desired and/or start their own business."

However, Mr. Nelson said that the Total Ban is broad and could have harmful impacts on his members' ability to deliver local news, journalism, emergency information, and other programming. Mr. Nelson explained that his organization and its members preferred the proposed legislative revisions drafted by Councilmember Pinto.

He maintained that businesses need the ability to enter into contractual arrangements with "key employees" to prevent them from simultaneously working for a competitor and/or from working for a direct competitor post-employment, provided that any such post-employment restriction is reasonable. Mr. Nelson gave the example of a television station's chief meteorologist in whom a station invests significant resources as a way to build their trusted brand and gain the loyalty of viewers, as well as advertisers. If that station can't ensure that its chief meteorologist won't simultaneously be working for one of its direct competitors, then the customer loyalty, and the revenues that flow from it, would be at risk. In addition, the station's incentive to invest in that on-air talent is dramatically decreased. Similarly, he said, top salespeople working for broadcasters are trained and provided with sales strategies and techniques that need to be protected as the employer's investment, not be susceptible of benefitting a competitor. In his testimony, Mr. Nelson recommended adopting Councilmember Pinto's language exempting any employee who "holds a position such that the employee is reasonably and readily publicly identifiable with the employer or the employer's branded products or services." Even with these changes, he said, the District's law would still be one of the most stringent in the country.

Councilmember Pinto asked him to speak about the harm to their business if a brand-recognizable radio or TV personality competes. Broadcasters invest a lot of resources in on-air employees to bring in viewers and listeners and generate advertising revenue. It dilutes the reason people are watching or listening if the employee isn't exclusive to their employer. He also said that the station invests in those employees in a community to build up the news brand, but they won't do it if they can't protect the person from going to a competitor on the weekend.

Councilmember Henderson asked whether there should be a general exception to the law or an industry-specific exception. Mr. Nelson said that he favors the Councilmember Pinto approach that would carve out as "key employees" those who have access to sensitive information in their roles.

Najah Farley, Senior Staff Attorney, National Employment Law Project

Ms. Farley supports limiting the proposed amendments to the original ban in order to "ensure that the amendments do not reduce the effectiveness of the non-compete law." She indicates that non-compete agreements have increased significantly in recent years, with research suggesting that nearly 1 in 5 workers in the United States are currently bound by a non-compete. Ms. Farley said that the rationales that employers use for non-competes do not apply to most workers. For example, most workers do not have access to trade secrets so this reason does not apply to them. Narrower types of agreements can be used with the workers who do have access to that protected information.

Ms. Farley noted the momentum across state legislatures to ban non-competes as well as by President Biden's recent Executive Order instructing the Federal Trade Commission to put regulatory restrictions on non-competes.

Ms. Farley said that the DC ban on non-competes is model legislation and one of the strongest in the country, containing protections for workers including notice provisions, damages to workers, private right of action, and civil penalties to deter violations. She said the current exceptions are broad enough that employers can restrict employees from using proprietary information as it "lists the various types of proprietary information and acknowledges that agreements that bar the usage of sensitive information and agreements that prelude competition when buying or selling a business is still lawful."

To the extent that the D.C. Council is persuaded to amend the law, Ms. Farley suggested the Council only clarify that a conflict-of-interest provision does not violate the non-compete law, rather than changing the applicability of the law. This would preserve the integrity of the law and ensure employers can protect proprietary information. She concluded that curbing the use of non-compete clauses is integral to the country's economic recovery.

Councilmember Silverman began her questions by asking Ms. Farley about employers' desire to use non-competes with "key employees" who have access to confidential or proprietary information, referring back to the Broadcasters Association or the Washington Nationals' testimony. Ms. Farley said that there may be situations where employers can apply reasonable limits on simultaneous employment, but not post-employment. Highly skilled employees should not be restricted from continuing to work in their field and continuing to use their expertise to enrich themselves and their families. Regarding the issue of garden leave, Ms. Farley said it could be complicated for employees to actually make sure they receive the garden leave payments. She also mentioned that prospective employers may be less likely to hire someone who has not used their relevant skills during the non-compete time frame than someone who has been able to use those skills more recently. She later said that this rationale applies to CEOs as well as lower-paid workers.

Councilmember Silverman asked her whether the garden leave idea was unfair. Ms. Farley said that asking people to stay out of the workplace restricts their ability to continue building skills in their field. Most workers increase their wages when they move to a new job; if the person is not in the workforce, they have less leverage to negotiate better wages in their next job. She referred back to the greater impact such practices would have on the regional economy.

Marcy Karin, public witness

Ms. Karin is an employment lawyer and professor employed by the University of the District of Columbia who has previously worked at multiple universities in faculty and staff positions. She believes that the Ban on Non-Compete Agreements Amendment Act of 2020 is critically important and should take effect *as enacted* as it would "significantly reduce the impact of non-compete provisions on the upward mobility, safety, and economic security of local workers." In response

to suggestions that the law be amended again, she said she feels it is premature to amend the law to create additional carve-outs from the general requirement banning non-compete provisions.

Ms. Karin believes a specific carve-out for faculty at postsecondary institutions would be a mistake with negative impacts on the academic market. In her experience, it is common for a faculty member to move across institutions, affiliate with multiple institutions, or take leave from one's home institution to participate in another valuable opportunity. She indicated that some colleagues "have visited at other universities, taken unpaid leaves to go into the government, worked at think tanks, non-profits, or other organizations while on sabbatical, been simultaneously affiliated with other (often) higher-ranked institutions, or participated in Fulbright and other prestigious fellowships." Ms. Karin said the Committee should "tread carefully in creating changes to the general ban" as "the law may end up suppressing the ability of academics and other staff to grow in their fields." Ms. Karin proposes that any new limitations to the law should be accompanied by additional protections "to accomplish the law's original goals." She referred to her written testimony, including limiting bona fide conflict-of-interest provisions to written policies; requiring such provisions to be reasonable in time, geography, and scope; and mandating their disclosure in job postings. She also suggested that employers and employees engage with each other to determine how to best manage conflicts, rather than employers unilaterally barring outside work. In conclusion, she noted that, as a tenured professor at UDC, she did not have the same risk of retaliation by her employer that non-tenured colleagues at non-public institutions might.

Councilmember Silverman asked about the potential harm that the Consortium witness, Dr. Flagel, said could result if a tenured professor were allowed to hold tenure at a second institution. Ms. Karin said that she was encouraged to hear that the conflict-of-interest situation described by Mr. Flagel is very limited. Faculty are careful to adhere to the grant requirements or their professional rules of conduct.

David Stephen, Political Director, Metropolitan Washington Council AFL-CIO

Mr. Stephen said the union is comprised of 150,000 union members affiliated with the D.C. Labor Council, including about 40,000 labor union members in Washington, DC, including food, commercial, healthcare, and office professionals everywhere on the income spectrum. The D.C. Labor Council supported the Ban on Non-Compete Agreements Amendment Act in 2020 because of its potential impact on economic opportunity, and they now also support "the equal application of this law and want to see it remain strong and simple for workers to understand." The simplest way to protect all workers is to ensure there is a broad ban, rather than carving out certain workers. He characterized the current amendment as a middle ground that balances business interest and the protection of their confidential or sensitive information while also protecting undue restraints and limitations on working people.

Councilmember Pinto asked whether paying an employee for six months while a non-compete was in place would help address concerns about unemployment. He said that for low-income people, they would be disadvantaged at getting a new job after spending six months out of the workforce. He said even earning \$80,000 in this job market it is still hard to secure employment. This is an undue burden on workers, and we should not create barriers to them get into a new job.

Councilmember Pinto also asked about conflicts of interest while someone is employed. Mr. Stephen supports the existing legislative language.

Kari Bedell, Executive Director, Greater Washington Society of CPAs

Ms. Bedell said the GWSCPA represents 3,500 financial professionals based in the metropolitan area. Their members are independent auditors, advisors, and accountants for non-profits, government, small businesses, and individuals. She said that the bill makes important strides toward correcting many of the consequences of the 2020 Act and asked for additional changes.

Because many local accounting firms maintain offices and licenses in multiple jurisdictions, Ms. Bedell supports amending the definition of employee to mean “an individual whose employment or prospective employment is or will be based in the District and who regularly spends or will spend a substantial amount of their working time in the District and not more than 50 percent of their working time in any particular state.” Ms. Bedell believes that the “bona fide conflict of interest” exception would not fully capture all potential conflicts or perceived conflicts, and therefore does not protect CPA independence. She supports amending exceptions to include “compliance with applicable statutory or common law, state or federal sponsored grants or contracts, conditions of a sponsored grant or award, applicable professional rules of conduct, ethical and regulatory obligations.”

She estimated that one-third of her association’s members used non-compete agreements.

Geneva Kropper, public witness

Ms. Kropper testified about her experience as a low-wage worker with a broad non-compete agreement. She does not support any changes to the existing law.

Councilmember Pinto asked Ms. Kropper what she thought about the garden leave requirement during a post-employment period of up to six months.

Ms. Kropper was concerned that the employer would not actually pay the money during that time frame. She emphasized that there is information asymmetry between employers and employees, with employers using exceptions in the law to mislead their employees about how non-competes work. This leads to employees giving up and not challenging their employer, and instead complying with even an invalid non-compete agreement. She said, if the threshold was pushed up to \$250,000, most workers with those disadvantages would be protected, but the threshold could not be as low as \$80,000 since workers in DC area earning that salary do not have enough power to negotiate fair terms.

Councilmember Silverman asked her about her experience with a non-compete agreement in DC. Ms. Kropper said she was working at a Democratic digital fundraising company at age 22, newly graduated from college, and signed it in onboarding process without awareness of what the non-compete was for. She began considering leaving for a new job after witnessing abusive treatment and harassment in the workplace. She believed the non-compete was enforceable, so she sought work in non-digital marketing. Upon notifying her employer of the new position, she was told it

would violate her non-compete agreement and believed the employer was wrong based on extensive research she conducted on her own. However, she believes the employer was trying to intimidate her to not leave for her new job.

She doesn't think employees should have to have nuanced understanding of non-compete law in order to protect against those unfair practices. The importance of the clear ban on non-competes can be undermined with exceptions to the law.

Kevin Wrege, DC Chamber of Commerce

Mr. Wrege appeared on behalf of DC Chamber of Commerce CEO Angela Franco. He began by saying that when employers thrive then their employees will thrive as well. He noted that four out of five members of the DC Chamber are small businesses. He thanked Councilmember Silverman for revisiting the original bill and prioritizing holding the hearing.

Mr. Wrege said the bill began to address several issues triggered by the Total Ban, but did not go far enough. He believes that most employee conflicts of interest do not result in the types of conflicts described in the draft legislation such as unethical business behavior, violations of laws, or professional standards. Mr. Wrege favored the proposed legislative language drafted by Councilmember Pinto, saying it was narrowly tailored to preserve important protections in the law such as an employee's ability to pursue simultaneous work in an unrelated field. For example, the non-competes that employers could use would be limited to six months and require payment to the employee.

Mr. Wrege said that non-competes "are the only truly effective way to prevent an employee from unwittingly considering, applying or disclosing confidential information obtained through work with a competing firm" as opposed to nondisclosure agreements. An employee who was working for two employers using non-disclosures agreements could not fulfill their obligations to either employer; therefore, a non-compete agreement could avoid this situation arising. He said the law would harm the region because DC employers would not be able to use non-competes to protect against having employees poached by employers in other states.

Responding to questions from Councilmember Pinto, Mr. Wrege said the Chamber did not want to restrict low-wage workers' ability to have a second job. However, tech workers and salespeople might have access to proprietary information that those workers could unwittingly disclose. In response to Councilmember Silverman's questions about non-disclosure agreements, Mr. Wrege said that Virginia and Maryland have limited restrictions on non-competes and so the DC businesses were at a disadvantage. He said his and other businesses' recommendations to Councilmember Pinto were circumspect and did not go as far as some members of the group wanted.

Bernie Brill, Executive Director, Sheet Metal and Air Conditioning Contractors' National Association (SMACNA) Mid-Atlantic Chapter

Mr. Brill said his organization represents 50 union signatory contractors. Mr. Brill encourages the Committee to reconsider the ban on non-compete agreements. He made the argument that non-compete contracts help protect proprietary information, databases, and customer lists. He stated that a complete ban would discourage businesses from choosing to locate or stay in the District. Non-competes are used with senior-level managers and executives because employers want to prevent those employees from leaving to work for a direct competitor. He maintained that allowing a ban on non-competes could threaten businesses by allowing an employee to transfer key information and company secrets without recourse.

Mr. Brill said the District government should not interfere with the use of non-compete agreements by certain businesses. He believes that employees who do not want to sign a non-compete agreement can refuse to sign them and seek employment elsewhere. Responding to questions from Councilmember Pinto, Mr. Brill said that building trade employers can spend \$100,000 per apprentice to get them to the level of skill they need them. He said that these employers retain workers with higher wages and benefits to incentivize them staying with one employer for decades. He said that in his industry senior management are usually asked to sign non-compete agreements.

Janene Jackson, Partner, Holland & Knight on behalf of Opportunity DC

Ms. Jackson believes that as drafted, the bill “increases employer and employee confusion regarding an employer’s ability to safeguard its highly competitive and confidential information from disclosure and the restrictions employers can place on their employees” in situations where employees can work for competing companies. She said that the bill’s language was vague and failed to clarify under what circumstances simultaneous employment was allowed. She was also concerned that it was not clear how an employer can protect their confidential and proprietary information. She noted that the DC law approach differs from California’s ban, which only addresses post-employment competition.

She recommends that the Council amend the ban on non-competes by allowing reasonable limitations on simultaneous employment when the employee has access to confidential information and by allowing employers to use post-employment non-compete agreements for employees earning over a certain income threshold when the employer agrees to pay the employee for the period they are not working. Her written testimony included draft legislative text and she supported the amendments drafted by Councilmember Pinto.

Responding to questions from Councilmember Pinto, Ms. Jackson said that an employee could use an employer’s information in their second job without ever disclosing it. Therefore, she said a non-disclosure agreement would only protect against disclosing information in a detrimental manner.

Councilmember Pinto asked Ms. Jackson to address employer’s need for clarity and the time required to implement the changes. Ms. Jackson said HR policies are not developed overnight and that after the law is enacted, employers will need time to draft policies, adapt their materials, and implement their practices accordingly.

Daniel Essrow, Organizer, Nonprofit Professional Employees Union

Mr. Essrow supports a clear and simple ban on non-compete agreements in DC. He said that a key part of his job is to educate workers, including highly educated and highly paid individuals, about their rights in the workplace. He expressed his concern about attempts to “water down” DC’s ban on non-compete agreements before it goes into effect. Mr. Essrow believes the complicated thresholds proposed by others should be rejected in favor of clear and universal rules. Mr. Essrow pointed out that managers and supervisors cannot be in unions; in his experience, employers use that rule to exclude large categories of workers from the union undercutting worker leverage in that workplace. He said that employees should be encouraged to grow and improve in their field rather than being tied to a particular employer where they might not be growing. He said that even in a healthy economy, leaving a job is a fraught and difficult choice. For a worker bound by a non-compete agreement, quitting without the ability to apply their skills at another job in the same industry is nearly impossible. He said that until every workplace in the country has a union, employers will continue to hold most of the cards in setting the terms and conditions of employment. Workers need to be afforded simple and enforceable rules, without undue exceptions, so they aren’t forced to sign away their rights just to secure a job.

When Councilmember Pinto asked Mr. Essrow about post-employment non-competes, he said that too many exceptions to the law will make it too hard for employees to understand their rights. In his experience, employers use non-disclosure agreements. But other employers can just fire an employee if they are undercutting their employer.

Daniel Perez, Vice President of Organizing, Nonprofit Professional Employees Union

Mr. Perez testified the ban on non-competes should be preserved because these agreements negatively impact workers and the economy at large. Mr. Perez said that non-compete harm workers by making workers sign away their right to switch jobs and pursue better opportunities.

Mr. Perez outlined that non-compete agreements reduce wages and economic mobility, disproportionately harm already marginalized workers, and there are good alternatives available. He cited studies that showed workers were less satisfied in jobs where they had signed non-compete agreements; where they were banned, wages for minority groups and women increased. Binding workers is bad for wages but also bad for workers in hostile workplaces due to sexual harassment, bullying, or hazardous conditions. He rejected the idea that non-compete agreements were the only way employers could protect their confidential information; employers can offer better wages and working conditions to their employees. Mr. Perez said that preventing employees from leaving jobs is a short-sighted solution and one that erodes working standards.

Keisha Davis, Human Resource Manager, Enlightened, Inc.

Ms. Davis read the testimony of Antwayne Ford, President and CEO of Enlightened, Inc. Ms. Davis testified that they did not support a complete ban on non-compete agreements.

She said that employees can willingly or unwillingly share proprietary, competitive, and/or confidential information with competitors and harm small businesses, such as in a situation where

a larger business offers higher pay to obtain a competitive advantage. Ms. Davis supports clarifying the law further to prevent current and former employees from accessing, selling, or using employer information particularly pricing lists and other intellectual property.

Ms. Davis stated that a full ban on non-compete agreements would trigger unethical business practices and create chaotic legal issues. She believes that employees should not be able to work for competing employers at the same time. As an example, she shared that current employees could use their ongoing access to confidential information to benefit their second employers. Ms. Davis supports adding an exception to permit restrictions against employees performing work for or providing services to a competing employer simultaneously and explicitly excluding non-soliciting contracts. She supported reasonable restrictions on post-employment non-competes for employees earning under \$80,000. She supported the parameters of Councilmember Pinto's proposal.

Linwood Jolly, Vice President, Business Development, Codice

Mr. Jolly read the testimony of Dash Kirdena, CEO of Codice. He said that the Total Ban presented grave challenges for businesses in the District who are always competing with businesses operating in Virginia and Maryland. He believes that the amendment "is an important step to striking a balance for District employees and employers."

Mr. Jolly said that a blanket prohibition on non-compete agreements poses serious challenges to small companies that rely on industry-specific expertise in upper management. He emphasized the point that allowing simultaneous employment for upper-level managerial employees could harm businesses, especially small businesses. In addition, he said that "the current Ban on Non-Competes would allow upper management employees to perform work for direct competitors immediately following the end of employment with a business. High level employees may find themselves in a situation where they subconsciously rely on intimate knowledge of a former employer's technology to give their new current employer an unfair advantage in the marketplace.

He said the ban disadvantages subcontractors relative to larger enterprises because subcontractor agreements may contain prohibitions against competing with the prime contractor. He said the proposed amendment did not address his concerns.

When asked by Councilmember Silverman if he had signed a non-compete agreement, Mr. Jolly said "yes" but because of the high level of his position, he was not concerned about the impact of that agreement on him.

Laura Miller Brooks, Senior Associate, Federal City Council

Ms. Miller Brooks testified against the ban on non-compete agreements. She has a background in tech startups, including the Lime transit company. She stated that the ban could give companies a reason to not hire in the District. Tech startups provide unique opportunities to workers but the ban could result in these businesses not locating in Washington, DC. Ms. Miller Brooks said she signed a non-compete when she worked for Lime during a crowded market. She said how they competed was more important than the services they offered. In the early stages of her own startup, she had

to assure investors that the idea could be brought to fruition without other businesses interfering; therefore, using a non-compete agreement could protect the startup against another company that was able to pay high salaries. DC should not have more onerous regulations than California, Austin, New York, Miami, Virginia, or Maryland.

Justin Palmer, DC Hospital Association, Vice President for Public Policy and External Affairs.

Mr. Palmer said his association represents employers of over 30,000 associates. He said DCHA supports the clarification in the present legislative proposal. He also mentioned the limited allowance for non-compete agreements with medical specialists that was already in the law and which he said should remain unchanged.

B. Written Testimony

Stacy Burnette, Senior Director, Government & Regulatory Affairs, Comcast, wrote specifically about the need to use non-compete agreements with uniquely-qualified, highly-educated, and highly-compensated employees of Comcast, such as news producers, reporters, correspondents, and/or on-air hosts. For example, the bill would permit “Chuck Todd (on-air host of Meet the Press) to simultaneously work as an on-air host of a CBS News program.”

In a joint submission, ***Angela Franco, President and CEO of the DC Chamber of Commerce, and Glenn Spencer, Senior Vice President of the Employment Policy Division of the US Chamber of Commerce,*** wrote asking the Council to clarify the underlying law regarding long-term incentive awards. They said that the Committee’s Development report on Law 23-209 (dated Nov. 19, 2020) noted that non-compete agreements are “usually... 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 employment” but found the existing statutory language ambiguous and asked for changes to clarify that the law would not apply to long-term incentives that are forfeited if an employee joins a competitor.

Marta Zaniwski, Vice President, State Regulatory and Legislative Affairs, American Institute of Certified Public Accountants

Ms. Zaniwski asked that the Committee amend the current Act to “help protect all businesses in the District of Columbia and make it a competitive place to do commerce.” She wanted stronger protection of sensitive and private information, including client and customer lists, research grants, pricing lists, intellectual property, and trade secrets. She said non-competes are necessary to protect a business’s economic advantage and an employer’s investments.

She was concerned that the legislation, as drafted, “only addresses an employee’s disputes that cause the employer’s business to operate in either an ‘unethical manner,’ or infringe upon applicable laws or rules and it does not preserve a firm’s ability to protect itself against a well-placed employee accessing confidential, sensitive, or proprietary business information and seeking to work simultaneously, or subsequently for a competing firm.” She stated that AICPA supported the draft amendment circulated by Councilmember Pinto.

Melissa Bradley, Founder and Managing Partner, 1863 Ventures

Ms. Bradley testified in opposition to the noncompete ban. She believes that the ban is a barrier to minority entrepreneurship, it could increase inequities in venture capital, start-ups, and wealth, and it undermines the very goal that the Council and minority activists are trying to achieve. She also thinks that “investors will not take the chance on a DC-based startup knowing full well that the startup’s team could jump ship to a competitor spilling all of the startup’s valuable intelligence.”

Rob Stewart, Former Managing Partner, JBG Smith

Mr. Stewart opposed the ban. He said that the larger regional context of DC’s economy made the existing ban harmful to the city’s economic competitiveness and to the economic prospects of the people the DC Council is intending to help. Mr. Stewart worried that businesses would prefer to operate in Tysons Corner or Bethesda rather than the District. He said that “this ban means that a rival company in the suburbs could orchestrate a one-sided poach of their software programmers, mechanical engineers or paralegals.”

Tim O’Shaughnessy, President and CEO, Graham Holdings

Mr. O’Shaughnessy opposed the overall ban on non-compete agreements in the existing law. He said that an entrepreneur would be less likely to start a company in the District if a competitor in Arlington could “orchestrate a one-sided poach of their software programmers.” He reiterated similar points that Mr. Stewart had made.

Greater Washington Board of Trade submitted comments supporting some of Councilmember Pinto’s proposed changes to the introduced bill. They said those changes would strike a balance between allowing DC employees to enjoy the benefits of a competitive job market and making sure employers can minimize the risk of competition. They sought an exception for the use of noncompete agreements with employees who earn more than \$80,000 a year and noted the importance of protecting employee access to confidential, sensitive, or proprietary business information. They also suggested further post-employment restrictions for employees with access to sensitive data.

Wayne McOwen, Executive Director, District of Columbia Insurance Federation

Mr. McOwen’s written comments applauded the initiative of Councilmember Silverman to revise and improve the provisions of the total ban. He suggested a provision that would protect employers against employees with confidential sensitive or proprietary business information simultaneously or subsequently working for a competitor. He supported a salary threshold to identify employees who had more access to proprietary information. Mr. McOwen also asked the committee to consider setting a “window of protection,” which would be a time when the prohibition of the noncompete would apply after employment.

VI. IMPACT ON EXISTING LAW

This bill limits the application of the Total Ban in two ways. First, it allows employers to use non-compete agreements with “highly compensated employees” (anyone earning \$250,000

total compensation). Previously, only employers of “medical specialists” earning \$250,000 or more were allowed to use non-compete agreements. Therefore, more employees in the District will be excepted than under the Total Ban as enacted in 2021. Second, the present legislation clarifies that. Additionally, this legislation specifies the types of policies employers may use to manage potential conflicts of interest. By specifying these, the law simplifies for employers, employees, and the enforcement agency which employer policies are permitted.

The administrative complaint investigation and enforcement provisions of the law remain unchanged.

VII. FISCAL IMPACT STATEMENT

The attached fiscal impact statement (FIS) issued by the District’s Chief Financial Officer states that funds are sufficient in the fiscal year 2022 budget and fiscal year 2023 through fiscal year 2026 budget and financial plan to implement the bill. The Department of Employment Services’(DOES) Office of Wage Hour Compliance will be responsible for implementing the current Ban on Non-compete Agreements, including writing rules, promoting the bill’s protections to employees, and investigating complaints received about employers violating the non-compete ban. The FIS states that the bill’s clarifications and amendments to the ban are not expected to increase the anticipated workload for the DOES Office of Wage Hour Compliance.

VIII. SECTION BY SECTION ANALYSIS

Section 2 contains most of the title’s provisions.

Subsection 2(a) of the legislation wholly rewrites Title I of Law 24-256, the “Non-Compete Clarification Amendment Act of 2022.” The law will apply as of October 1, 2022, which is specified within substantive sections below. Sections 101 through 104 within Title I specify as follows:

Section 101 defines terms used in the bill.

Section 102 prohibits non-compete provisions for covered employees. It bars employers from requiring or requesting an employee to sign such agreement or abide by a workplace policy that includes a non-compete provision. It also bars employers from retaliating against covered employees.

Section 103 details requirements for non-compete provisions with highly compensated employees to be valid and enforceable, including that the geographic area, type of competitive work. In addition, a duration of twelve months or less must be stated in the agreement for most employees; those working in medical fields can be asked to sign such agreements up lasting to two years. This section bars retaliation against these employees. The employer is required to provide the non-compete provision to the employee in writing at least 14 days before the start of work or, for already-employed workers, at least 14 days before the employee must execute the agreement.

Section 103a. Disclosures to employees. This section specifies that employers using conflict-of-interest policies which restrict employees’ ability to hold a second job must provide

those policies to employees. In addition, a highly compensated employee's employer must provide a notice to the employee stating that they are excepted from the non-compete ban.

Section 104. The section details what relief and penalties the District and employees are entitled to recover when an employer violates this law.

Section 104a. The section states that this title does not supersede a collective bargaining agreement.

Section 104b. The section provides rules of construction explaining how the title interacts with other laws.

Section 105. The section directs the Mayor to issue rules implementing the title, specifically addressing yearly changes to the minimum qualifying annual compensation and with respect to the records that employers are required to maintain by law.

Subsection 2 (b) amends section 302 to apply as of October 1, 2022.

Section 3 specifies the fiscal impact statement.

Section 4 provides the effective date of the legislation.

IX. COMMITTEE ACTION

The Committee on Labor and Workforce Development convened at 10:30 a.m. on June 16, 2022 to consider and vote on B24-256. Committee Chairperson Silverman called to order the Labor Committee to order at 10:34 am. She noted that the meeting was being held via the Zoom virtual platform and broadcast on Channel 13 and Facebook. She noted that the presence of herself, Councilmembers Henderson (At-Large), Robert White (At-Large), and Trayon White (Ward 8) made a quorum of the Committee (to be joined by the final Committee member, Janeese Lewis George (Ward 4)) and moved to the meeting's only agenda item, consideration and vote on B24-256, the Non-Compete Clarification Amendment Act of 2022.

She explained that she introduced this bill in May 2021 and held a public hearing July 14, 2021, to clarify and revise DC law 23-209, the Ban on Non-Compete Agreements Amendment Act of 2020. That law generally prohibits all non-compete agreements, while the present Committee print would create an exception for "highly compensated employees" and limitations on holding a second job.

The Chairperson explained that a non-compete agreement was a contract between an employer and employee saying that the employee would not work for a competing business after leaving their current job. They are "restraints on the economy" and the law limits their enforceability. She noted that they are not only used for CEOs but were even used until recently by sandwich shop Jimmy John's to prevent their sandwich makers from going to work for a competitor. Non-competes are much more common than the Chairperson initially thought, and she mentioned hearing witnesses in entry-level and technology jobs who had been asked to sign them. Even if the agreement is not legally enforceable in court, she explained, a worker will often abide by it because they are intimidated that their employer will sue them. For these reasons, the Council

passed B23-494 banning the use of non-compete agreements with only a narrow exception for highly paid doctors.

Since then, the Chairperson has spent more than a year talking with employers who raised concerns about the ban. Employers formed a working group which discussed their concerns at length with the Chairperson and her staff. She thanked Mondie Kumbula-Fraser, Andrew Flagel, Janene Jackson, Kevin Wrege, and Natalie Ludaway for their work. The Chairperson said, “we’re not in complete agreement” but that the bill before the committee generally addressed the Group’s concerns, and that is what compromise is all about.

The Chairperson explained that the committee print addressed two concerns. The first involved workers holding more than one job at the same time. Businesses raised concerns about protecting trade secrets and being able to have conflict of interest standards in their workplace. Therefore, the print expressly allows certain conflict of interest and conflict of commitment policies. The Councilmember said these changes will resolve these issues for employers. She noted that she spoke with the Consortium of Universities of the Washington Metropolitan Area the previous evening and they were satisfied.

The Chairperson turned to the second issue, regarding where to draw a line for employers who want to use non-compete agreements. She said that the solution she proposed was arrived at after constructive engagement with the working group. She also mentioned that the Office of the Attorney General had written a letter of support, which the Chairperson had circulated to her Council colleagues. The Chairperson thanked the Office of the Attorney General for the assistance they provided to the Committee while the non-compete legislation was considered. Chairperson Silverman then turned to colleagues to ask if they wanted to make any statements or ask any questions.

Councilmember Henderson thanked the Chairperson and staff for their work on the bill. She said that she appreciated the Chair’s commitment to home in on non-compete laws which have significant implications on worker wages, retention, and overall economic health. Councilmember Henderson said that she attended the hearing on the legislation and heard the testimony about the potential impacts of the underlying bill. She said she is pleased that much of that feedback was considered, and that she would be voting yes. Councilmember Henderson then said that she had a couple reservations she wanted to be addressed as the bill moved to a full Council vote. She noted that the broadcast industry was excluded from the exception for “highly compensated employees,” and she understood this to maintain a 2002 law. She said the 2002 law was advocated for by SAG-AFTRA to protect on-air talent but noted that the wage ceiling for on-air talent in the District is presently less than \$120,000. Thus, she said, the functional impact of this policy choice would be to the benefit of highly-compensated executives earning upwards of \$250,000 in the broadcast industry but not for other executive employees earning at that high level. If we want to protect on-air talent, she explained, maybe the Council can carve them out so highly paid employees aren’t included.

The Chairperson said the Committee has worked with the Maryland, D.C., and Delaware Broadcasters Association to understand its concerns but has been giving it additional thought after

speaking with Councilmember Henderson. She asked Councilmember Henderson to clarify her concern about broadcast employees. Henderson stated that she wants to protect on-air employees because very few of them earn above the \$250,000 threshold in this legislation, but they are in a different category than a vice president type role. Chairperson Silverman asked if that clarification would only apply to executives, and Councilmember Henderson said yes but noted there was an existing exclusion for salespeople in the 2002 Broadcast Industry Contracting Freedom Act.¹

The Chairperson said her office would work with Councilmember Henderson to address the concerns she raised as the Council moved to first reading. Chairperson Silverman said she thought she agreed with Councilmember Henderson about the need for a ban with on-air talent. Councilmember Silverman said the concern they were discussing involved the so-called “secret sauce,” but for on-air talent, “the secret sauce is them.” She said the purpose was to not to allow employers to restrict a person’s personal brand, giving the example of Jim Vance, the beloved DC television news personality saying he had the “Jim Vance brand.” The Chairperson noted that Councilmember Janeese Lewis-George (Ward 4) had joined the meeting and whose presence completed the Committee. There was no further discussion.

The Chairperson moved to a vote. Without objection, Chairperson moved the committee print and report for B24-256, the Non-Compete Clarification Amendment Act of 2022, with leave to make technical and conforming changes. The vote was conducted by voice vote, with all voting in favor and no objections. The motion passed unanimously. The Chairperson thanked her colleagues for making time for the vote, thanked staff members from her own and her colleagues’ offices, and concluded the meeting. The members voted as follows:

Vote

Chairperson Elissa Silverman	Yes
Councilmember Christina Henderson	Yes
Councilmember Janeese Lewis-George	Yes
Councilmember Robert C. White	Yes
Councilmember Trayon White, Sr.	Yes

Thus, the committee print and accompanying report were passed, with the Members present voting “yes.”

The committee meeting adjourned at 10:56 a.m.

X. ATTACHMENTS

1. B24-256 as introduced
2. Notice of Intent to Act
3. Public hearing notice for B24-256
4. Public hearing agenda and witness list for the July 14, 2021 hearing.

5. Public hearing witness testimony and additional statements and documents submitted for the record
6. Fiscal Impact Statement
7. Legal Sufficiency Determination
8. Racial Equity Impact Assessment
9. Comparative Print of B24-256
10. Committee Print of B24-256

Attachment 1
B24-256 as introduced



Councilmember Elissa Silverman

A BILL

IN THE COUNCIL OF THE DISTRICT OF COLUMBIA

To amend the Ban on Non-Compete Agreements Amendment Act of 2020 to clarify that bona fide conflict of interest provisions in workplace policies do not violate the law's restrictions on the use of non-compete provisions; to clarify that employers may bar an employee's use, in addition to the disclosure, of confidential, proprietary, or sensitive information, client lists, customer lists, or trade secrets during or after the employee's employment for the employer; and to amend the Minimum Wage Revision Act of 1992 to modify the existing Notice of Hire form to inform employees of the Ban on Non-Compete Agreements Amendment Act of 2020.

BE IT ENACTED BY THE COUNCIL OF THE DISTRICT OF COLUMBIA, That this act may be cited as the "Non-Compete Conflict of Interest Clarification Amendment Act of 2021".

Sec. 2. The Ban on Non-Compete Agreements Amendment Act of 2020, effective March 16, 2021 (D.C. Law 23-209; D.C. Official Code § 32-581.01 *et seq.*) is amended as follows:

(a) Section 101 is (D.C. Official Code 32-581.01) is amended as follows:

(1) A new paragraph (1A) is added to read as follows:

“(1A) “Bona fide conflict of interest provision” means an otherwise lawful written provision or workplace policy that bars an employee from accepting money or a thing of value from a person during the employee's employment with the employer because the employer reasonably believes the employee's acceptance of money or a thing of value from the person will cause the employer to:

32 “(A) Conduct its business in an unethical manner; or

33 “(B) Violate applicable local, state, or federal laws or rules.”.

34 (3) Paragraph (5) is amended as follows:

35 (A) Subparagraph (A) is amended as follows:

36 (i) Strike the word “disclosing” and insert the phrase “disclosing or
37 using” in its place.

38 (ii) Strike the phrase “; or” and insert a semicolon in its place.

39 (B) Subparagraph (B) is amended by striking the period and adding the
40 phrase “; or” in its place.

41 (C) A new subparagraph (C) is added to read as follows:

42 “(C) A bona fide conflict of interest provision.”.

43 (b) Section 102(c) (D.C. Official Code § 32-581.02(c)) is amended by striking the phrase
44 “No employer” and inserting the phrase “With the exception of a bona fide conflict of interest
45 provision, no employer” in its place.

46 (2) Subsection (d) is amended as follows:

47 (A) Paragraph (3)(D) is amended by striking the phrase “; or” and
48 inserting a semicolon in its place.

49 (B) Paragraph (4) is amended by striking the period and inserting the
50 phrase “; or” in its place.

51 (C) A new paragraph (5) is added to read as follows:

52 “(5) Asking the employer whether the employee’s acceptance of money or a thing
53 of value from another person during or after the employee’s employment for the employer
54 violates the employer’s workplace policy.”

55 Sec. 2. Section 9 of the Minimum Wage Revision Act of 1992, effective (D.C. Law 9-
56 248; D.C. Official Code § 32-1008(c)), is amended by adding a new paragraph (4B) to read as
57 follows:

58 “(4B) The statement required by section 102(e)(2) of the Ban on Non-Compete
59 Agreements Amendment Act of 2020, effective March 16, 2021 (D.C. Law 23-209; D.C.
60 Official Code § 32-581.02(e)(2)).

61 Sec. 3. Fiscal impact statement.

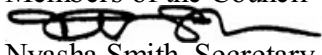
62 The Council adopts the fiscal impact statement in the committee report as the fiscal
63 impact statement required by section 4a of the General Legislative Procedures Act of 1975,
64 approved October 16, 2006 (120 Stat. 2038; D.C. Official Code § 1-301.47a).

65 Sec. 4. Effective date.

66 This act shall take effect following approval by the Mayor (or in the event of veto by the
67 Mayor, action by the Council to override the veto), a 30-day period of congressional review as
68 provided in section 602(c)(1) of the District of Columbia Home Rule Act, approved December
69 24, 1973 (87 Stat. 813; D.C. Official Code § 1-206.02(c)(1)), and publication in the District of
70 Columbia Register.

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 : Monday, May 24, 2021
Subject : Referral of Proposed Legislation

Notice is given that the attached proposed legislation was introduced in the Office of the Secretary on Friday, May 21, 2021. Copies are available in Room 10, the Legislative Services Division.

TITLE: "Non-Compete Conflict of Interest Clarification Amendment Act of 2021",
B24-0256

INTRODUCED BY: Councilmember Silverman

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

Attachment

cc: General Counsel
Budget Director
Legislative Services

Attachment 2

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 <http://www.dccouncil.us>.

COUNCIL OF THE DISTRICT OF COLUMBIA

PROPOSED LEGISLATION

B24-0250 Facility Allowance for Child Development Centers Amendment Act of 2021

Intro. 05-18-2021 by Councilmembers Henderson, Cheh, Nadeau, Silverman, R. White, Bonds, and Pinto and referred to the Committee of the Whole

B24-0251 Contractor Indemnity Act of 2021

Intro. 05-19-2021 by Councilmembers Bonds, Cheh, Nadeau, and Pinto and referred to the Committee of the Whole with comments from the Committee on Business and Economic Development

B24-0252 Subcontractor Prompt Payment Amendment Act of 2021

Intro. 05-19-2021 by Councilmembers Bonds, Cheh, and Nadeau and referred to the Committee of the Whole with comments from the Committee on Business and Economic Development

B24-0253 Protecting Children and Vulnerable Adults Through Mandatory Reporting Amendment Act of 2021

Intro. 05-20-2021 by Chairman Mendelson and referred to the Committee on

Judiciary and Public Safety with comments from the Committee on Government Operations and Facilities

B24-0254 School Police Incident Oversight and Accountability Amendment Act of 2021

Intro. 05-20-2021 by Councilmembers Henderson, Pinto, McDuffie, Lewis George, and R. White and referred sequentially to the Committee on Judiciary and Public Safety, and Committee of the Whole

B24-0256 Non-Compete Conflict of Interest Clarification Amendment Act of 2021

Intro. 05-21-2021 by Councilmember Silverman and referred to the Committee on Labor and Workforce Development

PR24-0250 Electric Vehicle Public Infrastructure Expansion Approval Resolution of 2021

Intro. 05-18-2021 by Chairman Mendelson and referred to the Committee on Transportation and the Environment

PR24-0251 Commission on Out of School Time Grants and Youth Outcomes Margaret Siegel Confirmation Resolution of 2021

Intro. 05-20-2021 by Chairman Mendelson and referred to the Committee of the Whole

PR24-0252 Commission on Out of School Time Grants and Youth Outcomes Dr. Kenneth Taylor Confirmation Resolution of 2021

Intro. 05-20-2021 by Chairman Mendelson and referred to the Committee of the Whole

PR24-0253 Commission on Out of School Time Grants and Youth Outcomes Matthews Hanson Confirmation Resolution of 2021

Intro. 05-20-2021 by Chairman Mendelson and referred to the Committee of the Whole

PR24-0254 Commission on Out of School Time Grants and Youth Outcomes Rev. Gary Hill
Confirmation Resolution of 2021

Intro. 05-20-2021 by Chairman Mendelson and referred to the Committee of the
Whole

PR24-0255 Commission on Out of School Time Grants and Youth Outcomes Walter
Peacock Confirmation Resolution of 2021

Intro. 05-20-2021 by Chairman Mendelson and referred to the Committee of the
Whole

Attachment 3

**Public hearing notice for B24-
256**

**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

B24-256, the Non-Compete Conflict of Interest Clarification Amendment Act of 2021

**Wednesday, July 14, 2021
1:00 pm**

**Virtual hearing via the Zoom platform
Broadcast on DC Cable Channel 13 and online at www.dccouncil.us**

Councilmember Elissa Silverman, Chairperson of the Committee on Labor and Workforce Development, announces a public hearing before the Committee on B24-256, the Non-Compete Conflict of Interest Clarification Amendment Act of 2021. The bill will amend the Ban on Non-Compete Agreements Amendment Act of 2020 to clarify that bona fide conflict of interest provisions in workplace policies or in contracts do not constitute non-compete provisions in violation of the law. It will also clarify that employers may bar an employee's use, in addition to the disclosure, of confidential, proprietary, or sensitive information client lists, customer lists, or trade secrets during or after the employee's employment for the employer, and amend the existing, legally required Notice of Hire form to ensure employees know about the law.

Public witnesses may use their phone or computer to participate in this virtual hearing. Those who wish to testify must sign up on the form located at: <https://forms.gle/msTwb3AQPAWkwUdu7> by 5:00 p.m. on Monday, July 12, 2021 and provide their name, email address, telephone number, organizational affiliation and job title (if any), as well as the language of oral interpretation they require (if any). Witnesses who require language interpretation, including American Sign Language, are requested to inform the Labor Committee of the need as soon as possible, but no later than 5:00 p.m. on Tuesday, July 6, 2021. The Council's Office of the Secretary will fulfill timely requests for language interpretation services, however requests received later than July 6 may not be able to be fulfilled due to vendor availability.

The committee will email instructions on how to participate and the Zoom link to those who have signed up by 5:00 p.m. on Monday, July 12, 2021. Only witnesses who have signed up by the deadline will be permitted to participate. Those wishing to testify are encouraged to email their written testimony to labor@dccouncil.us by 3:00 p.m. on Tuesday, July 13, 2021, so that staff may distribute testimonies to committee members and staff in advance. 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 many witnesses.

If anyone is 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 labor@dccouncil.us. Additionally, the public may provide testimony by voice mail by calling (202) 455-0153, stating

and spelling the witness's name, stating any organizational affiliation, and speaking slowly to provide a statement to be transcribed and included in the record. The record will close at 5:00 p.m. on Wednesday, July 28, 2021.

Attachment 4

**Public hearing agenda and
witness list for the July 14,
2021 hearing**

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

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

ANNOUNCES A PUBLIC HEARING ON

B24-256, the Non-Compete Conflict of Interest Clarification Amendment Act of 2021

**Wednesday, July 14, 2021
1:00 pm**

**Virtual hearing via the Zoom platform and
Broadcast on Facebook (<https://www.facebook.com/CMElissaSilverman>)**

AGENDA AND WITNESS LIST

I. CALL TO ORDER

II. OPENING REMARKS

III. PUBLIC HEARING

1. Evan Starr, PhD, Assistant Professor, University of Maryland, Robert H. Smith School of Business
2. Sandeep Vaheesan, Legal Director, Open Markets Institute
3. Andrew Flagel, President and CEO, Consortium of Universities of the Washington Metropolitan Area
4. Betsy Philpott, Vice President & General Counsel, Washington Nationals
5. Tim Nelson, Counsel, Maryland-DC-Delaware Broadcasters Association
6. Geneva Kropper, public witness
7. Najah Farley, Senior Staff Attorney, National Employment Law Project
8. Marcy Karin, public witness
9. David Stephen, Political Director, Metropolitan Washington Council
10. Kari Bedell, Executive Director, Greater Washington Society of CPAs
11. Kevin Wrege, DC Chamber of Commerce
12. Bernie Brill, Executive Director, SMACNA Mid-Atlantic Chapter
13. Janene Jackson, Executive Director, Opportunity DC
14. Daniel Essrow, Organizer, Nonprofit Professional Employees Union
15. Daniel Perez, Vice President of Organizing, Nonprofit Professional Employees Union
16. Laura Miller Brooks, Senior Associate, Federal City Council

17. Justin Palmer, Vice President, Public Policy & External Affairs, DC Hospital Association

18. Keisha Davis, Human Resources Manager, Enlightened Inc

19. Linwood Jolly, Vice President, Business Development, Codice

IV. ADJOURNMENT

Attachment 5

**Public hearing witness
testimony and additional
statements and documents
submitted for the record**

July 14, 2021

Re: B24-256, Non-Compete Conflict of Interest Clarification

Dear Chairperson Silverman and Members of the Committee,

Thank you for the opportunity to testify in today's hearing. I am the legal director at the Open Markets Institute (OMI), an antimonopoly research and advocacy organization based here in the District of Columbia. OMI supports labor market rules that encourage fair competition among employers for workers' services and protect the right of all workers to form unions and engage in other forms of concerted action. In March 2019, OMI, the AFL-CIO, SEIU, and more than sixty other labor and public interest groups and scholars petitioned the Federal Trade Commission to ban non-compete clauses for all workers.¹ Last week, in his Executive Order on Promoting Competition in the American Economy, President Biden called for FTC regulatory action against non-compete clauses.²

In my testimony, I will not recite the harms of non-compete clauses to workers and the public. These harms, which are especially severe for members of marginalized groups,³ are familiar to members of the Committee, as indicated in its report published last November. Instead, I will focus on two specific issues: workers' general inability to bargain over non-compete clauses and the specious employer justification for these contracts.

Non-compete clauses are classic contracts of adhesion presented to workers by employers on a take-it-or-leave-it basis. Only a small fraction of workers can, or believe they can, resist or try to negotiate these contractual provisions. A leading study on the practice reported that only about one in ten workers attempted to negotiate over a non-compete.⁴ This appears true of highly paid workers too. One survey of automatic speech recognition professionals—the tech workers who develop and improve apps like Siri—found that fewer than one in six tried to bargain with their employer over a non-compete clause.⁵

Workers are at a bargaining disadvantage relative to their employers for several reasons. In general, workers need wages and salaries to subsist and do not have significant non-labor

¹ Press Release, Open Markets Institute, Open Markets, AFL-CIO, SEIU, and Over 60 Signatories Demand the FTC Ban Worker Non-Compete Clauses (Mar. 20, 2019), <https://www.openmarketsinstitute.org/publications/open-markets-afl-cio-seiu-60-signatories-demand-ftc-ban-worker-non-compete-clauses>.

² Exec. Order on Promoting Competition in the American Economy (July 9, 2021), <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/07/09/executive-order-on-promoting-competition-in-the-american-economy/>.

³ Michael Lipsitz & Evan Starr, *Low-Wage Workers and the Enforceability of Noncompete Agreements*, MGMT. SCI. (forthcoming).

⁴ Evan P. Starr, J.J. Prescott & Norman D. Bishara, *Noncompete Agreements in the U.S. Labor Force*, 64 J. L. & ECON. 53, 71-72 (2021).

⁵ Matt Marx, *The Firms Strikes Back: Non-compete Agreements and the Mobility of Technical Professionals*, 76 AM. SOC. REV. 695, 706 (2011).

income.⁶ In addition to paying for housing, food, and other essentials, millions of workers have substantial amounts of debt to service every month, including credit card balances, car loans, and student loans from undergraduate and graduate study.⁷ Many workers believe that questioning or objecting to a non-compete clause could lead to the revocation of a job offer or termination.⁸ Millions of workers across the country also have only a few prospective employers due to highly concentrated labor markets.⁹ For example, hospital markets in many areas, including in the District, are dominated by a single or a few large chains¹⁰—concentration that further disempowers doctors, nurses, and other health care professionals relative to their employers.

Whereas the harms from non-competes are real and well documented, the conventional justification for these contracts does not withstand scrutiny. Employers and their representatives assert that non-competes are necessary for protecting trade secrets, customer lists, and other valuable information. According to this theory, restricting worker departure is necessary to prevent the appropriation of knowhow by rivals or workers who want to start competing businesses. To the extent employers do need to safeguard proprietary information, they have several less restrictive alternatives for preventing unauthorized disclosures. They can use copyright and trade secret law and targeted non-solicitation agreements to ensure that their information is protected.

If employers believe that retaining workers is the only way to protect their business information, they once again have other methods. To ensure a loyal workforce, employers can offer regular raises and promotions and provide fair treatment on the job,¹¹ as well as bonuses tied to length of tenure. For high-level workers with regular access to sensitive business information, employers can also opt out of the default rule of at-will employment through fixed-term employment contracts that commit both parties (employer and employee) to the relationship for a period.¹² Such contracts characterize professional sports in the United States today.

In contrast to these methods of protecting proprietary information, non-competes are, in the words of law professor Viva Moffat, “the wrong tool for the job.”¹³ They are overbroad. Non-competes restrain worker mobility with the purported aim of protecting business information even if it is dated or trivial. For instance, a worker who has been with an employer for ten years

⁶ BD. OF GOV. OF THE FED. RES. SYS., REPORT ON THE ECONOMIC WELL-BEING OF U.S. HOUSEHOLDS IN 2018 12, 21 (2019).

⁷ E.g., Letter from Allegheny Cnty. Med. Soc’y to Fed. Trade Comm’n (Feb. 10, 2020), https://downloads.regulations.gov/FTC-2019-0093-0260/attachment_1.pdf.

⁸ Starr, Prescott & Bishara, *supra* note 4, at 72.

⁹ José Azar, Ioana Marinescu & Marshall Steinbaum, *Labor Market Concentration*, 55 J. HUMAN RES. 1218 (2020).

¹⁰ Brent D. Fulton, *Health Care Market Concentration: Trends in the United States: Evidence and Policy Responses*, 36 HEALTH AFF. 1530 (2017).

¹¹ Janet Yellen, *Efficiency Wage Models of Unemployment*, in ESSENTIAL READINGS IN ECONOMICS 280 (Saul Estrin & Alan Marin eds., 1995).

¹² *Nickens v. Labor Agency of Metropolitan Washington*, 600 A.2d 813, 816 (D.C. 1991).

¹³ Viva R. Moffat, *The Wrong Tool for the Job: The IP Problem with Noncompetition Agreements*, 52 WM. & MARY L. REV. 873 (2010).

and generated substantial revenues and profits for the company can be locked into place by a non-compete because the employer wants to guard job training materials provided to the worker years earlier. At the same time, non-competes are also too narrow. For example, they do not prevent the unauthorized, covert disclosure of trade secrets to competitors. They are poorly targeted for their ostensible purpose.¹⁴

Given these considerations, the Council of the District of Columbia should not amend the current law on non-compete clauses to carve out additional workers. If the Council does make amendments to the law, it should eliminate existing exemptions in the statute and extend its protection to all workers in the District.

Sincerely,

Sandeep Vaheesan
Legal Director
Open Markets Institute
vaheesan@openmarketsinstitute.org

¹⁴ Sandeep Vaheesan, *The Bogus Justification for Worker Non-Compete Clauses*, ONLABOR, Apr. 24, 2019, <https://onlabor.org/the-bogus-justification-for-worker-non-compete-clauses/>.



CONSORTIUM OF UNIVERSITIES OF THE WASHINGTON METROPOLITAN AREA

**TESTIMONY FROM THE
CONSORTIUM OF UNIVERSITIES OF THE WASHINGTON METROPOLITAN AREA
FOR DC COUNCIL COMMITTEE ON LABOR & WORKFORCE DEVELOPMENT
RE: NONCOMPETE CONFLICT OF INTEREST CLARIFICATION ACT
Wednesday, July 14, 2021**

Good afternoon, Chairperson Silverman and Members of the Committee on Labor and Workforce Development.

I am Dr. Andrew Flagel, President and CEO of the Consortium of Universities of the Washington Metropolitan Area. The Consortium represents 20 colleges and universities—including 9 located in the District of Columbia which include American University, Catholic University of America, Gallaudet University, Georgetown University, The George Washington University, Howard University, National Defense University, Trinity Washington University and the University of the District of Columbia. Collectively our members, all non-profits, are the District's largest non-government employers with over 10,000 employees, serving over 300,000 students annually. Approximately 50% of our students receive financial aid including 25% who are Pell Grant recipients.

Thank you for the opportunity to testify regarding the Non-Compete Conflict of Interest Clarification Act. The District's ban on non-compete agreements is a very important issue to the Consortium. We appreciate that the Council had legitimate concerns when it acted to prevent the excessive or unreasonable use of non-compete provisions. We commend Councilmember Silverman for introducing the Clarification Act to clarify the instances where noncompete agreements are reasonable, appropriate, and even necessary. We also appreciate Councilmember Silverman for your commitment to delay the applicability date for the original noncompete bill until April 2022, so we can address some of the challenging outcomes of the original law before it takes effect.

We also appreciate Councilmember Pinto for recommending further changes to the bill which are critical to focusing the legislation on its intended purpose. The Consortium will continue to work with the DC Council and members of the business community, including the DC Chamber of Commerce, to ensure an outcome that supports the rights of both employees and employers without derailing the District's economic recovery.

The Consortium members strongly support outside employment opportunities for our employees. However, should the District implement the country's most extensive ban on both simultaneous and subsequent employment, it will cause tremendous harm to our higher education community.

For example, nearly every grant process, federal and private, requires disclosure of conflict of interest. Precluding us from preventing and/or managing those conflicts—as the current law

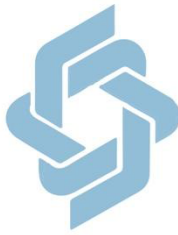
inadvertently does--risks hundreds of millions of dollars in grant funding that would otherwise be granted to institutions in the District. Thank you, Councilmember Silverman for addressing the issue of research grants in your proposed legislation.

We urge the Committee to further amend the law to address the serious conflict of interest and conflict of commitment concerns that the current legislation creates. It must be reasonable for universities to preclude administrators, such as coaches, admissions officers, and financial aid officers, from taking outside employment that creates ethical and equity concerns. I am sure you will agree that an admissions officer should be precluded from providing outside private college counseling services to wealthy students who have applied to their school, because that would disadvantage lower income students who cannot afford this luxury service. We know the Council did not intend to allow for such situations, and we will work with you to ensure that such situations can be proactively managed by the university as they are in every other jurisdiction.

We also have concerns regarding how the ban on simultaneous employment would impact full-time faculty, especially tenured faculty. Tenured faculty are in a distinct category, because due to their unique employment status, they often have a significant role in university governance and already receive a very broad range of protections including almost unlimited job security, competitive compensation, and limited oversight, just to name a few. In turn, universities expect such faculty to make a full-time commitment to their institutions and their students. Under the ban on noncompete agreements, DC would be the only place in the country where universities could not preclude faculty from being tenured at more than one university simultaneously. It is hard to imagine how any faculty member could fulfill their commitment to students while accepting two such competing roles, yet this legislation would make that inadvertently possible. As a result, the Consortium supports Councilmember Pinto's recommendation to explicitly exempt full-time faculty from the ban on noncompete agreements.

Thank you for the opportunity to share the Consortium's concerns regarding the ban on noncompete agreements and our recommendations for strengthening it with regard to research grants, full-time faculty, conflicts of interest, and conflicts of commitment. Since the Council's Labor and Workforce Development Committee plans to fund the original ban on noncompete legislation in the District's fiscal year 2022 Budget, it is critical that the Council make the needed revisions to the law in the Budget Support Act at the same time. Should the law take effect as is, the harm to the higher education community would be significant. The Consortium is a trusted ally and we stand ready to partner with you and the Council to make the necessary reforms.

Thank you.



CONSORTIUM OF UNIVERSITIES OF THE WASHINGTON METROPOLITAN AREA

ADDITIONAL COMMENTS FROM THE CONSORTIUM OF UNIVERSITIES OF THE WASHINGTON METROPOLITAN AREA ON THE NONCOMPETE CONFLICT OF INTEREST CLARIFICATION ACT SUBMITTED JULY 28, 2021

Dear Councilmember Silverman, Councilmember Pinto and Members of the DC Council Labor and Workforce Development Committee,

The Consortium of Universities of the Washington Metropolitan Area submitted both oral and written testimony regarding the Noncompete Conflict of Interest Clarification Act for the hearing held by the Labor and Workforce Development Committee earlier this month. We appreciate this opportunity to submit additional comments to support the timely approval of these clarifications and address comments raised at the hearing regarding an exemption for full-time faculty.

There were two key points raised in our original testimony:

- Nearly every grant process, federal and private, requires a strict conflict of interest policy. Precluding us from enforcing such a policy—as the current law inadvertently does—risks hundreds of millions of dollars in grant funding that would otherwise be granted to institutions in the District.
- Universities must have the ability to preclude certain administrators in sensitive positions, such as coaches, admissions officers, and financial aid officers, from engaging in outside employment that creates ethical and equity concerns. For instance, admissions officers should be precluded from providing outside private college counseling services available only to wealthy students who have applied to their school, because that would unfairly disadvantage students who are unable to afford this luxury service. In addition, athletic coaches should be precluded from scouting players for more than one school at a time. Both situations raise legitimate conflict of interest and of commitment concerns inadvertently created by the current law.

In addition, we feel compelled to address an issue raised at the hearing by a local professor who testified in her personal capacity regarding the importance of allowing faculty members to engage in professional activities and collaborations outside of their institution. The Consortium and our members could not agree more – in fact, academic collaboration is at the heart of the formation of the Consortium. Faculty handbooks for our members typically contain language such as the following, taken directly from that of a current Consortium member:

“The University allows and encourages all faculty to engage in other professional activities and relationships that foster professional development and enhance the mission of the University, when these activities do not undermine the fulfillment of their University responsibilities or compromise the basic values of transparency, objectivity, impartiality, integrity of scholarship, and independence. To ensure that they are compatible with a full-time faculty member’s primary responsibilities, the University has special rules governing Outside Professional Activities[.]”

To suggest that the proposed faculty exemption would negatively impact opportunities for faculty to collaborate demonstrates a tremendous misunderstanding of our position. It is critical, however, that higher education institutions have the tools necessary to manage the complexities that arise from such activities. Notably, every other jurisdiction that has sought to limit the use of non-compete provisions through legislation has recognized - and not restricted - the legitimate needs of higher education in this and other contexts. We urge the District of Columbia to do the same.

It is also worth clarifying that the proposed faculty exemption to the current law would only apply to full-time faculty. Consortium members do not seek to limit any options for adjunct faculty. A University of Maryland expert testified at the hearing that due to the extensive time commitment involved in serving as a full time professor, it would be extremely difficult to simultaneously hold the position at more than one university. Despite such conflicts of interest and commitment concerns, this issue has arisen and will continue to arise at our universities. While this issue may not be visible to all faculty, it arises most often among the highest profile institutions and faculty members.

Accordingly, for this and the foregoing reasons, the Consortium strongly endorses an exemption for full-time faculty from the ban on non-compete agreements.

The Consortium appreciates the Council considering these additional points and our original testimony.

If you have any further questions, I can be reached at aflagel@consortium.org.

The Consortium of Universities of the Washington Metropolitan Area comprises 20 non-profit higher education institutions in the National Capital Region—of which 10 are located in the District of Columbia: American University, Catholic University of America, Gallaudet University, Georgetown University, The George Washington University, Howard University, National Defense University, The Smithsonian Institute, Trinity Washington University and the University of the District of Columbia. Collectively our members are the District's largest non-government employers with over 10,000 employees, serving over 400,000 students annually. Approximately 50% of our students receive financial aid including 25% who are Pell Grant recipients.

Testimony of
Betsy Philpott, Vice President and General Counsel
Washington Nationals Baseball Club

Non-Compete Conflict of Interest Clarification Amendment Act 2021

Committee on Labor and Workforce Development
Council of the District of Columbia

July 14, 2021

Good Afternoon Councilmember Silverman and other members of the Committee on Labor and Workforce Development. I am Betsy Philpott, Vice President and General Counsel of the Washington Nationals. Thank you for your time today to discuss the Ban on Non-Compete Agreements Amendment Act of 2020 (L23-0209) and the Non-Compete Conflict of Interest Clarification Amendment Act of 2021 (B24-256).

I am here today to discuss what I believe are unintended effects of the underlying law. And unfortunately, while the bill under consideration today addresses some concerns that need to be corrected within the Act, the bill does not fully resolve certain issues that profoundly impact the Nationals and the sports industry as a whole.

From our perspective, the bill does not permit an employer to protect itself against certain employees that have access to confidential, sensitive or proprietary business information who seek to work simultaneously for a competing business. Inherent within the sports industry is an understanding that teams within the same league must directly compete against each other to win. Thus, it is critically important that that teams have the ability to limit some employees who have access to confidential, sensitive or proprietary business information from using such information while working simultaneously for a competing team. It's worth noting that our concern about noncompete clauses is not broad and is limited to a very small proportion of our employees.

Take, for example, an amateur scout. This employee is hired to analyze the talent of amateur players and provide confidential and sensitive business information to the front office in order for the team to draft better talent than a competing team. If the Nationals, for example, cannot restrict this employee from working for a competitor simultaneously, not only could this employee sell or use the confidential and sensitive information against the Nationals, but, this entire scenario could damage the integrity of the sport.

Another issue is that the bill does not take into account non-compete provisions or duty of loyalty provisions that are required in order for employers and employees to comply with collective bargaining agreements. Within Major League Baseball, teams like the Nationals are subject to league rules and regulations, including the collective bargaining agreement between the league and the players association. As part of that CBA, certain contract templates are agreed upon, which include duty of loyalty provisions. These templates must be used to sign players and other certain employees, so if compliance with collectively bargained agreements is not carved out of the Act, then the Nationals will be in an impossible position. Either the Nationals will be forced to breach its player/employee contracts, the CBA, and MLB rules and regulations or the Nationals will violate the Act.

It is important to note that these issues impact a very small group of employees who work at the ballpark and/or for the team. In fact, for some Nationals employees that are not privy to confidential and sensitive business information, the Nationals are pleased that some of these employees work simultaneously for other organizations in our line for work. This is especially true for our seasonal guest experience staff work for other sports teams and venues in the region. They gain positive and useful professional experiences working elsewhere and some are able to piece together year-round employment, which we are pleased about.

In closing, the Nationals respectfully request that you resolve these issues by adding language to the bill that: (i) allows employers to require certain employees to sign an agreement that restricts such

employees that have access to the employer's confidential, proprietary or sensitive business information from performing work simultaneously for a competing business; and (ii) exempts non-compete provisions that are required under CBAs. If you need suggested language, the Nationals support the language in Councilmember Pinto's amendments. Specifically, the exceptions to the ban on non-compete provisions set forth in Section 103.

Thank you for the opportunity to testify today. I am happy to answer any questions.



**Council of the District of Columbia
Committee on Labor and Workforce Development
Public Hearing: B24-256, the Non-Compete Conflict of Interest
Clarification Amendment of 2021**

**Written Testimony of Tim Nelson on behalf of the
Maryland-DC-Delaware Broadcasters Association**

Submitted July 14, 2021

Thank you for the opportunity to submit this testimony regarding B24-256, the “Non-Compete Conflict of Interest Clarification Amendment of 2021.” My name is Tim Nelson, and I serve as counsel to the Maryland-DC-Delaware Broadcasters Association.¹ MDCD’s members include approximately 35 television stations and 175 radio stations, with about fourteen physically located in the District of Columbia, and dozens more whose signals reach the District, serving its residents and businesses. As many of you are well aware, local broadcasters serve as a vital source of trusted local news, journalism, and life-saving emergency information, as well as entertainment and companionship—all over-the-air, for free.

On behalf of your local broadcasters, I wish to thank Councilmember Silverman for her willingness to revisit Law 23-0209, the Ban on Non-Compete Agreements Amendment Act of 2020 (“the Law”), including extending its applicability date, and for holding this hearing on potential amendments thereto. I would also like to thank Councilmember Silverman’s staff for their consistent engagement with our Member television and radio stations on this very important issue.

As members of the D.C. community themselves, local broadcasters do not object to—indeed, we support—what we believe was the policy rationale underlying the Law in the first place: to ensure that District employees are not overly limited in their ability to find work and to permit people to make a decent living, including to work multiple jobs if desired and/or start a business.

But the Law goes too far. Indeed, the extremely broad scope of the Law—which is without parallel nationwide in terms of its scope and severity—would have potentially major (if unintended) harmful consequences for D.C. area broadcasters and their ability to continue serving the District with quality local news, information and other programming.

We believe, however, that the Law can be revised in a manner that strikes a balance wherein D.C.-based employees can enjoy the benefits of a competitive job market and D.C. employers, including local broadcasters, will be at lesser risk of serious competitive harm to their businesses.

¹ The Maryland-DC-Delaware Broadcasters Association (“MDCD”) is a voluntary, non-profit trade association that advocates for the interests of its member radio and television stations and, more generally, the interests of broadcasting in Washington, D.C., Maryland, and Delaware.

By contrast, broadcasters are supportive of the reasonable, commonsense revisions to the Law that Councilmember Pinto has circulated in draft form, and we urge this Committee and the full Council to consider them.

Businesses, including the District's broadcasters, need the ability to enter into contractual arrangements with certain, limited types of what I'll call "key employees" that prevent such key employees from simultaneously working for a competitor and/or from working for such a direct competitor post-employment, provided that any such post-employment restriction is reasonable. There are multiple sound business reasons why employers need to be able to protect their interests—and, frankly, by extension, their employees—through such arrangements.

Consider, for example, a television station that invests substantial resources in promoting its on-air talent, say its chief meteorologist, so that viewers will readily identify and associate their station with that person. This is critical to how stations build their trusted brand and loyalty with respect to viewers, as well as advertisers, upon whom our businesses depend. If that station can't ensure that its chief meteorologist won't be simultaneously be working for one of its direct competitors in D.C., that loyalty, and the revenues that flow from it, are directly at risk. And, the station's incentive to invest in that on-air talent is dramatically decreased.

I'll give you another example, concerning employees with access to sensitive information. Consider radio stations, all of which have proprietary advertising sales data, client lists, and selling strategies and techniques that are essential to their ability to compete for advertisers. A station invests in its top sales people, entrusting them with confidential information and training them to use that information when conducting business. If that radio station cannot reasonably limit those sales people's ability to simultaneously sell for another radio station—including direct competitors—where they would inevitably draw upon the proprietary techniques, sales information and even client lists they'd been given access to, the station would simply not be able to effectively compete. The broadcaster ought to have a means to reasonably limit the salesperson from taking all that has been learned and using it to the broadcaster's detriment by working for a competitor either concurrent with or as soon as he leaves the station's employ.

Councilmember Silverman's proposed amendment affords the broadcasters in the above examples no protection against serious competitive harms. Businesses need to be able to prevent certain key employees from simultaneously working for a competitor for commonsense, business reasons. Councilmember Silverman's amendment only lets a business prevent simultaneous employment if the simultaneous employment at issue would somehow result in the business acting unethically, or in violation of laws or regulations. The Silverman bill doesn't address the problem. (And it doesn't even contemplate post-employment situations.)

The MDCD Broadcasters Association urges this Committee and the full Council to follow Councilmember Pinto's lead. Her proposed revisions address both the simultaneous and post-employment issues in a manner that is practical, limited and reasoned; her approach aims to strike the right balance between protecting the District's employees and its employers. Councilmember Pinto's proposal limits an employer's ability to enter into contractual arrangements pertaining to simultaneous employment and post-employment to certain "key employees" only—those either publicly identifiable with the employer's brand (think a TV news anchor) or those with access to sensitive, proprietary information (think a top radio station advertising salesperson). Importantly,

the Pinto proposal also clarifies that the D.C. non-compete Law only applies to employees who work principally in the District, borrowing similar language from the District's minimum wage law. This clarification is uniquely important in the District given the vast number of non-D.C.-based employees who travel here occasionally or sporadically to conduct business, attend a trade show, meet with political leaders, and the like.

Even with the reasonable allowances under the Pinto proposal, the District would still have one of the most progressive and stringent non-compete laws in the nation.

Again, we appreciate Councilmember Silverman's efforts here and hope this Committee will continue to further work on changes to the Law that will increase wages and enable job mobility—and help the District's broadcasters and other businesses, and their employees—survive and thrive.

Thank you again for your consideration. I welcome your questions.

* * * * *

Testimony of Najah Farley

National Employment Law Project

Regarding Proposed Amendments to D.C. Law 23-209, Ban on Non-Compete Agreements Amendment Act of 2020

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

July 14, 2021

Najah Farley
Senior Staff Attorney

National Employment Law Project
90 Broad St., Suite 1100
New York, New York 10004
(646) 693-8225
nfarley@nelp.org

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 favor of limiting the proposed amendments to D.C. Law 23-209 in order to ensure that the amendments do not reduce the effectiveness of the non-compete law. As many scholars have shown over the past decade, the use of non-compete covenants for employees and other workers has grown significantly. 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 and for those workers who do have access to trade secrets, other mechanisms exist to protect those trade secrets and proprietary information.³ 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.⁴ We therefore urge the DC Council to reject these substantial amendments to D.C. Law 23-209.

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 the usage of non-competes with sandwich makers. We uncovered the usage of the non-competes in stores in New York state.⁵ 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.⁶

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 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).

⁴ 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.

⁵ Dave Jamieson, *Jimmy John's Makes Low-wage workers sign oppressive non-compete agreements*, Huffington Post, Oct. 13, 2014, https://www.huffpost.com/entry/jimmy-johns-non-compete_n_5978180?1413230622.

⁶ Sophie Quinton, *These days, even janitors are being required to sign non-compete clauses*, USA Today, May 27, 2017, <https://www.usatoday.com/story/money/2017/05/27/noncompete-clauses-jobs-workplace/348384001/>.

Outside of public enforcement and investigations, this issue has resulted in a bevy of state legislation, from Washington State to Vermont and many states in between.⁷ This momentum to ban non-competes is not only shared across state legislatures, but also by the federal government. Just last week, President Biden issued an Executive Order instructing the Federal Trade Commission to pursue rulemaking in this area.⁸ This Executive Order is coupled with the continuing push to pass the Workforce Mobility Act, a bill sponsored by Senators Chris Murphy (D) and Todd Young (R).⁹ The Workforce Mobility Act would effectively ban non-competes for the majority of workers.

The DC non-compete law is model legislation that I have shared with other states because it is one of the strongest, if not the strongest law in the country. It includes all of the key elements that workers' rights lawyers and economic researchers have found to curb the usage of abusive non-competes, primarily because it is a near complete ban on the usage of non-competes that includes public enforcement, a private right of action, notice provisions, retaliation protections and civil penalties to ensure that workers are informed and that violations of the law are deterred.

The current exceptions in paragraph 5 of D.C.'s non-compete law are broad enough that employers can restrict employees from using proprietary information. It lists the various types of proprietary information and acknowledges that agreements that bar the usage of sensitive information and agreements that preclude competition when buying or selling a business are still lawful. To the extent that the D.C. Council is persuaded to amend the law, clarifying that a conflict of interest provision does not violate the non-compete law as it stands, rather than changing the applicability of the law is the best course of action to preserve the integrity of the law and to ensure employers can protect proprietary information.

President Biden's Executive Order on July 7, 2021 directed the Federal Trade Commission to exercise its statutory rulemaking authority to "curtail the unfair usage of noncompete clauses and other agreements that may unfairly limit worker mobility."¹⁰ Similarly, state after state, from Massachusetts to Oregon to Nevada has undertaken comprehensive noncompete reform, and research has shown in those that have wages have increased. The effects of the overuse of these agreements have been documented time and again and the

⁷ New Map of Recent Changes to State Noncompete Laws, Fair Competition Law Blog, Beck, Reed and Riden LLP, June 8, 2021, <https://faircompetitionlaw.com/2021/06/08/new-map-of-recent-changes-to-state-noncompete-laws/>.

⁸ United States, Executive Office of the President Joseph Biden. Executive Order 14036: Promoting Competition in the American Economy, July 9, 2021, Sect. 5, <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/07/09/executive-order-on-promoting-competition-in-the-american-economy/>.

⁹ Workforce Mobility Act of 2021, S.843, 117th Cong., 2021, <https://www.congress.gov/bill/117th-congress/senate-bill/483>

¹⁰ *Supra* Note 8.

D.C. Council taking bold action to eliminate noncompetes for the majority of workers should not be rolled back.

Thank you for the opportunity to submit this testimony.

TESTIMONY OF MARCY L. KARIN
regarding B24-256
the “Non-Compete Conflict of Interest Clarification Amendment Act of 2021”
Before the Committee on Labor and Workforce Development, D.C. Council

Dear Chair Silverman and Committee Members:

Thank you for the opportunity to testify about B24-256, the Non-Compete Conflict of Interest Clarification Amendment Act of 2021. As an employment law practitioner and professor,¹ I have counseled both employers and employees and researched issues related to restrictive covenants in the District of Columbia, including in the higher education setting. Over the years, I also have been employed at multiple universities as a tenured, tenure-track, clinical, contract, and adjunct professor as well as having served as a fellow, a grant-funded, non-teaching, institute staff member, and a student worker. Based on these experiences, I offer four observations.

First, **the Ban on Non-Compete Agreements Amendment Act of 2020 is critically important and should take effect *as enacted*.** Our community should be proud that when that law takes effect (presumably in 2022), it will significantly reduce the impact of non-compete provisions on the upward mobility, safety, and economic security of local workers. As I said in support of the original law, these restrictions “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.”² This continues to be true and our new law will demonstrate that the District leads in protecting its workers—and does so in ways that also recognize and address our businesses’ needs. This law also has caused other jurisdictions to take note and consider similar actions, as evidenced by President Biden’s decision to explore banning non-compete provisions in a recent Executive Order.³

It is premature to amend this law to create additional carve-outs from the general requirement banning non-compete provisions. The reality is that the existing patchwork of employment law is complicated and hard for the average worker or small business to understand. The Council should—to the extent possible—simplify and create uniform laws. This new law already contains some exceptions by explicitly excluding trade secrets from the definition of “non-compete provision.”⁴ And preemption and conflict of law principles should address any concerns related to compliance with government grant or other ethical requirements such as the D.C. Rules of Professional Responsibility. Further, the law also does not eliminate the common law duty of loyalty owed to employers. Without specific evidence of non-compliance or documented problems, additional exceptions are not yet needed and could lead to unintended consequences.

Second and relatedly, **universities do not need a special exemption** and creating a university carve-out could impact the academic market. It is common to move across institutions, affiliate with multiple institutions, or take leave from one’s home institution to participate in another valuable opportunity. Personally, I have worked at three D.C. universities in various capacities and partnered with colleagues at other local schools on teaching, scholarship, and service projects. These have been invaluable opportunities and created a career trajectory that has benefited both me and these institutions. Similarly, colleagues have visited at

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/Civil Rights Clinic at the University of the District of Columbia David A. Clarke School of Law. In addition to the Clinic, I teach Employment Law, Employment Discrimination, Gender and Sexual Orientation Under the Law, Disability Law, and Administrative Law.

² 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 (December 20, 2019).

³ The White House, *FACT SHEET: Executive Order on Promoting Competition in the American Economy* (July 9, 2021), <https://www.whitehouse.gov/briefing-room/statements-releases/2021/07/09/fact-sheet-executive-order-on-promoting-competition-in-the-american-economy/>.

⁴ D.C. Code § 32-581.01(5) (“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, client list, customer list, or a trade secret . . . 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.”).

other universities, taken unpaid leaves to go into the government, worked at think tanks, non-profits, or other organizations while on sabbatical, been simultaneously affiliated with other (often) higher-ranked institutions, or participated in Fulbright and other prestigious fellowships. This work has been performed while simultaneously continuing to thrive at their home institutions or by bringing prestige to them—both while on leave or sabbatical and upon one’s return. This is normal—it is what some academics do and what universities, who also benefit from the status of these joint affiliations and/or work, can expect and plan for in recruitment, hiring, and ongoing operations. Given this market reality, I respectfully ask the Committee to tread carefully in creating changes to the general ban for one of the largest industries in our community. Otherwise, the law may end up suppressing the ability of academics and other staff to grow in their fields or profession or otherwise participate in career-enhancing work. I also encourage the Committee to remember that a range of statuses and positions exist at universities beyond tenured professors (who arguably have more power than their non-tenured academic colleagues or other non-teaching staff to negotiate with the university). The impact on all university staff should be considered during deliberations.

Third, despite my preference to postpone consideration of amendments, should the Committee move forward, **any new limitations should be accompanied by additional protections** to accomplish the law’s original goals. Specifically, to take advantage of a “bona fide conflict of interest” and impose restrictions on a specific position or range of positions, employers should be required to:

- Limit “bona fide conflict of interest provisions” to *written* provisions or workplace policies.⁵
- Limit any such restriction to be reasonable in time, geography, and scope to eliminate the “bona fide conflict of interest;”
- Clearly state the application of any non-compete provision in a job description if a “bona fide conflict of interest” is anticipated for the position;
- Engage in an interactive process with the worker to determine whether a “bona fide conflict of interest” exists if one arises after someone has been employed or with an applicant if the potential conflict becomes apparent during the interview process;⁶ and
- Notify applicants and workers of the law’s requirements relate to “bona fide conflict of interest provision(s)” and their corresponding rights including related to enforcement.

Finally, thank you for recognizing the importance of anti-retaliation protections should you move forward with an amendment. My comfort in speaking publicly today stems from having tenure and recognizing that the law does not apply to District workers. Collectively, this removes any fear of retaliation for me, but I note that concerns about retaliation might prevent others from speaking out today against their employer’s purported interests.

Thank you again for holding this hearing. As the District leads the country in implementing its ban, I encourage caution before creating exceptions that chip away from the ability of the original law to succeed. As always, I am available to answer questions if helpful.

Sincerely,



Marcy L. Karin

⁵ This changes the definition of “workplace policy” in D.C. Code § 32-581.01 by striking “or as a matter of practice.”

⁶ As drafted, the amendment proposes to defer to the employer’s belief about whether a conflict of interest would exist. (Lines 27-33.) Applicants and workers—who often have additional information, context, and knowledge—are not a party to the decision and there is no requirement for their input into what constitutes a “thing of value” or whether the work would actually lead to “unethical” or illegal conduct. While the amendment does allow an employee to ask whether something constitutes a conflict of interest and prevents employers from retaliating against an employee for doing so (Lines 51-54.), the worker does not have a role in determining whether a bona fide conflict of interest exists. Allowing an employer to unilaterally decide that something is a conflict of interest—without a process for the worker to participate in the decision—also potentially undermines the law’s ability to counteract the power imbalance between employer and worker.



Metropolitan Washington Council, AFL-CIO

815 16th Street, NW, • Washington, DC 20006 • (202) 974-8150 • Fax (202) 974-8152

An AFL-CIO "Union City"

Executive Board

Officers

Dyana Forester

President

Robert Hollingsworth (AFSCME 2776)

1st Vice President

Chuck Clay (IATSE 22)

2nd Vice President

Herb Harris (IBT/BLET)

3rd Vice President

Lisa Wilsonia-Blackwell (UFCW 1994)

Secretary

Eric Bunn (AFGE District 14)

Treasurer

Members

Dena Briscoe (APWU)

Donna Brockington (DC CLUW)

Robin Burns (DCNA)

Tom Clarke (IBEW 26)

Jaime Contreras (SEIU 32BJ)

Jacqueline Pogue Lyons (WTU 6)

George Farenthold (OPEIU 277)

Mark Federici (UFCW 400)

Dan Fields (SEIU 722)

Stephen Frum (NNU)

Don Havard (IUOE 99)

Roxie Mejia (Painters DC 51)

Doris Reed (ASASP)

Wanda Shelton-Martin (NUHCE 1199DC)

Gina Walton (AFGE 1975)

Trustees

Djawa Hall (1199 SEIU)

Tim Traylor (AFSCME 2250)

Dave Richardson (AFGE 12)

Non-Compete Conflict of Interest Clarification

Amendment Act of 2021

Committee on Labor and Workforce Development

July 14, 2021

To: Chairwoman Elissa Silverman and the Committee on Labor and Workforce Development

On behalf of our 150,000 union members affiliated with the D.C. Labor Council including about 40,000 labor union members in Washington D.C., we thank you for the opportunity to provide testimony in support of the Non-Compete Conflict of Interest Clarification Amendment Act of 2021.

The workers we represent include food and commercial, healthcare, and office professionals who earn a wide range in salary from low-wage to high-income earners that could potentially be impacted by this bill. The DC Labor Council supported the Ban on Non-Compete Agreements Amendment Act in 2020 because of its potential impact on economic opportunity in D.C. and workers, and we now also support the equal application of this law and want to see it remain strong and simple for workers to understand.

The Labor movement supports this legislation's ability to find a middle ground that balances business interest and the protection of their confidential or sensitive information while also protecting undue restraints and limitations on working people. We thank Councilmember Silverman for her attempts to find the middle ground, especially in defining what types of conflict of interests policies are legally permitted in the legislation.

We are concerned about the attempt to limit non-competes to a specific salary range. We believe the ban should be applied to all workers to avoid confusion or misinterpretation. This is the fair and simplest way to apply this law so that workers will not be confused about if they are protected. Workers at all income levels should be protected.

Thank you for this opportunity to provide testimony and we look forward to working with the Council on the fair application of this law once it is implemented.

In Solidarity,
David Stephen
Political and Legislative Director

Bringing Labor Together Since 1896

www.dclabor.org



Chairwoman Elissa Silverman
Committee on Labor and Workforce Development
District of Columbia Council
The John Wilson Building
1350 Pennsylvania Avenue, NW
Washington, DC 20004

July 14, 2021

Dear Distinguished Member Silverman:

I am writing to you today on behalf of the Greater Washington Society of CPAs. We represent 3,500 CPAs and other financial professionals based in the DC metro area. Our members serve the public interest as independent auditors, are advisors to, or in-house accountants for, corporate, non-profit and governmental entities and small businesses and as tax professionals advising local citizens.

Thank you for the opportunity to speak to you today regarding non-compete agreements in the accounting world, and the Ban on Non-Compete Agreements Amendment Act of 2020 (the 2020 Act) and the subsequent Non-Compete Conflict of Interest Clarification Amendment Act of 2021 (the 2021 Act) more specifically. I appreciate the Committee's initiative to address these important workforce issues and Councilwoman's Silverman's efforts to address initial concerns from the business community via her Amendment.

Today I am speaking to you because while the 2021 Act makes important strides toward correcting many of the unintended consequences of the 2020 Act, some concerns remain. We feel that the 2021 Act doesn't go far enough, or provide enough clarity in some areas to address these concerns. We do feel these issues can be addressed through additional changes, specifically those proposed Councilwoman Pinto's Proposed Revision of Law 23-0209, the Ban on Non-Compete Agreements Amendment Act of 2020 "Limit on Non-Compete Agreements Amendment Act of 2021" and we support her amendment language.

As it relates to the definition of employee, we would support further clarification of the definition of employee. The accounting profession is a very mobile one, with many staff working remotely and in multiple locations throughout the metro area serving clients in all three local jurisdictions, as well as nationally. Many local firms maintain offices and licenses in multiple jurisdictions and will require further clarity as to which employees will be subject to this Act.

Specifically, the definition of employee as currently defined is “employee” to include “an individual who performs work in the District 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.” This is concerning as it reads to cover anyone who performs any amount of work in the District particularly if someone does not regularly spends more than 50% of their working time in the District of Columbia. We support amending the definition to state an employee “means an individual whose employment or prospective employment is or will be based in the District and who regularly spends or will spend a substantial amount of their working time in the District and not more than 50% of their working time in any particular state.”

As to *how* work is performed and *for whom*, CPAs abide by a strict code of professional ethics, which is the basis of the public trust in Certified *Public* Accounting. An important element of that code is the idea of independence. Independence in accounting takes two forms: independence of mind and independence of appearance.

a. Independence of mind is the state of mind that permits a member to perform an attest service without being affected by influences that compromise professional judgment, thereby allowing an individual to act with integrity and exercise objectivity and professional skepticism.

b. Independence in appearance is the avoidance of circumstances that would cause a reasonable and informed third party, who has knowledge of all relevant information, including safeguards applied, to reasonably conclude that the integrity, objectivity, or professional skepticism of a firm or member of the attest engagement team is compromised.

Simultaneously being employed by an audit firm, and the audit firm’s client, for example, would call into question a CPA’s and a firm’s independence. The profession has laid out very detailed ethical requirements such as these in its professional code of conduct and takes them very seriously. Similar restrictions are in place from other regulating bodies such as the Government Accountability Office, the Securities and Exchange Commission and the Public Company Accounting Oversight Board. The inability of a firm to prevent its employees from compromising independence through simultaneous employment with a client or its affiliate, would put them in jeopardy of impaired independence.

We appreciate the Councilmember’s clarification in the 2021 Act attempts to solve this issue. Simply stated, the amendment referencing a bona fide conflict of interest exception does not fully capture all potential conflicts or perceived conflicts, and therefore does not protect this critical CPA independence. We support amending exceptions to include “compliance with applicable statutory or common law, state or federal sponsored grants or contracts, conditions of a sponsored grant or award, applicable professional rules of conduct, ethical and regulatory obligations”.

Thank you for your time, and I appreciate your concern with this matter. Please feel free to reach out to me directly at kbedell@gwscpa.org.

Sincerely,



Kari Bedell
Executive Director
Greater Washington Society of CPAs/GWSCPA Educational Foundation

cc: Members of the Committee on Labor & Workforce Development

Written Testimony of Geneva Kropper

Submitted to the Council of the District of Columbia
Committee on Labor and Workforce Development

Concerning B24-256, the Non-Compete Conflict of Interest Clarification Amendment Act
Prepared for delivery on July 14, 2021

Chairperson Silverman, thank you for inviting the public to submit testimony concerning B24-256, the Non-Compete Conflict of Interest Clarification Amendment Act.

Last year, the District of Columbia took a tremendous step forward to protect workers from abusive non-compete agreements that limit their ability to work, seek higher wages, and advance in their fields. I strongly urge the Council to retain the full provisions of the legislation as it was passed in 2020, and to refrain from passing any amendments that would tip the balance of District non-compete law in favor of corporations.

In response to testimony earlier in this hearing, I want to point out that educational institutions, broadcasters, and professional sports organizations have continued to prosper in states where non-competes are totally banned, including California. However, prior to the passage of the Ban on Non-Compete Agreements Amendment Act, non-compete agreements were often imposed on young or low-wage workers in the District who do not have the legal resources to fight them.

I know this 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 firm that “engages in same or competes with” my employer for a year after termination of employment. My peers at the firm — including those making less than \$40,000 — were also required to sign these agreements as a condition of employment.

There was no geographic radius set on my non-compete, and the specific type of employer it restricted was not defined outside of the text provided above. At the time of my job offer, I was 22 years old and just over 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.

As the 2018 election cycle neared to a close, I decided that I wanted to seek a new opportunity after the 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.

After an extensive job search, I was offered a position in corporate 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, and I pushed back. While my manager acquiesced, I took her question as a clear attempt to intimidate me into remaining at the firm. 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.

The Ban on Non-Compete Agreements Amendment Act was never intended to limit non-disclosure agreements that ban employees from using proprietary information from their employer to directly compete. However, I want to strongly urge the Council to refrain from amending the bill in any way that would allow for non-compete agreements to limit the rights of D.C. workers.

I know that there are proposed changes that would allow employers to inflict non-compete agreements on their employees for six months with compensation. I want to remind the Council that the vast majority of non-compete agreements are imposed in situations where there is a significant power differential between employees and non-employees. Opening the door to allow more of these agreements would hurt workers, not establish greater balance.

The Ban on Non-Compete Agreements Amendment Act as originally passed ensures 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. I urge the Council to retain the current threshold, and reject any provisions allowing for “so-called garden leave” for workers earning over \$80,000. D.C. is an area with an extremely high cost of living, and the proposed \$80,000 income threshold for non-compete agreements is roughly in line with 100 percent of Area Median Income for a household of one.



DC Chamber of Commerce Testimony

To

The Committee on Labor & Workforce Development

on

B24-256, Non-Compete Conflict of Interest Clarification Amendment Act of 2021

Wednesday, July 14, 2021

Good afternoon, Councilmember Silverman, members and staff. I am pleased to fill in today to testify for Angela Franco, CEO of the DC Chamber of Commerce. I offer testimony on behalf of our member-companies representing all segments of the local business community, from the District's very largest employers to scores of sole proprietorships and small business partnerships located in all eight wards of the city. In fact, nearly 80 percent of our business members are small firms.

In the following paragraphs, I will attempt to convey four major points.

First, we want to express our appreciation for your willingness to revisit the Ban on Non-Compete Agreements Amendment Act of 2020 (L23-0209). We also want to thank you for the initiative you have taken to schedule this timely hearing on your bill, B24-256, Non-Compete Conflict of Interest Clarification Amendment Act of 2021.

Unfortunately, while that bill is a starting point to address several issues triggered by the Act, we do not believe it goes far enough to fully resolve those issues. Specifically, the bill only addresses two situations where employers need the flexibility to enter into non-compete agreements to protect their businesses from employee conflicts of interest: 1.) cases where the employee's conflict of interest causes the business to operate in an "unethical manner," and 2.) cases in which the conflict of interest violates applicable laws or rules. While these situations are certainly worthy of protection, in reality, most employee conflicts of interest do not cause unethical business behavior or trigger violations of laws or other codified professional standards.

The bill does not preserve an employer's ability to protect itself against a well-placed employee accessing confidential, sensitive or proprietary business information and also seeking to work subsequently *or even simultaneously* for a competing business. It is for these far more commonplace employee conflicts of interest that the business community seeks targeted relief.

Second, as you know, we have been working with you and your staff, along with Councilmember Pinto and her staff on amendments to address our core concerns regarding the Act's sweeping ban on non-compete agreements, particularly the prohibition on an employer's ability to protect itself against employees who accept conflicting simultaneous employment with competing firms.

I note, however, that the amendments proposed by Councilmember Ms. Pinto are narrowly tailored to preserve important protections provided by the Act, including the following:

1. The amendments would preserve an employee's ability to pursue simultaneous work in an unrelated field, such as an office worker "moonlighting" as an Uber driver or hosting, waitressing or bartending at a restaurant, or working as a retail associate. We do not seek to restrict in any way an employee's ability to supplement their income by accepting unrelated work elsewhere.
2. The amendments would continue to allow all employees earning less than \$80,000 annually the freedom to pursue subsequent employment, *even in cases where this presents clear conflicts of interest*. For example, an Administrative Assistant to the CEO of a mid-sized technology company earning \$70,000 a year would be free to take a subsequent position with a competitor, even if the Assistant had routine access to the prior employer's confidential, sensitive or proprietary business information. Our aim is to fully preserve the subsequent job mobility of lower paid employees, *regardless of circumstances*.
3. The amendments would also offer important protections for those employees earning \$80,000 or more annually with access to an employer's confidential, sensitive or proprietary business information. First, employers would only be able to restrict subsequent employment with a competitor for a maximum of 6 months. And even then, the employer would be required to fully compensate

its former employee for the entire period, up to a maximum pro rata annual compensation of \$150,000.

4. The amendments would also preserve an employee's freedom to pursue subsequent work with a direct competitor where there is no reasonable expectation that the employee would have access to confidential, sensitive, or proprietary business information. For example, a *UPS* delivery driver could not be prohibited by their employer from accepting subsequent work as a *Federal Express* delivery driver.

Third, some have suggested that non-disclosure agreements or NDAs provide a more targeted tool to prevent employee conflicts of interest. NDA's can offer employers another way to protect their proprietary, sensitive or confidential business information. But non-compete agreements serve an important role that cannot typically be replicated by an NDA.

Non-competes are the only truly effective way to prevent an employee from *unwittingly* considering, applying or disclosing confidential information obtained through work with a competing firm. Consider, for example, an employee working for two competing businesses simultaneously. The employee has entered into comprehensive NDAs with both employers. Practically speaking, if that employee were asked to analyze or opine on a pivotal issue for which they may be in a position to disclose -- *or even take into implicit consideration* -- information or experience acquired through work for the competing employer, an NDA would run up against that employee's duty of loyalty to the requesting employer. This potentially puts employees bound by NDAs in difficult and tenuous situations. Situations that can only be avoided by *preventing* certain employees from accepting *simultaneous* employment with direct competitors, and by *restricting*, under well-defined legal and financial parameters, *subsequent* employment with direct competitors.

Finally, we would ask the Committee to carefully consider the competitive implications of the Act. Taking into account simultaneous employment, the District now has the nation's most restrictive non-compete ban, one that is by far and away the most restrictive in the DMV. This puts our employers in the unenviable position of being unable to protect themselves from potential poaching of their key employees by national competitors and especially nearby businesses in neighboring jurisdictions.

Thank you very much for the opportunity to testify today. We urge you to consider supporting the amendments proposed by Councilmember Pinto as both reasonable and necessary I would be happy to try to answer any questions.



U.S. Chamber of Commerce

DC Chamber of Commerce
DELIVERING THE CAPITAL



July 28, 2021

The Honorable Elissa Silverman, At-large
Council of the District of Columbia
1350 Pennsylvania Avenue, NW Suite 408
Washington, DC 20004

Dear Councilmember Silverman:

Thank you for allowing additional comment regarding Law 23-0209, the Ban on Non-Compete Agreements Amendment Act of 2020 (the Act), and the Non-Compete Conflict of Interest Clarification Amendment Act of 2021 that is pending before the Council. In addition to the comments the business community shared during the public hearing, we also ask that you consider clarifying the underlying law regarding long-term incentive awards that some employers may offer employees. We would like to submit these additional comments for the record.

Long-term incentive awards are typically stock compensation issued to higher-salaried executive-level employees. The payment of these incentives tends to be deferred, payable after a specific time period, often a few years. Long-term incentive awards do not prohibit employees from seeking new employment opportunities, even with competitors. However, an employee who chooses to accept a new employment opportunity may have to forfeit any incentive awards that have not yet been paid. These employees are free to choose between continuing to receive payment of their long-term incentive award or joining a competitor.

Unfortunately, the Act is not clear when it comes to long-term incentive awards, which leaves some DC employers operating with uncertainty as they work to comply with the recent non-compete changes. A non-compete statute in Oregon provides a similar exception for these types of awards. Furthermore, these long-term incentives are generally awarded to highly compensated, sophisticated employees, and therefore not generally applicable to employees earning less than \$80,000 annually. Although it appears that the recent ban on non-compete agreements was not intended to apply to long-term incentive awards, the ambiguity leaves employers and employees in uncertain territory.

The Act defines a "Non-compete provision" as "*a provision... 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.*" These forfeiture provisions within long-term incentive awards do not prohibit competition, but only end payment opportunities if an employee accepts employment with a competitor.

The DC Council's Committee on Labor and Workforce Development report on Law 23-209 (dated Nov. 19, 2020) indicates that the Act may not have been intended to apply to long-

term incentive awards. This report noted that non-compete agreements are "usually... 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 employment..."

While both the underlying language and this report seem to favor exclusion of long-term incentive awards, the ambiguity still concerns our members. We request that the Council consider addressing this particular issue and clarify that the law does not apply to long-term incentive awards that are forfeited if an employee joins a competitor.

Sincerely,

A handwritten signature in black ink that reads "Angela Franco". The script is cursive and fluid.

Angela Franco, President & CEO
DC Chamber of Commerce

A handwritten signature in black ink that reads "Glenn Spencer". The script is cursive and fluid.

Glenn Spencer
Senior Vice President, Employment Policy Division
U.S. Chamber of Commerce

cc: Members of the Committee on Labor & Workforce Development

Council of the District of Columbia
Comments by
Bernie Brill
Executive Director of SMACNA Mid-Atlantic Chapter

**B24-256, the Non-Compete Conflict of Interest Clarification Amendment Act of
2021**

Wednesday, July 14, 2021
Virtual Hearing--Zoom

My name is Bernie Brill, and I am the executive director of the Sheet Metal and Air Conditioning Contractors' Association Mid-Atlantic Chapter. Our association represents nearly 50 union signatory contractors whose members fabricate and install state-of-the-art environmental systems in buildings, as well as install metal roofing, perform air testing and balancing, and manufacture and install specialty metal products such as kitchen equipment.

As you know, our members were involved with helping to build many of the area landmarks such as the African American History Museum, Audi Field, Nationals Baseball Park, along with converting the DC Convention Center to a Covid medical facility...just to name a few.

Today I am here to encourage the Labor and Workforce Development Committee to reconsider the ban on non-compete contracts. Non-compete contracts or agreements, if written and executed properly, protect businesses and jobs. They safeguard a company's proprietary information, databases, customer lists, and allows for a smooth transition when companies are bought and sold.

Consider for a moment that you own a construction company and have invested millions of your hard earned dollars in plasma cutters, coil lines, robotics, state of the art software and other high tech equipment. Of course you most important asset are your people who you have invested millions of dollars in training and other benefits.

Without a non-compete agreement in place, a high ranking employee could walk out the door and begin working for your top competitor or start their own business using your information. While the District's existing law makes some exceptions for these agreements, I believe a complete ban on both simultaneous and post-employment restrictions would discourage businesses transitioning and possibly forcing many to close or even leave the District.

When it comes to the construction industry, non-compete contracts are common with senior-level managers and executives. Consider that companies are bidding on work that may not commence for two or three years. Bidding in of itself is an expensive proposition. Sheet metal companies like others closely guard their customer lists, pricing guidelines, fabrication processes, intellectual property, and other trade secrets. We would support further amendments that only limits non-competes to individuals that have access to or knowledge of their employer's confidential, proprietary or sensitive information including pricing and customer lists.

As noted, these are senior-level managers and executives and not material handlers, truck drivers, or other low-level workers which we agree should not be the focus of the law. So how the law defines "employee" and "employer" is important. No firm can afford to have a senior-level employee move to another company with highly classified information. These senior-level managers and executives are highly compensated individuals with generous wages and benefits.

As you have heard me discuss before, by definition a journeyman or journeyperson moves from job-to-job and from employer-to-employer depending upon the demand for labor. Unless the employer has another job to transition to, the worker has the option of moving on to another employer or collecting unemployment.

Successful businesses continually reinvest significant sums of money back into their own companies in terms of technology, new processes, and other creative business practices. Allowing this ban on non-compete contracts to continue will further threaten businesses by allowing an employee to freely transfer key information and company “secrets” without threat or concern. Thus, the system rewards the unscrupulous individual and punishes the business that is responsible for paying taxes, providing jobs, and providing important services.

We appreciate that the Council addressed non-disclosure agreements and is open to ensuring employer information is not used inappropriately, but would like to see specific language in the law to address solicitation and poaching. Though the enacted law appears to be focused only on post-employment and simultaneous employment restrictions, it does not explicitly carve out these commonly used non-solicitation restrictions.

My question is why does the government want to interject or interfere with this practice? It has been my experience that no two businesses are the same and for this reason, the “one size fits all” simply does not work here.

A non-compete contract is and should be, viewed as a managerial tool. If the employee does not wish to sign one the employer can then decide whether or not to keep the employee without a non-compete contract or suggest other employment.

We saw during the pandemic that construction was seen as “essential” work. Our contractors carried on despite under challenging circumstances and increasing costs. These companies must be given the latitude to operate their business as they see fit with minimal government interference. The need to implement the fixes outlined above is urgent, and that is why we are urging Councilmembers to support amendments that will reform a few critical aspects of the new law in time to account for the post-pandemic planning of many of the District’s employers.

Thank you for this opportunity to share my thoughts and I am available to address your questions.

Bernard D. Brill
SMACNA Mid-Atlantic Chapter
301/446-0002 x 101

Council of the District of Columbia
Testimony by Janene D. Jackson, Esq.
On Behalf of Opportunity DC
Bill 24-256, the Non-Compete Conflict of Interest Clarification Amendment Act of 2021
Wednesday, July 14, 2021 at 1:00 pm
Virtual Hearing – Zoom

Good afternoon Councilmember Silverman, members of the Council and staff. I am Janene Jackson, Equity Partner at Holland & Knight, LLP. I am testifying on behalf of Opportunity DC, an organization that seeks, amongst other things, to ensure the District of Columbia government maintains balanced budgets and fiscal discipline and achieves regional competitiveness. Today, I am testifying on Bill 24-256, the “*Non-Complete Conflict of Interest Clarification Amendment Act of 2021*.”

As drafted, the bill increases employer and employee confusion regarding an employer’s authority to safeguard its highly competitive and confidential information from disclosure and the restrictions employers can place on their employees given that employees can simultaneously work for competitors; employees are able to immediately switch to a competitor without any cooling off period when the employee has current and relevant competitive knowledge; and the state of unknown in the District as to how non-competes are treated during this critical time as the City continues the herculean efforts of re-opening. The bill also does not address many of the concerns raised by employers regarding the recently enacted, *Ban on Non-Compete Agreements Amendment Act of 2020* (“Act”).

Bill 24-256 contains language that is vague and ill-defined, and fails to instruct employees and employers on when and the circumstances in which employees may engage in simultaneous employment. The bill also fails to address how the rights of employers to protect confidential, proprietary information aligns with employees’ rights to hold simultaneous employment.

First, the bill amends Section 101 by adding a “Bona fide conflict of interest provision.” The new paragraph (A1) states:

an otherwise lawful written provision or workplace policy that bars an employee from accepting money or a thing of value from a person during the employee’s employment with the employer because the employer reasonably believes the employee’s acceptance of money or a thing of value from the person will cause the employer to:

(A) Conduct its business in an unethical manner; or

(B) Violate applicable local, state or federal laws or rules.

As written, this language has no real effect because it contains undefined and vague terms such as: “lawful written provision,” “workplace policy” and “thing of value.” Because these terms are undefined and vague, employees and employers will be unclear in their rights and obligations, it will result in employers taking different and inconsistent approaches to their workplace policies and will likely result in litigation and an

enforcement quagmire. Both employers and employees benefit from having clear rules on what and when certain conduct is prohibited.

Additionally, this language does not allow an employer to adopt a workplace policy that protects an employer's confidential and proprietary business information. These protections are critically important given the Act's prohibition against any policies prohibiting simultaneous employment. This omission in B24-256 is inconsistent given the fact that the Act expressly states that employers do have the right to protect confidential proprietary information.

The fact is that restrictions for simultaneous or secondary employment are necessary, and I am not aware of any jurisdiction that prevents an employer from having reasonable restrictions on certain employees. When the Act was passed in December 2020, the District of Columbia became the only jurisdiction in the United States that restricts an employer from having any workplace policy that prohibits employees from engaging in simultaneous or secondary employment. The District's approach is even inconsistent with California, which limits its non-compete ban to post-employment and permits an employer to control an employee's conduct and duties while employed.¹ The Act allows employees to freely work for a competitor, even those employees who are routinely exposed to confidential and sensitive business information.

The Council should amend the *Ban on Non-Compete Agreements Amendment Act of 2020* to protect employees and employers because both deserve clarity and need to be able to plan. The fact is that employers are struggling to prepare appropriate policies that allow them to comply with ethical or other professional rules and protect confidential and sensitive business information. The Council can do this by (1) allowing employers to place reasonable limitations on an employee's simultaneous outside employment when the employee has access to sensitive information and the employee seeks to work for a similarly situated competitor and (2) restoring an employer's ability to enter into certain enforceable post-employment non-compete agreements with employees above a certain income threshold when the employer agrees to compensate the employee in exchange for the prohibition.

Opportunity DC is proposing the following reasonable amendments:

1. Allow an employer to prevent a non-compete employee or a medical specialist from:

- Disclosing, using, accessing for any use other than the employer's need, or selling an employer's confidential, proprietary, or sensitive information, client lists, customer lists, pricing lists, research grants, intellectual property, or trade secrets.
- Soliciting or providing services to or accepting as a client or customer the employer's customers or potential customers, clients that the employee had solicited on behalf of the employer, or employees of the employer.

¹ *Techno Lite, Inc. v. Emcod, LLC*, 44 Cal. App. 5th 462, 471, 257 Cal. Rptr. 3d 643, 650 (2020).

- Being simultaneously or subsequently employed by another employer who operates a business that is likely to result in the disclosure or use of an employer's confidential, proprietary, sensitive information, client lists, customer lists, pricing lists, research grants, intellectual property or trade secrets, or who would be in direct competition to the employer.

2. Require compliance by an employee with:

- Applicable statutory or common law, state- or federal-sponsored grants or contracts, conditions of a sponsored grant or award, applicable professional rules of conduct, ethical and regulatory obligations, or collective bargaining agreements.
- Bona fide and written conflict of interest policies that require the disclosure of material competing financial, business, or legal interests, ethical or regulatory obligations, or collective bargaining agreements.

3. Protect employees by requiring that a non-compete provision that restricts an employee after an employee leaves a job:

- May not be in force for more than 6 months.
- Only applies to an employee with a total annual compensation of at least \$80,000.
- Compensates the employee for the entire period the provision is in force.

Thank you for the opportunity to testify today and I am available for questions.

Daniel Essrow
Nonprofit Professional Employees Union
717 Kenyon St. NW
Washington, DC 20010 (Ward 1)
716-417-3394
07/12/21

Testimony Regarding B24-256, the Non-Compete Conflict of Interest Clarification Amendment Act of 2021

Thank you for the opportunity to testify today in support of implementing and enforcing a clear and simple ban on the use of non-compete agreements in the District of Columbia.

My name is Dan Essrow and I am a staff organizer with the Nonprofit Professional Employees union based in DC. Each and every day, my inbox is filled with messages from nonprofit workers in DC and around the country asking for help in improving their workplaces and exercising their rights on the job. Over the past two years, our union has assisted hundreds of nonprofit professionals at dozens of organizations form a union. These workers range from administration and operations assistants, to development professionals, communications specialists, lawyers, and PhD economists.

As these campaigns play out at each workplace, I am reminded that our economy and our politics are about power. Rights granted to someone without the power or knowledge to use them are worthless. At workplaces across DC, employers have a keen understanding that at the end of the day—they hold the power. The terms and conditions of employment reflect that. Employers wield their power to keep wages low, exclude staff from decision making, and in some cases prevent employees from looking for better work.

A key part of my job is explaining to highly educated and sometimes highly paid professionals—including those who work directly in legal and policy settings—what their rights as employees are. **There is no level of pay or education at which employees automatically know their rights.** The right to form a union, the right to paid family leave or sick days in DC, the right to overtime for low-wage workers, are all things we must actively educate our membership on.

This is why I am concerned about attempts to water down DC's ban on non-compete agreements before it even goes into effect. When basic labor rights have complicated thresholds, vary significantly by industry, or are up to employer discretion, these rights are much less likely to be accessed—especially by workers who are most marginalized.

Clear, universal rules are the most effective. Employment discrimination based on race or gender, for example, is illegal. Period. We don't make exceptions for certain industries, or say that high-wage workers can simply advocate for themselves.

The workers that my union represents do have more power relative to their non-unionized peers. If the terms of their employment deteriorate, they can appeal to the contract. This is not true for non-unionized workers—if their jobs deteriorate, their only recourse is to quit. Even in a healthy economy, leaving a job is a fraught and difficult choice. For a worker bound by a

non-compete agreement, quitting *without the ability to apply their skills at another job in the same industry*, is effectively impossible. A worker who is forced to sign a non-compete agreement to start a job they are excited about, but who then faces unsafe working conditions, is effectively trapped with little choice and no power.

Until every workplace in the country has a union, employers will continue to hold a majority of the cards in setting the terms and conditions of employment. We must give DC workers simple and enforceable rules so they aren't forced to sign away their rights just to secure a job.

I applaud the Council for taking the bold step in banning non-compete agreements in DC, and I look forward to the day this bill is implemented so we can begin educating our members about their new rights. Employers know that they will always have more time, more money, more resources than their staff—and they will continue to use that structural advantage to limit employee power within the bounds of the law, and seek to water down the law when it suits them. In what will be one small step in shifting that balance of power, I urge you to commit to implementing and enforcing a clear ban on non-compete agreements with no salary threshold and no undue carve outs.

Testimony before the
District of Columbia City Council
Committee on Labor

Daniel Perez
Vice President of Organizing
Nonprofit Professional Employees Union
400 Galloway St NE
Washington, DC 20011 (Ward 5)

Testimony on preserving the ban on non-compete clauses in the District of Columbia

Members of the Committee, thank you for the opportunity to speak today about the importance of preserving the District of Columbia's ban on non-compete clauses. My name is Daniel Perez, and I am the Vice President of Organizing for the Nonprofit Professional Employees Union (NPEU), a worker, and a proud DC resident. NPEU is a union that represents workers at nonprofits like the Brookings Institution, DC Jobs with Justice, the American Civil Liberties Union, and nearly 50 other organizations in DC and across the country. My fellow workers are from diverse backgrounds – they are newly minted graduates, senior fellows, caregivers, immigrants, workers of color, and I am here to talk about the negative impact that non-compete clauses have on my fellow workers and our economy at large.

Non-compete clauses (NCCs) hurt workers, by living up to their name. That is, NCCs ban competition by making workers sign away their right to switch jobs and pursue better opportunities.

My testimony establishes that:

- Non-compete clauses hurt workers by reducing wages and economic mobility in DC, and across the nation.
- Non-compete clauses disproportionately harm already marginalized workers.
- Better alternatives to non-competes are available to employers seeking to protect business interests and retain workers.

Economic and legal research illustrate the harm of non-compete clauses

A large body of legal and economic research shows that non-compete clauses are harmful to workers and the economy at large. For example, one 2014 study of 11,505 individuals showed that workers subject to non-compete clauses were 12.5% less likely to be satisfied with their job. This same study shows that being bound by a non-compete was associated with an 11% increase in the length of time at one's job.¹ Another 2020 study shows that when Oregon banned non-

¹ Star, Evan, J.J. Prescott, and Norman Bishara. 2020. "[Noncompete Agreements in the U.S. Labor Force](#)" *Journal of Law and Economics*, Revised October 24, 2020.

compete clauses, it resulted in higher wages for workers of all ages, education levels, and wage distributions – and especially for women.² Binding workers to their employers through NCCs, is not only bad for wages, but also for workers who are enduring hostile work environments because of sexual harassment, bullying, or hazardous working conditions.

Non-compete clauses are a tool better suited for restricting competition than protecting trade secrets

When businesses can exercise power in a local labor market to pay workers less, they are exercising what economists call monopsony power. Monopsony power can occur naturally, but it can also be intentionally created and cultivated through collusion, or by intentionally restricting competition.³ Businesses have a variety of tools they can use to build monopsony power – non-compete clauses, which ban workers from switching jobs, are one of those tools.

Defenders of non-compete clauses claim they are a tool for good, insisting that they protect business trade secrets, incentivize research and development, and more. However, these goals can already be achieved through existing legal tools like trade secret clauses, non-disclosure agreements, and copyright and patent laws.⁴ An additional, more powerful tool that businesses can use to use to retain employees is offering better wages and working conditions. Prohibiting workers from switching jobs is a short-sighted solution at best, and a tool to intentionally erode working standards at worst.

Conclusion

The freedom to pursue better opportunities is a fundamental American value. I applaud the Council for upholding this value, by leading the effort to ban non-compete clauses without exceptions or carve-outs. As a result, my fellow NPEU colleagues, community members, I, can look forward to a DC economy that is freer, fairer, and more competitive.

See also: Colvin, Alexander J.S., and Heidi Sheirholz. 2019. [*Noncompete Agreements: Ubiquitous, Harmful to Wages and to Competition, and Part of a Growing Trend of Employers Requiring Workers to Sign Away Their Rights*](#). Economic Policy Institute, December 2019.

² Lipsitz, Michael and Evan Starr. 2020. [*Low-Wage Workers and the Enforceability of Non-Compete Agreements*](#). Management Science, revised October 20, 2020.

³ Krueger, Alan B. and Eric A. Posner. 2018. [*A Proposal for Protecting Low-Income Workers from Monopsony and Collusion*](#). Brookings Institution, February 2018.

⁴ Vaheesan, Sandeep. 2019. [*The Bogus Justification for Worker Non-compete Clauses*](#). OnLabor.org, April 2019.

Testimony of Antwayne Ford, President/CEO, Enlightened, Inc.

Before the Committee on Labor & Workforce Development

On the Issue of Non-Compete Agreements and B24-256, the Non-Compete Conflict of Interest Clarification Amendment Act of 2021

Wednesday, July 14, 2021 at 1:00 PM

Good Afternoon Councilmember Silverman, members, and staff. Thank you for allowing me to provide my comments regarding B24-256, the Non-Compete Conflict of Interest Clarification Amendment Act of 2021, and the District's Ban on Non-Compete Agreements. My name is Antwayne Ford, President of Enlightened Inc., a technology firm located in Washington DC. Nationally, I serve as the Vice-Chair of the US Black Chamber of Commerce (140 Black Chambers nationwide) as well as the Secretary of the National Association of Workforce Boards (over 500 Workforce boards). These roles provide keen insight on workforce, technology, and economic development issues. It is with this perspective as an employer that I provide my recommendation.

To begin, I would like to thank the Council for being so willing to hear the business community's concerns and openness to address them in a timely manner to ensure the law is workable for all. For the record, I am not in support of a complete ban but like the Council I think there are limitations that can be formulated to work for all stakeholders. For starters, a complete ban on non-compete agreements would pose various conflicts for the employer.

Current, and in some cases, a prior employee can willingly, or unwillingly share proprietary, competitive and/or confidential information with competitors. This is especially harmful to small businesses that may be raided by a larger business that can overpay to achieve a competitive advantage. In addition, current and/or prior employees can retain proprietary, competitive and/or confidential information for their own entrepreneurial affairs. I support clarifying the law further to prevent current and/or prior employees from accessing, selling, or even using employer information particularly pricing lists and other intellectual property. I support creating and supporting small businesses, and have served as a Department of Defense Mentor, and a Small Business Administration mentor. However, a full ban on non-compete agreements would trigger unethical business practices and create chaotic legal issues.

Finally, a ban of this type allows employees to hold the same position currently with competing employers. In competing industry sectors, many different employers create a method to “steal” contracts from an incumbent by sharing business practices, best practice techniques, and other competitive advantages used by the incumbent employer. In a city that is focused on recovery, particularly in the technology sector, we cannot stand by and support a bill that would create these types of problems. Among other things, the active employee has current, real-time access to the employer’s clients and business plans, not merely historical knowledge of what those plans used to be. Applying to current employees creates a conflict of interest and does not allow businesses to offer additional compensation and/or benefits to prospective hires. We support adding an exception to permit restrictions against active employees performing work for, or providing services to a competing employer simultaneously and explicitly excluding non-soliciting contracts.

However, I can support reasonable limited restrictions on post-employment based on employees earning more than \$80,000 should those employees have access to competitive and proprietary information. This would ensure those entry-level and low-wage workers are protected. In addition, I would advocate on limiting post-employment based for a specific time after one leaves their employer for up to six (6) calendar months. During this six-month cooling off period, the employee is free to seek employment in the same field and industry as long as it is not in direct competition, or on a contract in which the employee had previously worked or had proprietary information. Considering the tech-job market across Washington, DC, it is typical for technology-based job seekers earning more than \$80,000 per year to find gainful employment within 1 – 2 weeks, without working for a direct competitor, or in a comparable position.

Finally, a partially enforceable Non-Compete Agreement should include the following:

During the employment tenure:

- The agreement should prohibit employees from retaining or using for personal or business use, company-specific information, proprietary documents, internal practices, etc.
- The agreement should be immediately enforceable upon an employee’s resignation from the company up to the end of the cooling off period
- The agreement should enforce competition to be within a reasonable vicinity of the primary work location

As stated above, employees making less than \$80,000 per year should be able to seek employment and have no ban on post-employment as long as they don't have access to proprietary information.

In closing, I would like to thank the committee for the opportunity to present my testimony and hope you see my perspective as a person who is actively involved in this discussion nationwide.



**Testimony before the
Council of the District of Columbia
Committee on Labor and Workforce Development
Hearing on
B24-256, the Non-Compete Conflict of Interest Clarification
Amendment Act of 2021**

*** * ***

**Presented by
Justin Palmer, MPA
VP, Public Policy & External Affairs
July 14, 2021**

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.

Greetings Chairperson Silverman and members of the Committee on Labor and Workforce Development, my name is Justin Palmer, and I am the Vice President for Public Policy & External Affairs for the District of Columbia Hospital Association (DCHA). I appreciate the opportunity to present testimony B24-256, the Non-Compete Conflict of Interest Clarification Amendment Act of 2021.

DCHA represents the interests of our members who employ over 30,000 associates providing care to residents from all eight wards, our neighbors in Maryland & Virginia, and patients from around the world.

The legislation before the Committee today makes clarifying changes to the “Ban on Non-Compete Agreements Amendment Act of 2020” to clarify that bona fide conflict of interest policies are allowed to prevent unethical behavior or

prevent the violation of other local, state, or federal laws and rules. This clarification, in my understanding, seeks to avoid conflicts with provisions included certain grants including some federal research. We support this clarification.

During the consideration of the underlying bill last Council Period, we worked with you, Chairperson Silverman, and your staff to develop consensus language concerning medical specialists. Through that agreement, medical specialists making at least \$250,000 a year in total compensation could be asked to sign a non-compete agreement provided the appropriate notice is given as well as the employee is free from actual or threatened retaliation.

The pandemic has once again the shined the light on not only the importance of health coverage but also access to care. Allowing the limited use of non-compete agreements for

medical specialists, as agreed to, ensures health care providers in the District can maintain access for our patients and avoids creating an unlevel playing field with health providers in Maryland and Virginia who otherwise would be able to poach our providers without our ability to do the same.

The District of Columbia Hospital Association and our members maintain our support of this agreement and encourage these provisions remain unchanged as the Committee considers the recommended changes requested by our colleagues from other sectors of the business community.

Thank you for allowing me to testify today, and I am happy to answer any questions you may have.

TESTIMONY OF DASH KIRIDENA
COUNCIL OF THE DISTRICT OF COLUMBIA
COMMITTEE ON LABOR AND WORKFORCE DEVELOPMENT

Bill 24-256, the Non-Compete Conflict of Interest clarification Amendment Act of 2021

July 14, 2021
1:00 pm

[Read by Linwood Jolly: Good Afternoon and thank you for holding this hearing. Dash Kiridena, CEO of Codice, is unfortunately out of town on business and unable to be here today, so, I will be reading his testimony in his place.]

Good afternoon Chairwoman Silverman, Councilmembers, and staff. My name is Dash Kiridena, and I am a long-time resident of Ward 4 and the owner and Chief Executive Officer of the D.C. Certified Small Business Enterprise Health IT 2 Business Solutions doing business as Codice. Thank you for the opportunity to testify about Bill 24-256, the Non-Compete Conflict of Interest Clarification Amendment Act to amend the Ban on Non-Compete Agreements Amendment Act of 2020. As a small business owner, the Ban on Non-Compete Agreements presented grave challenges for my and other businesses in the District who are, at all times, competing with businesses that operate out of neighboring Virginia and Maryland. While not the final step, the Amendment that we are here to discuss today is an important step to striking a balance for District employees and employers. My testimony today will focus on the impact of the Ban on small businesses like mine and ways that the Ban on Non-Competes can be improved to truly serve the D.C. labor force.

Codice is a minority-owned information technology and business process outsourcing company specializing in healthcare administration, compliance, IT solutions, and talent management. The company was founded in 2009 and currently operates out of offices in Ward

5, where we have maintained operations since 2009, and most recently Ward 2 where we opened a new office this past year. We have 88 employees, the vast majority of whom are District residents with a broad range of professional experience and expertise. Codice as a company believes in investing and growing its talent. We expend countless hours and resources training new and current talent so that each employee may flourish and grow with the business.

Last year, D.C. passed the Ban on Non-Compete Agreements Amendment Act of 2020, a blanket prohibition on almost all non-compete agreements between employers and employees regardless of salary level or an employee's position within a company. The prohibition appears to apply to non-compete agreements for both current and post-employment opportunities. This kind of blanket prohibition poses serious challenges to small companies like mine that rely on industry-specific expertise in its upper management. For example, as written, the Ban on Non-Competes arguably prohibits businesses from requiring its executives to dedicate their full time and attention to their jobs. That kind of language in an agreement, under the current Ban on Non-Competes, could be read, on its face, to be an unlawful limitation on an executive's ability to perform work or provide services for pay for another person. As a general business matter, it is a reasonable expectation that upper-level managerial employees dedicate their full time and attention to the business. To allow simultaneous employment for upper-level managerial employees, would be detrimental to businesses, especially small businesses.

The Act's blanket prohibitions on post-employment non-compete agreements are also problematic for small businesses. Upper-level management employees for small businesses quickly become intimately familiar with various business strategies, technologies, secrets, and other proprietary information and industry knowledge. The current Ban on Non-Competes would allow upper-level management employees to perform work for direct competitors

immediately following the end of employment with a business. The foreseeable unintended consequence is that upper-level employees may find themselves in a situation where they subconsciously rely on intimate knowledge of a former employer's business solutions and technology that gives their new current employer an unfair advantage in the marketplace.

The Ban on Non-Competes also jeopardizes the viability of small businesses who are subcontractors to larger enterprises. Oftentimes subcontracting agreements will contain provisions that prohibit their subcontractor companies and those subcontractors' key managerial employees from competing against the interests of the prime contractor. The Non-Compete ban would put small businesses in a position where they may unintentionally breach those provisions because it does not allow small businesses to limit upper-level employees ability to compete. The penalties for these kinds of breaches can be very costly.

I want to thank you, Chairwoman Silverman and Councilmembers, for taking this important step to amending the Ban on Non-Competes to clarify the conflict-of-interest provisions of the bill. However, the examples of challenges that small companies face that I have described here will not be resolved by the proposed Amendment, which focuses almost entirely on a very specific kind of quantifiable conflict of interest or explicit disclosure of proprietary information. As a small business owner, I am not opposed to reasonable restrictions on non-competes. Reasonable restrictions that are effective in controlling the adverse impact of non-competes on regional workforces include wage floors and time restrictions for non-compete agreements. Such reasonable restrictions would have the effect of ensuring that low and middle-wage earners have the opportunity to compete and advance their careers, while still safeguarding the viability of small local businesses who invest disproportionate amounts of time and resources into upper-level managerial employees compared to larger competitors in neighboring areas that

are not subject to the same restrictions. I ask the Council to consider additional changes to the underlying law that would address my comments and those of the business community that you have heard today and in previous meetings. As you continue to study the impact of the Ban on Non-Competes on the District's economy, I hope that you continue to engage the small and local business community so that this body may strike a harmonious balance between the interests of the District's employers and employees.

I appreciate you and your staff for taking the time to hold this public hearing so that we may hear and understand one another's priorities and possible ways forward. I and my organization hope to continue the conversation with you as the Ban on Non-Competes is updated to reflect the best interests of all District residents. We look forward to working with you and your staff on changes to the law. Thank you for the opportunity to testify.



July 28, 2021

The Honorable Elissa Silverman
DC City Councilmember At-Large
Chairperson, DC City Council Committee on Labor and Workforce Development
The Wilson Building
1350 Pennsylvania Ave., NW
Washington, DC 20004
labor@dccouncil.us

RE: Comcast's Written Comments on the Non-Compete Conflicts of Interests Amendment Act of 2021 (B24-256) Following the DC City Council Committee on Labor and Work Force Development's Hearing on July 14, 2021.

Dear Chairperson Silverman,

Thank you for holding a hearing to allow public testimony regarding the above-referenced bill on July 14th. Please allow this document to serve as Comcast's comments on this pending bill. Comcast requests that you include this document in the public record on this bill.

Comcast appreciates the Committee on Labor and Work Force Development's willingness to consider amendments to the current non-compete law as well as its recommendation to change the effective date of the current Ban on Non-Compete Agreements law to April 2022. As explained in greater detail below in our recommendation, Comcast is hopeful that the Committee on Labor and Workforce Development will also support Councilmember Pinto's proposed amendment (in draft form) to the District's Ban on Non-Compete Agreements law, as it includes needed exceptions to protect the competitive interests of DC businesses.

Comcast has a significant presence in Washington, DC. As a large business that has successfully operated in Washington, DC for 21 years, Comcast has over 800 employees who work from our District of Columbia properties. Comcast has paid over \$100M in taxes, fees, and permits in the last three years, and we have invested nearly \$500M in payroll benefits and training for our

Washington, DC workforce over the last three years. Moreover, in 2020, Comcast donated over \$50M in cash and in-kind services to over 220 DC community-based organizations.

Comcast is deeply invested in Washington, DC's success and we want to work collaboratively with City leaders to ensure the District remains a coveted place for businesses to operate, grow, and prosper. This, in turn, will positively impact the DC economy and thousands of DC workers and their families.

Recommendation

While Comcast agrees with the District's desire to prevent the excessive and/or unreasonable use of non-compete provisions in employment agreements, we feel that this goal should be balanced against protecting the legitimate interests of the business community. Fortunately, the Council need not consider these important policy objectives in a vacuum; to the contrary, many states across the country have tried to reach similar goals and have passed non-competition laws in recent years. We urge the Committee to consider this recent history in connection with this pending bill.

We are concerned that the broad language in the current Ban Non-Compete Agreements law does not achieve this goal because (i) it prohibits non-competition agreements irrespective of the employee's job duties, salary, and access to confidential or privileged information or other trade secrets; (ii) the law is unclear as to how it impacts non-solicitation provisions over customers and employees; (iii) the law seems to conflict with current law on an employee's duty of loyalty; and (iv) the law includes a blanket prohibition on policies that prohibit current employees from working for a competitor. The current law is the broadest ban on non-compete agreements in the United States and is at odds with the many non-compete laws passed across the country in recent years. If it is not amended to include reasonable exceptions, the District is at risk of creating an unfriendly business environment that pushes businesses to consider other options, including flight to neighboring jurisdictions, to the detriment of the District of Columbia and its residents.

Unfortunately, the proposed Amendment addressed at the hearing on July 14, 2021, B24-256, Non-Compete Conflict of Interests Clarification Amendment Act of 2021, <https://lims.dccouncil.us/searchresult/documentSearch=false&searchString=B24-256>, does not address the various employment circumstances that require an exception to the ban on non-compete agreements. Instead, it addresses two limited circumstances that rarely occur: (i) when an employee's conflict of interest causes a business to operate in an unethical matter; and (ii) when a conflict of interest violates applicable laws or rules. Specifically, B24-256 fails to address any of the remaining circumstances which put this bill at odds with the many non-compete laws that have been considered and/or adopted across the country in recent years.

Below are examples of common employee conflicts of interest for Comcast NBCUniversal. These examples demonstrate how Comcast NBCUniversal's competitive interests will be negatively impacted if legal protections are not in place.

Examples of Common Conflicts of Interest Circumstances Not Protected in the Current Law or B24-256

NBCUniversal, a Comcast subsidiary, operates an NBC News Bureau in DC that allows it to provide news on the federal government and DC issues. Some of these DC employees are staff in which outside employment may not be an issue due to their level or work and access, such as being behind the camera. However, there are many uniquely talented, highly-educated and highly-compensated, talent who gain access to contacts and resources due to being an NBC News producer, reporter, correspondent, and/or on-air hosts. These employees often gain large numbers of followers on social media due to the exposure NBC News employment provides to them. Yet, the current law and B24-256 would allow Chuck Todd (on-air host of Meet the Press) to simultaneously work as an on-air host of a CBS News program; causing confusion for the audience and conflict of duty issues by his work with a competitor. Or, an on-air reporter and producer who have White House credentials from NBC News to perform their job tasks could simultaneously set-up their own video podcast on Spotify, in which they discuss White House politics, essentially competing against NBC News. The generic paragraph that the Act does not apply to provisions that protect proprietary information or client lists would be wholly ineffective to restrict the above acts, yet each would be extremely detrimental. Without any provision to protect legitimate business and competitive interests of NBC News (and any other media with DC presence), the company would have little incentive to promote talent as the “face of a show” or pay high salaries to DC employees. Presumably, it was these types of issues that caused the Council to reasonably remove “medical specialists” from the generalized definition of “employee” under the Act and to establish parameters, including a compensation metric.

Conclusion

For the reasons set forth above, Comcast strongly recommends that the District adopt the amendment to the current law proposed by Councilmember Pinto (in draft form) that addresses the reasonable competitive interests of DC businesses while maintaining the legislative intent of the District’ Ban Non-Compete Agreements law.

Thank you for considering Comcast’s comments. Please contact me at (202) 368-8829 should you have any questions.

Sincerely,



Stacy Burnette
Senior Director
Government & Regulatory Affairs

Copies to:
Committee Members, DC City Council Committee on Labor and Work Force Development



Chairwoman Elissa Silverman
Committee on Labor and Workforce Development
District of Columbia Council
The John Wilson Building
1350 Pennsylvania Avenue, NW
Washington, DC 20004

July 14, 2021

Dear Distinguished Member Silverman:

I am writing you today on behalf on the American Institute of Certified Public Accountants (AICPA) regarding The Ban on Non-Compete Agreements Amendment Act of 2020 that was passed during the 2020 council session in addition to the Non-Compete Conflict of Interest Clarification Amendment Act of 2021 (the 2021 Act). We are asking you to amend the current Act to help protect all businesses in the District of Columbia and make it a competitive place to do commerce.

The AICPA is the world's largest member association representing the accounting profession, with more than 431,000 members in 137 countries and territories, and a history of serving the public interest since 1887. Our members advise clients on federal, state, and international tax matters and prepare income and other tax returns for millions of Americans. AICPA members provide services to individuals, not-for-profit organizations, small and medium-sized businesses, as well as America's largest businesses.

Current changes needed to the 2021 Act are the following:

- Guaranteed protection of sensitive and private information, including but not limited to the following: client and customer lists, research grants, pricing lists, intellectual property, and trade secrets
- Clear protection of a business' economical advantage
- Protection of an employer's investments

Further, in 2021 the Council introduced legislation in attempts to clean up the previous legislation with the Non-Compete Conflict of Interest Clarification Amendment Act of 2021. This bill does two things that are problematic to the CPA profession in particular, (1) it only addresses an employee's disputes that cause the employer's business to operate in either an "unethical manner," or infringe upon applicable laws or rules and (2) it does not preserve a firm's ability to protect itself against a well-placed employee accessing confidential, sensitive, or proprietary business information and seeking to work simultaneously, or subsequently for a competing firm.

Additionally, AICPA supports the amendments brought to the Council by Councilmember Pinto (attached are the proposed revisions). Councilmember Pinto's amendments to the Non-Compete

Conflict of Interest Clarification Amendment Act of 2021, offers bans to the non-compete criteria, that we find favorable and fall within industry standards, that include:

- An employer may require that a non-compete employee sign an agreement or may have a workplace policy that includes a non-compete provision that: restricts the employee from disclosing, using, accessing for any use other than the employer's need, or selling an employer's confidential, proprietary, or sensitive information, client lists, customer lists, pricing lists, research grants, intellectual property, or trade secrets.
- Restricts the employee's ability to: solicit or provide services to or accept as a client or customer, the employer's: customers or clients; or potential customers or clients that the employee had solicited on behalf of the employer; or solicit employees of the employer.
- Restricts the employee from being simultaneously or subsequently: employed by, performing work for, or providing services for another employer; or operating the employee's own business in a manner that is likely to result in.
- The disclosure or use of an employer's confidential, proprietary, sensitive information, client list, customer list, pricing lists, research grants, intellectual property, or trade secrets; or the employee's business being in direct competition to the employer.
- Requires compliance with bona fide and written conflict of interest policies that require the disclosure of material competing financial, business, or legal interests, ethical or regulatory obligations, or collective bargaining agreements; or is 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.

Thank you for your time, and I appreciate your concern with this matter. Please feel free to reach out to me directly at Marta.Zaniewski@aicpa-cima.com.

Sincerely,

Marta Zaniewski

Marta Zaniewski
Vice President, State Regulatory and Legislative Affairs
American Institute of Certified Public Accountants

cc:

Christina Henderson, Councilmember At-Large
Janeese Lewis George, Councilmember Ward 4
Trayon White, Sr., Councilmember Ward 8
Robert C. White, Jr., Councilmember At-Large

Testimony of Melissa Bradley
Founder and Managing Partner
1863 Ventures

Committee on Labor & Workforce Development
Chair Elissa Silverman

Hearing on “The Non-Compete Conflict of Interest Clarification Amendment Act of 2021”

July 14, 2021

I am submitting this written testimony opposing the current noncompete ban.

I have lived in the District for 25 years and have taught entrepreneurship at Howard, Georgetown and American. I run a black-founded, DC-based business development nonprofit called 1863 Ventures that helps black entrepreneurs launch startups, refine business models, access capital and scale up.

1863 Ventures is now the leading development nonprofit for New Majority Entrepreneurs and individuals who have historically been marginalized. We accelerate them accerate these startups from high potential to high growth through rigorous leadership training and strategic market access. Our thesis is that entrepreneurship is becoming an increasingly viable pathway to build wealth for a community that has been deprived from building wealth for generations. We aim to reduce barriers and risk for these founders across the nation and right here in the District.

This noncompete ban is a barrier to minority entrepreneurship. It could increase inequities in venture capital, startups and wealth. It undermines the very goal that the Council and minority activists like myself are trying to achieve.

The DC Council should be doing everything in its power to make it easier for entrepreneurs to start businesses, attract investors and then hire local DC residents. You may think that this noncompete ban protects employees. But the likely actual result is that fewer startups are launched in the District and employers will locate elsewhere, depriving local DC residents of employment opportunities.

Investors will not take the chance on a DC-based startup knowing full well that the startup’s team could jump ship to a competitor spilling all of the startup’s valuable intelligence.

No other jurisdiction in the country has installed such a sweeping ban on noncompetes. This will put the District, its entrepreneurs and its minority residents at a distinct disadvantage. The wealth gap will widen, not close—particularly compared to other regions.

The playing field is already unfair for minority entrepreneurs and workers. Don’t make the problem worse.

Testimony of Rob Stewart
Former Managing Partner
JBG Smith

Committee on Labor & Workforce Development
Chair Elissa Silverman

Hearing on “The Non-Compete Conflict of Interest Clarification Amendment Act of 2021”

July 14, 2021

I am submitting written testimony in opposition to the ban on noncompetes in the District of Columbia, especially since no other jurisdiction in the region have any similar restrictions.

I come from the world of real estate and am keenly aware of how DC’s high-cost environment puts a damper on the District’s economic development. I used to be Managing Partner of JBG SMITH where I handled acquisition, financing and disposition of JBG investments, as well as managing development plans for JBG assets.

First, let me say that I am personally passionate about closing the wealth and equity gap in the region and the District. I serve on the Board of the Washington Housing Conservancy, which is just now acquiring properties in high-opportunity neighborhoods in order to preserve them as affordable in perpetuity.

I am sympathetic to the ban’s intentions. Young people and those from disadvantaged communities deserve having a free and clear open road ahead of them as they climb an income or career ladder. Noncompetes do restrict post-employment choices.

But the DC Council cannot ignore the larger regional context that makes this ban harmful to the city’s economic competitiveness position—and by extension, harmful to the economic prospects of the people the DC Council is intending to help.

This ban gives entrepreneurs and employers another reason to choose Tysons or Bethesda over the District. Being in DC carries even more of a competitive disadvantage. On top of the higher cost of doing business in DC, this ban means that a rival company in the suburbs could orchestrate a one-sided poach of their software programmers, mechanical engineers or paralegals.

While employees deserve thoughtful protections, the truth is that without employers, it’s hard for DC workers to make any income or career gains.

There are hints that President Biden may institute a nationwide ban on noncompetes, which would change the game. Then every jurisdiction would be on an even playing field and DC’s noncompete ban would be moot. But we aren’t there yet. And until we are, it is foolish for the DC Council to put in place a ban that does nothing but narrow the economic opportunities available to DC workers and residents.

Testimony of Tim O'Shaughnessy

President and CEO
Graham Holdings

Committee on Labor & Workforce Development

Chair Elissa Silverman

Hearing on "The Non-Compete Conflict of Interest Clarification Amendment Act of 2021"

July 14, 2021

I am submitting written testimony in opposition to the ban on non-competes in the District of Columbia.

My career has been devoted to the world of business, trying to help create the future, along with better ways of living and operating in our world. I have both worked at (AOL, Revolution Health) and founded technology companies (LivingSocial). Now I lead Graham Holdings, which operates a variety of businesses in a variety of sectors, both inside and outside of DC. The DC-based businesses include Framebridge and Clyde's Restaurant Group, as well as technology & media companies Code3, Decile, Slate and Foreign Policy. In addition to being a business operator, I am currently a DC resident and have been for 20 of the last 21 years.

I have had the experience of launching a startup, raising capital and quickly hiring large numbers of employees. I also understand the perspective of investors and corporate management.

The non-compete ban has been framed as a way to clear barriers to economic advancement for workers. But this ban will harm DC's economy, business environment—and ultimately will harm the DC residents that this ban intends to help.

Tech can be an incredible income escalator for employees. The average DC tech job pays \$113,930¹, with potential for career and financial advancement. This can be in contrast to many DC employees who hail from the government, non-profits, associations or legal professions, industries that are more mature and traditionally have had more limited advancement opportunities.

A ban on non-competes will deal a blow to human capital intensive sectors like tech. An entrepreneur will become less likely to start a company in the District if his or her competitor in Arlington can orchestrate a one-sided poach of their software programmers. Perhaps equally as important, any existing technology company looking to setup a new office in the DMV area is

¹ Source: May 2020 State Occupational Employment and Wage Estimates for the District of Columbia from the Bureau of Labor Statistics for major occupational code "15-0000 Computer and Mathematical Occupations".

highly unlikely to consider DC as an option and expose themselves to one-sided poaching from nearby jurisdictions. Would an up-and-coming e-commerce company like Shopify set up an engineering shop in DC if they knew Amazon could poach its employees from across the river with no protections? The ban will help Virginia and Maryland and provide another challenge for DC businesses to overcome.

DC's lack of representation already puts DC operations at a relative disadvantage to Maryland and Virginia. We have no Senators and no voting member of the House to care about our interests. I know the Council shares the desire in seeking this representation and I am optimistic we are closer than ever before. But the fact remains DC is accumulating an ever-larger set of hurdles for its businesses to jump over.

Leaders of businesses are constantly making assessments of the future. I worry the non-compete ban will be taken as an unambiguous sign that businesses should think twice before setting up shop in DC, both because of the ban itself and because of what it signals about DC's desire to help employers grow and thrive. The ban unequivocally will make DC a less welcoming place to businesses.

I urge the DC Council to repeal the ban and collaborate with DC businesses to make it easier for companies to grow their DC operations with DC resident employees.



GREATER WASHINGTON
Board of Trade

**Formal Statement of the
Greater Washington Board of Trade**

**“B24-256, Non-Compete Conflict of Interest Clarification
Amendment Act of 2021”**

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

Wednesday, July 14, 2021

Chairman Silverman, thank you for the opportunity to provide comments on B24-256, the Non-Compete Conflict of Interest Clarification Amendment Act of 2021. The Board of Trade is in full support of Councilmember Pinto’s amendments to the Ban on Non-Compete Agreements Amendment Act of 2020 (L23-0209).

As a regional organization representing the business community in Maryland, D.C., and Virginia, we find the Act places a tremendous disadvantage to District businesses with adjacent Maryland and Virginia laws on non-compete.

The Maryland’s Non-compete and Conflict of Interest Clause Act, applies to employees earning equal or less than \$31,200 annually or \$15.00 per hour. While in Virginia, the newly passed law in 2020, equally bans low wage earners. Creating more hurdles for businesses in DC or for those looking to relocate here.

The pandemic has delivered an unjust financial blow to businesses and employees and as we are looking to get back to a new normal, much have change on how we do business. Including laws like L-23-0209, where employers

are reviewing, and in cases reformulating employee policies and practices to meet the law's requirements. The Council needs to amend the law to protect businesses small and large. The law may also have the unintended consequence of discouraging businesses from operating in the District to the extent it hinders their ability to protect business assets and sustain competitive advantage.

Councilmember Pinto's proposed amendments fixes some of the non-compete law's most significant flaws and strike a balance between allowing DC based employees to enjoy the benefits of a competitive job market while putting D.C. employers at lesser risk of serious competitive harm.

The Board of Trade supports the following proposed amendments to the law:

- Preserving an employee's ability to pursue simultaneous work in an unrelated field,
- Protecting an employee's ability to supplement his/her income by accepting unrelated work elsewhere,
- Allowing employees earning less than \$80,000 annually the freedom to pursue subsequent employment,
- Preserving an employee's freedom to pursue subsequent work with a direct competitor where there is no reasonable expectation that the employee would have access to confidential, sensitive, or proprietary business information.

We need to have reasonable restrictions in place, like allowing for post-employment restrictions for employees with access to sensitive data.

Thank you very much for the opportunity to submit comments and respectfully urge your full support.



DISTRICT OF COLUMBIA INSURANCE FEDERATION

1455 Pennsylvania Ave, NW, Suite 400 Washington DC 20004

wmcowen@dcif.org * 202.797.0757

Testimony of

District of Columbia Insurance Federation

Wayne E. McOwen, ARM, PLC -- Executive Director

Submitted to the

DC Council Committee on Labor and Workforce Development

14 July 2021

Bill 24-256

"Non-Compete Conflict of Interest Clarification Amendment Act of 2021"

Good morning Chairperson Silverman and members of the Committee on Labor and workforce development. My name is Wayne E. McOwen. I represent the District of Columbia Insurance Federation (DCIF), a state insurance trade association whose members provide property, casualty, life and health insurance products and services in the District of Columbia. On behalf of the DCIF, I appreciate this opportunity to submit the following remarks with regard to B24-256, the “Non-Compete Conflict of Interest Clarification act of 2021.”

The DCIF applauds the initiative by you and your committee to revise and improve the provisions of the Ban on Non-Compete Agreements Amendment Act of 2020, now DC Law L23-029. The focus of B24-256 on protecting propriety information and customer lists is a significant step toward protecting the interests of both the employer and the employees remaining with that employer. Ensuring the continued viability of the organization is critical for all stakeholders in any organization.

Additionally, we appreciate your willingness to extend the effective date of the non-compete law until April. That said, businesses remain focused on the need for time to move forward with fixes to the law that address urgent employer concerns. For this reason we are hopeful that you will consider marking up B24-256 when the Council returns from its recess early this fall.

As you and your committee deliberate the mark-up of this bill, we respectfully suggest additional ways to strengthen the protection provision of the legislation:

- Consider incorporating a provision to preserve an employer’s ability to protect against a well-placed employee – one with access to confidential, sensitive or proprietary business information – from seeking to work simultaneously, or subsequently, for a competing business.**
- Consider separating specific classifications of employees from the general population by establishing a salary threshold in terms of identifying those employees whose positions enable or require their access to proprietary information that would be harmful to the business if shared with competitors**
- Consider setting a “window of protection” in terms of a specific period of time during which such protections/prohibitions would be applicable, most particularly a period of time extending beyond the term of employment.**

Thank you for this opportunity to provide testimony on this issue. Please let me know if there are questions regarding my testimony, or if I can be of further assistance as the committee continues its deliberations.

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Department of Employment Services



Public Hearing on

**B24-256, the “Non-Compete Conflict of Interest Clarification Amendment Act
of 2021”**

**Written 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**

Wednesday, July 14, 2021

1:00 pm

Virtual hearing

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 24-256, the “Non-Compete Conflict of Interest Clarification Amendment Act of 2021.”

The stated purposed of Bill 24-256 is to amend the Ban on Non-Compete Agreements Amendment Act of 2020 (the “Act”) to clarify that bona fide conflict of interest provisions in workplace policies or in contracts do not constitute non-compete provisions in violation of the law. It will also clarify that employers may bar an employee’s use, in addition to the disclosure, of confidential, proprietary, or sensitive information, client lists, customer lists, or trade secrets during or after the employee’s employment for the employer, and amend the existing, legally required Notice of Hire form to ensure employees know about the law.

The Act, which became effective on March 16, 2021 but has not yet been funded, was meant to protect District workers from having to sign an agreement that includes a non-compete provision, as defined under the Act. The Act would also ban non-compete language in employer policy manuals or handbooks. The Act did carve out exceptions to the non-compete ban for volunteers, casual babysitters, lay members engaged at a religious organization in religious functions, and medical specialists and provided specific protections to medical specialists.

Just like with the Act, if Bill 24-256 is passed then DOES would be responsible for implementation, administration, and enforcement and the drafting of new regulations. These actions would require additional funding. Specifically, DOES would need to promote a current staff member to a Supervisory Program Analyst position. In addition, the bill would necessitate the hiring of a new Program Analyst, hired at Grade 12. In cases where an actual, not a perceived, conflict of interest arises, DOES would need to conduct a more in-depth forensic assessment, review, and fact finding of the situation than was previously needed under the original Act.

The provisions under the original Act were tied to salary and/or position, therefore the

proposed amendments under this bill will necessitate the inclusion of additional personnel at a supervisory level to provide a higher-level analysis. The estimated cost for promoting a current DOES employee to a supervisory position and adding a new employee would total \$433,000 over a four-year period. This is considered a conservative estimate and one that may be expanded if, during implementation, DOES determines that the Act as amended impacts a larger number of the estimated 200,000 District employees.

Chairperson Silverman and Councilmembers, thank you for the opportunity to submit testimony for the record on Bill B24-256, the “Non-Compete Conflict of Interest Clarification Amendment Act of 2021.”



Memorandum

To: Margaret O’Hora
Legislative Counsel

Liz Weiss
Committee Director
Committee on Labor and Workforce Development

From: Natalie O. Ludaway
Sadina Montani
Crinesha Berry
Crowell & Moring LLP

Date: March 16, 2021

Re: Amendments to Act 23-563 Ban on Non-Compete Agreements Amendment
Act of 2020

I. Introduction

The following amendments are proposed to the District of Columbia’s Ban on Non-Compete Agreements Amendment Act of 2020 (the “Act”). The proposed amendments would (i) allow employers to place reasonable limitations on employees’ simultaneous outside employment activities, and (ii) restore employers’ ability to enter into certain enforceable post-employment non-compete agreements with high-level employees. As explained, the current law goes further than *any* other jurisdiction – including California – and is harmful to workers and employers. The proposed amendments to the existing legislation which are fully set forth in Attachment A modify the following key sections:

II. The District is the only place that has no restriction on simultaneous employment and subsequent employment.

Prohibiting District employers from preventing simultaneous employment is without compare in any other jurisdiction in the United States. No other jurisdiction flatly prohibits employers from restricting simultaneous employment. Indeed, while Washington State restricts employers’ ability to limit employees’ simultaneous employment opportunities, even then it only restricts employers from prohibiting *an employee earning less than twice the applicable state minimum hourly wage* from having an additional job, supplementing their income, or becoming self-employed.¹

¹ See Wash. Rev. Code § 49.62.070. Washington’s statute is similar to the original introduced bill.]

The District's Act is broader than California where employees *are restricted from simultaneous employment*. California's laws do not include the following language, which is in the District's Act:

- (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

California's broad non-competition statute only impacts employers' rights to restrict post-employment activities and thus allows employers to restrict employees' activities during employment.²

Further, the Act's provision that allows employers to maintain policies that "restrict an employee from disclosing the employer's confidential, proprietary, or sensitive information, or a trade secret" without simultaneously allowing the employer to restrict employees' workplace activities do not adequately address the problem. Without any restriction, highly compensated employees, who are knowledgeable about employers' most competitive information, are free to compete and support employers' competitors while simultaneously employed, or set up their own competing businesses. No jurisdiction allows for this scenario.

Further, the post-employment restrictions should be tailored to restrict highly compensated employees. The same employer restrictions that apply to medical professionals should also extend to other sensitive employees.

III. Proposed Amendments

There are a number of ways in which the scope of the Act could be limited to more narrowly accomplish the underlying goals of the Act (*e.g.*, enabling job mobility, strengthening the entrepreneur class, allowing employers to have access to more talent) while more practically addressing the legitimate business interests acknowledged in the Committee Report (*e.g.*, protecting employers' confidential and proprietary information, trade secrets, and business reputation). These proposed amendments are narrowly tailored to acknowledge the stated goals and recognized business interests outlined in the Council's Committee Report.

² See Attachment B, *Techno Lite, Inc. v. Emcod, LLC*, 44 Cal. App. 5th 462, 471, 257 Cal. Rptr. 3d 643, 650 (2020) (confirming the relevant statute "does not affect limitations on an employee's conduct or duties *while employed*").

a. Allowing restrictions for simultaneous or secondary employment

The Act currently restricts an employer from instituting any workplace policy that prohibits an employee from engaging in simultaneous or secondary employment. This provision is out of step with the rest of the country, including California - the broadest in the country. The California Court of Appeals³ limits its non-compete ban to post-employment and permits an employer to control an employee's conduct and duties while employed. *Techno Lite, Inc. v. Emcod, LLC*, 44 Cal. App. 5th 462, 471, 257 Cal. Rptr. 3d 643, 650 (2020).⁴

An expansion of this statutory language would allow employers to enter into contracts and institute policies that allow tailored and limited prohibitions related to simultaneous employment that implicate such protected business information. This tailored amendment also should allow employers to institute policies to ensure compliance with ethical or professional rules. The amendments are as follows⁵:

Section 101(5)(A):

(5) "Non-Competition provision" . . . does not include:

(A) An otherwise lawful provision that:

(i) restricts the employee from disclosing, **using, selling, or accessing** the employer's confidential, proprietary, or sensitive information, client list, customer list, 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));

(ii) **restricts the employee from being simultaneously employed by another person, performing work or providing services for pay for another person, or operating the employee's own business in a manner that is likely to result in the disclosure or use of the employer's confidential, proprietary, or sensitive information, client list, customer list, 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));**

(iii) **requires compliance with applicable professional rules of conduct and ethical obligations; or**

³ The Supreme Court of California has not addressed this issue, so this is the current state of the law.

⁴ Attachment B.

⁵ Additional language is reflected in red.

b. Allowing post-employment non-compete agreements with “Key Employees” is consistent with the nature of the position and comparable to the treatment of medical specialists.

In addition to the above, employers should be able to enter into post-employment non-compete agreements with key well paid employees who are not the intended beneficiaries of this legislation. These employees are often highly compensated and have access, or either is privy, to highly confidential and sensitive business information. Parameters around these employees is appropriate and still maintains the integrity and purpose of the Act. Idaho has similar language.⁶

Similar to the definition carve-out for “Medical specialists” currently in the Act, we recommend a definition for “Key Employees” that relies upon an employee’s exposure to sensitive employer information and practices:

Sec. 101. Definition.

(5) “Key employee” means an individual who performs work in the District on behalf of an Employer and who:

- (A) Has access to or knowledge of the employer’s confidential, proprietary, or sensitive information, client list, customer list, 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)), and
- (B) Has total compensation of at least \$150,000 per year.

IV. Conclusion

As written, the statute is far broader than necessary to achieve its stated goals. The proposed amendments properly align with the Act’s underlying goals, while balancing the interests of both employees and the business community.

Please contact us should you need additional information or have further questions.

Enclosures

60239591

⁶ Idaho Code §44-2702(1).



**Consortium of Universities of the
Washington Metropolitan Area**

March 15, 2021

The Honorable Elissa Silverman
Chairman
Committee on Labor and Workforce Development
Council of the District of Columbia
John A. Wilson Building
1350 Pennsylvania Avenue, NW
Washington, DC 20004

SENT VIA ELECTRONIC MAIL

Dear Councilmember Silverman,

The Consortium of Universities of the Washington Metropolitan Area is writing to you regarding the Ban on Non-Competitive Agreements Amendment Act (B23-494). We appreciate your commitment to legislation that will provide additional protections for employees by increasing opportunities to supplement their income in this uncertain economy.

In our subsequent review of the BNCAAA, it has come to the Consortium's attention that the law effectively would preclude any prohibition or limitation on employees engaging in simultaneous employment. Although colleges and universities have many employees who engage in simultaneous employment (i.e. professional development is supported through programs such as sabbaticals and exchange programs, including with the District of Columbia and federal agencies through IPAs), there are particular instances where simultaneous employment would cause significant legal issues relating to conflicts of interest and commitment for colleges and universities.

Based on our research while there are other jurisdictions that have a ban on non-compete agreements--California, Montana, North Dakota and Oklahoma, they all have provisions that address conflict of interest and/or non-solicitation concerns. For example, in California, an employer may prohibit a current employee from moonlighting with a competitor or competing against his employer, while employed—particularly competitors. In addition, the bans on non-compete agreements in Montana, North Dakota and Oklahoma allow exceptions for the sale of a business or the dissolution of a partnership.

In order to address the Consortium's concerns regarding conflict of interest—including a time sensitive federal research grant issue that could impact funding at colleges and universities, the Consortium would like to propose a few amendments for your consideration. Our proposed amendments would preserve the spirit and integrity of the BNCAA, while addressing these conflict of interest concerns that--absent an immediate solution--will negatively impact federal research grants and our colleges and universities, a tremendous potential loss for the District.

Below you will find specific examples of these challenges. We are requesting that you move emergency legislation that addresses our concerns and includes the proposed amendments included below. *Due to the urgent nature of our request, we respectfully request a response by Monday, March 22, 2021.*

Examples of BNCAA's Simultaneous Employment Provision and the Negative Impact on Colleges and Universities

(1) Conflict of Interest Concerns and Conflict of Commitment Concerns for Full-Time Faculty at Colleges and Universities

- a. Research—Our colleges and universities have a current and ongoing obligation to our research sponsors, particularly the federal government, to ensure that *all* conflicts are disclosed and managed. In addition, institutions receiving research funding have to manage concerns around the protection of intellectual property and ownership of work products. For example, research for the COVID-19 vaccines are funded by the federal government. If a college or university cannot inquire about conflicts of interest amongst full-time faculty, in order to manage the conflict and uphold ethical standards, a college or university could be at risk of not receiving the funding. This would negatively impact students who often rely on such funding for compensation through internships and fellowships, because full-time faculty members regularly hire students to assist with the execution of research projects. This is why we are requesting the introduction of emergency legislation, in order to address this time sensitive issue which is unique to colleges and universities.

Here is the Uniform Guidance – the overarching federal regulations regarding awards funded by federal sources:

§ 200.112 Conflict of interest.

The Federal awarding agency must establish conflict of interest policies for Federal awards. The non-Federal entity must disclose in writing any potential conflict of interest to the Federal awarding agency or pass-through entity in accordance with applicable Federal awarding agency policy.

- b. Employment and Tenure—With the intent of protecting academic freedom, tenure and tenure track faculty are in distinctive employment roles. Tenure is an indefinite

academic appointment that can be terminated *only* for cause or under extraordinary circumstances. Because this establishes a distinct long-term position with significant compensation and little oversight, colleges and universities generally prohibit faculty from holding tenure at more than one institution. BNCAAA raises concerns regarding whether a full-time faculty member could be tenured at more than one university at the same time. Further, a college and university's reputation is defined in large part by its full time faculty (tenured or not). Allowing its full time faculty to simultaneously work at other universities may significantly impact its ability to distinguish itself from its competitors. If a faculty member was awarded tenure by multiple institutions, without an exemption in the bill, even if the faculty member devoted far less time to her assigned students and other responsibilities, it would be exceptionally hard to address this disparity.

(2) Conflict of Interest Concerns For College and University Admissions Counselors, Financial Aid and Development Staff

Per the BCNAAA's ban on non-compete agreements with regard to simultaneous and subsequent employee, a college admissions staffer could moonlight by starting his own college admissions counseling/consulting business that assists in getting students into the universities of their choice. He would be in a position to receive compensation for assisting students in gaining admission to the very university for which he works, even for providing tips on sample application essays which he would later read. This would be a clear conflict of interest, because the admissions staffer would have access to private information regarding the university's applicant pool and admission criteria which he could use to the advantage of his paying clients. It is likely that he would be more inclined to advocate for the admission of paying clients, in order to gain a financial benefit. This is especially problematic from an equity perspective, because it would give students who can afford to spend \$5,000 for a college consultant with a distinct advantage over students who cannot afford this luxury service. This same example would apply to any staff engaged in the admissions process, in financial aid processes, athletic recruitment, and in many cases for fundraising staff members.

Notably while Title I, Section 101(5)(A) of the BNJCAAA states that a "non-compete" provision does not include an otherwise lawful provision that restricts the employee from "**disclosing** [emphasis added] the employer's confidential, proprietary, or sensitive information, client list, customer list, or a trade secret", it does not preclude the employee from **utilizing** the restricted information. As a result, this provision would not address our conflict of interest concerns, because the college admissions staffer with his own college consulting business still could use private, confidential and propriety information to provide advantages for himself and his paying clients.

Proposed Amendments

The following proposed amendments are designed to address the conflict of interest concerns raised above:

Proposed Amendment #1

The Consortium recommends that Title I, Section 101(2) be amended to add subsections (E), (F) and (G) as follows:

(2.) “Employee” means and individual who performs work in the District 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; except, that this term shall not include:

- (A) An 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) A lay member elected or appointed to office within the discipline of any religious organization and engaged in religious functions;
- (C) An individual employed as a casual babysitter, in or about the residence of the employer; or
- (D) A medical specialist
- (E) Full-time faculty at a college or university engaged in simultaneous employment
- (F) Staff involved in any aspect of the admissions or financial aid processes or athletic recruitment or coaching at a college or university engaged in simultaneous employment
- (G) Staff involved in fundraising or advancement processes at a college or university engaged in simultaneous employment

Proposed Amendment #2

The Consortium recommends that Title 1, Section 101(5) be amended to add subsection C as follows:

- (C) An otherwise lawful provision which restricts the employee from engaging in activities that pose a conflict of interest or commitment in which the employee has a duty to more than one employer but cannot do justice to the actual or potentially adverse interests of the parties or that otherwise, in the employer’s judgment, cannot be appropriately managed through a management plan

Thank you very much for your consideration. As always, the Consortium is a trusted resource and here to support the DC Council. If you would like to discuss our proposed amendments, we welcome the opportunity to meet with you and your staff at your earliest convenience. I can be reached at mkfraser@consortium.org or 202-331-8080 ext. 160.

Sincerely,

Mondi Kumbula-Fraser

Mondi Kumbula-Fraser
Vice President of Government Relations & Membership Development
Consortium of Universities of the Washington Metropolitan Area

cc: Liz Weiss, Committee Director, Committee on Labor and Workforce Development
Margaret O'Hora, Legislative Counsel, Committee on Labor and Workforce Development

Attachment 6

Fiscal Impact Statement


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



Fitzroy Lee
Chief Financial Officer

MEMORANDUM

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

FROM: Fitzroy Lee
Chief Financial Officer 

DATE: June 15, 2022

SUBJECT: Fiscal Impact Statement – Non-Compete Clarification Amendment Act of 2022

REFERENCE: Bill 24-256, draft Committee Print as provided to the Office of Revenue Analysis on June 14, 2022

Conclusion

Funds are sufficient in the fiscal year 2022 budget and fiscal year 2023 through fiscal year 2026 budget and financial plan to implement the bill.

Background

The bill clarifies and makes amendments to the District's Ban on Non-compete Agreements¹ that is scheduled to take effect October 1, 2022. The bill clarifies that employers may prohibit employees' simultaneous employment that would:

- Result in the employee's disclosure or use of confidential employer information or proprietary employer information;
- Conflict with the employer's, industry's, or profession's established rules regarding conflicts of interest;
- Constitute a conflict of commitment if the employee is employed by a higher education institution; or
- Impair the employer's ability to comply with District or federal laws or regulations; a contract; or a grant agreement.

¹ By amending the Ban on Non-Compete Agreements Amendment Act of 2020, effective March 16, 2021 (D.C. Law 23-209; 68 DCR 782).

The bill removes the exemption for non-compete agreements with medical specialists and provides instead for an exemption for all "highly compensated employees," defined as employees who can expect to earn total annual compensation of \$250,000 (to be adjusted annually by inflation through rule-marking, beginning in 2024). To be enforceable, such agreements must:

- Have a duration of not more than 365 days after the employee leaves their job;
- Be limited by detailing the functional scope of the competitive restriction and geographical limitations; and
- Be provided to the employee at least 2 weeks before it must be signed.

The bill also revises the original law to:

- State that the law does not supersede the terms of a Collective Bargaining Agreement;
- Revise the definition of "employee" to clarify how the law applies to those working remotely or in more than one state;
- Extend the prohibition on non-compete agreements to broadcast industry employees, other than salespeople, regardless of how much they earn; and
- Remove the requirement for employers to provide notice of the Ban on Non-compete Agreements in a notice of hire.

Financial Plan Impact

Funds are sufficient in the fiscal year 2022 budget and fiscal year 2023 through fiscal year 2026 budget and financial plan to implement the bill.

The Department of Employment Services' (DOES) Office of Wage Hour Compliance is responsible for implementing the current Ban on Non-compete Agreements, including writing rules, promoting the bill's protections to employees, and investigating complaints received about employers violating the non-compete ban. The bill's clarifications and amendments to the ban are not expected to increase the anticipated workload for the agency.

Attachment 7
Legal Sufficiency
Determination



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: June 16, 2022

**RE: Legal Sufficiency Determination for the
Non-Compete Clarification Amendment Act of 2022,
Bill 24-256**

The measure is legally and technically sufficient for Council consideration.

The bill would amend Title I of the Ban on Non-Compete Agreements Amendment Act of 2020, effective March 16, 2021 (D.C. Law 23-209; 68 DCR 32-581.01 *et seq.*) ("Title I"), to:

- Permit employers, under certain conditions, to enter into non-compete agreements with highly compensated employees – any employee that makes over \$250,000 per year, including medical specialists – restricting post-employment competition;
- Except from the definition of “non-compete provision” policies that prohibit an employee from accepting money or a thing of value for performing work for another person if the employer reasonably believes that the employee’s acceptance of money or a thing of value will result in the disclosure of the employer’s confidential information, constitute a conflict of interest or conflict of commitment, or impair an employer’s ability to comply with a federal or District laws, a contract, or a grant agreement;
- Require employers to provide all employees notice of policies that fall into the enumerated exceptions to the definition of “non-compete provision”;

- Require employers to provide information about the Ban on Non-Compete Agreements Amendment Act of 2020 to highly compensated employees when an employer proposes a non-compete provision to an employee;
- Clarify the circumstances under which employers may be liable for retaliating against employees under Title I;
- Provide that the terms of Title I do not supersede a valid collective bargaining agreement;
- Provide that the prohibitions and rights in Title I are in addition to any rights under federal law and under District common law and statutory law.

The bill would also amend section 302 of the Ban on Non-Compete Agreements Amendment Act of 2020, effective March 16, 2021 (D.C. Law 23-209; 68 DCR 782), to make that law apply as of October 1, 2022.

I am available if you have any questions.

Attachment 8

Racial Equity Impact Assessment



BILL 24-0256

RACIAL EQUITY IMPACT ASSESSMENT NON-COMPETE CLARIFICATION AMENDMENT ACT OF 2022

TO: The Honorable Phil Mendelson, Chairman, Council of the District of Columbia
FROM: Namita Mody, Director, Council Office of Racial Equity
DATE: June 16, 2022

COMMITTEE

Committee on Labor and Workforce Development

BILL SUMMARY

Bill 24-0256 amends the Ban on Non-Compete Agreements Amendment Act of 2020 to clarify which non-compete provisions are acceptable under the law, allow non-compete provisions for high-earning employees if the provisions meet certain criteria, and clarify fines for violations, among other things.

CONCLUSION

Bill 24-0256 will likely make progress toward racial equity in the District of Columbia.

However, Black workers, Indigenous workers, and other workers of color who 1) have already signed non-compete agreements and 2) can still be impacted by non-compete agreements will experience the status quo of racial inequity, as they experience the negative effects of non-compete agreements to a greater extent.

In addition, a flat fine structure for violations may disproportionately penalize businesses owned by Black residents, Indigenous residents, and other residents of color.

Content Warning: The document you are about to read is a Racial Equity Impact Assessment, a careful and organized examination of how Bill 24-0256 will affect different racial and ethnic groups. We hope that this assessment sparks a conversation that is brave, empathetic, thoughtful, and open-minded.

The following content touches on racism, poverty, unemployment, and worker discrimination. Some or all of these issues may trigger a strong emotional response. We encourage you to use this knowledge in the way that is most helpful to you.

A **plain language glossary** of relevant terms is included on the last two pages of this REIA.

BACKGROUND

The following content describes Bill 24-0256 in plain language for the purposes of discussion. This explanation is not a substitute for the law.

Under Bill 24-0256, employers cannot require “covered employees”—loosely defined as employees who earn less than \$250,000 and primarily work in the District¹—to sign or comply with a “non-compete

¹ See Figure A for a more complete definition of “covered employees.”

provision.” Broadly, a “non-compete provision” is a provision [or part] in a written agreement or workplace policy that says an employee is not allowed to 1) work for another employer for pay or 2) run their own business.² In other words, if this bill passes, covered employees can work for other employers and run their own businesses.

Bill 24-0256 defines a *non-compete agreement* as an agreement that has a *non-compete provision*.³ A *non-compete provision* is specifically defined as:

A provision (or part) in a written agreement or workplace policy that says an employee is not allowed to 1) work for another employer for pay or 2) run their own business. However, the following do not count as non-compete provisions, and are allowed:

- an agreement between the seller and buyer(s) of a business saying that the seller will not compete with the buyer’s business
- an agreement that an employee will give up “equity compensation or a bonus...if the employee engages in competitive activity”
- an agreement that prohibits the employee from:
 - “disclosing, using, selling, or accessing the employer’s confidential employer information”
 - “accepting money or a thing of value for performing work for [someone] other than the employer, during [their employment], because the employer reasonably believes the employee’s acceptance of money or a thing of value...will:” result in the employee sharing confidential information, conflict with relevant conflict of interest rules, count as a conflict of commitment at a college or university, or negatively affect the employer’s ability to comply with District or federal laws, a contract, or a grant agreement.”⁴

This REIA uses the terms *non-compete agreement* and *non-compete provision*.

In addition, if an employer makes a covered employee sign a non-compete agreement after this bill is in effect, the agreement will be cancelled and unenforceable. The bill also protects employees by stating that the employer cannot retaliate (or threaten retaliation) against a covered employee for refusing to agree with or failing to comply with the non-compete provision. Employees are also protected if they ask, inform, or complain about a non-compete provision to any employer, a coworker, their lawyer, or a government entity.

Non-compete provisions *are* allowed for employees making \$250,000 or more *if* the provision specifies:

- “the scope of the...restriction including what services, roles, industry or competing entities the employee is restricted from performing work in or on behalf of”⁵
- “the geographical limitations of the work restriction”⁶
- that it only lasts up to one year after the employee’s last day.

In addition, a non-compete provision for a high earning employee can only be enforced if it is provided to the employee at least fourteen days before the employee starts work or at least fourteen days before the employee must sign the agreement (if they’ve already started work). These employees are also protected from retaliation if they: ask for a copy of the agreement (before or after signing), ask the employer to specify the required information (as listed in the bullets above), or discuss the agreement or B24-0256 with the employer, other employees, a lawyer, or a government entity.

² See Figure A for a more complete definition of “non-compete provision.”

³ Non-Compete Clarification Amendment Act of 2022, Pub. L. No. 24-0256 (n.d.).

⁴ Ibid.

⁵ Ibid.

⁶ Ibid.

The bill also requires employers with policies that limit employees' competitive activities (but do not count as non-compete provisions⁷) to provide written copies to their employees by certain dates and again if those policies ever change.

If an employer presents a non-compete provision to an employee that makes over \$250,000, the employer must provide the following notice:

The District of Columbia Ban on Non-Compete Agreements Amendment Act of 2020 limits the use of non-compete agreements. It allows employers to request non-competes from “highly compensated employees” under certain conditions. [Name of employer] has determined that you are a “highly compensated employee.” For more information about the Ban on Non-Compete Agreements Amendment Act of 2020, contact the District of Columbia Department of Employment Services (DOES).

The Mayor and Attorney General will administer and enforce this bill.

Violations will cost employers between \$350 and \$1000 for each violation. Penalties for employer retaliation against covered employees and for not providing highly compensated employees with the notice above will result in fines of at least \$1000. All money from violation fines goes to the Wage Theft Prevention Fund.

Employees who experience non-compete violations can file an administrative complaint with the Mayor or take the violation to court. If the violation is brought to the Mayor, the Mayor can fine the employer for requiring covered employees to comply with a non-compete provision, putting in place an invalid non-compete agreement with a highly compensated employee, or not sharing required information or notices with employees. These fines—which would be in addition to the administrative penalties, but paid to the employee(s)—range from \$250 to \$3,000 per employee. If the employer violates the law more than once, the fine increases.

Finally, the bill states that it does not override any valid union agreements.

The Mayor must write regulations to implement this law. The regulations must include yearly changes to the “minimum qualifying annual compensation” amount for high earning employees (currently at \$250,000) and rules for employers regarding keeping records of workplace policies, agreements, and disclosures.

Ban on Non-Compete Agreements Amendment Act of 2019

Bill 24-0256 amends the Ban on Non-Compete Agreement Act of 2019 (B23-0494), which was passed by the Council on December 15, 2020 and made law on March 16, 2021.⁸ However, the law has not been implemented, and is only applicable starting October 1, 2022.

The delay in implementation was partly due to the bill needing to be funded, but B23-0494's implementation was further postponed by various employers raising concerns with the bill as passed.⁹ These concerns were shared at the public hearing for B24-0256, held on July 14, 2021.

B24-0256—the bill under consideration now and the focus of this REIA—has more nuances and exceptions than the version passed in 2020, which was cited by Washington City Paper as “[having] been called the broadest ban on non-compete agreements of any jurisdiction in the U.S.”¹⁰

⁷ See Figure A for exceptions to the definition of “non-compete provision.”

⁸ DC Legislation Information Management System. “B23-0494 - [Ban on Non-Compete Agreements Amendment Act of 2019](#).”

⁹ Eisen, Nathaniel. “[Calls to Amend, Delay Non-Compete Ban Grow](#).” *Washington City Paper*, July 20, 2021.

¹⁰ Ibid.

To account for the fact that B23-0494 was not implemented and to make this assessment as straightforward as possible, CORE is analyzing the bill in front of us—as if B23-0494 had never been passed.¹¹

Non-Compete Agreements

To take a step back and understand the policy issue at a high level, non-compete agreements are defined as “an employment contract that restricts an employee’s ability to work in a particular field for a set period of time and in a specific geographical area.”¹² For example, a dance instructor who signs a non-compete agreement might not be allowed to teach dance at other studios while employed by the studio that required them to sign the non-compete.¹³ In addition, the non-compete agreement may say that the instructor cannot teach dance within 100 miles of the studio for three years after leaving the role. If the instructor does, the employer can sue.¹⁴

To date—and until October 1, 2022—it is legal for employers to require employees to sign an agreement like this. It is also not uncommon. A 2019 survey found that nationally, “roughly half...of responding [private-sector] establishments indicated that at least some employees in their establishment were required to enter into a noncompete agreement.”¹⁵ The same survey found that one in three establishments in the same group required “all employees in their establishment...to enter into a noncompete agreement, regardless of pay and job duties.”¹⁶

This type of agreement can have many consequences, for both the employee and the broader economy. Non-compete agreements can:

- decrease wages in an industry¹⁷
- cause workers to earn less overall¹⁸
- keep workers in jobs for longer than they prefer, decreasing job mobility¹⁹
- keep workers in jobs with unsafe or discriminatory environments.²⁰

As explained above, workers across the income spectrum have had to abide by non-compete agreements. However, a non-compete agreement would affect a worker making \$30,000 differently than it would affect a worker making \$300,000.

As the Washington Lawyers’ Committee testified at the hearing for Bill 23-0494, “non-compete terms are especially pernicious [harmful] 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

¹¹ At points, we will reference testimony and the Committee Report for B23-0494.

¹² Spiggle, Tom. “[Washington, D.C. No Longer Allows Most Non-Compete Agreements.](#)” *Forbes*, February 9, 2021.

¹³ This example is loosely based on the experience of a DC resident, Brendan Smullen, as [described in Nathaniel Eisen’s Washington City Paper article.](#)

¹⁴ Colvin, Alexander J.S., and Heidi Shierholz. “[Noncompete Agreements: Ubiquitous, Harmful to Wages and to Competition, and Part of a Growing Trend of Employers Requiring Workers to Sign Away Their Rights.](#)” Economic Policy Institute, December 10, 2019.

¹⁵ Ibid.

¹⁶ Ibid.

¹⁷ Farley, Najah. “[How Non-Competes Stifle Worker Power and Disproportionately Impede Women and Workers of Color.](#)” National Employment Law Project, May 18, 2022.

¹⁸ Ibid.

¹⁹ Ibid.

²⁰ Karin, Marcy. Ban on Non-Compete Agreements Amendment Act of 2020, § Committee on Labor and Workforce Development (2020).

in low-wage jobs. Lack of financial resources and lack of wealth means that a family is solely dependent on immediate income from wages.”²¹

Income, Wealth, Unemployment, Gender, and Race in the District

Bill 24-0256 uses income to determine what is and is not allowed when it comes to non-compete agreements in the District. Therefore, we must consider how income, unemployment, gender, and race interact in the District to accurately analyze the racial equity impacts of this bill.

The following statistics only highlight our current circumstances, but do not explain why these racial inequities exist. It is critical to understand that these racial inequities are the result of government policymaking, including the denial of wealth building opportunities, employment opportunities, and educational opportunities to residents of color.²² These racial inequities are also the result of racial discrimination in the workplace.

Unemployment and Race

- In the first quarter of 2022 (January – March), DC’s overall unemployment rate was 6.1%. For Black residents, it was 12.5%, six times that of white residents (1.7%).²³
- In the first quarter of 2022, DC had the highest overall unemployment rate in the country and the highest “Black-white unemployment ratio [of] 7.2-to-1.”^{24 25}

Income and Race

- In 2022, the median household income for Black residents in the District was \$53,629, one third of the median household income for white residents (\$160,914).²⁶
- Out of all racial groups, American Indian/Alaska Native residents make the lowest median household income in the District (\$50,850). White residents make the highest.²⁷ The median household income for all racial and ethnic groups is shown in Figure 1.
- Race also impacts the distribution of household incomes. As explained in the DC Racial Equity Profile for Economic Outcomes, “the evidence suggests that Black households, which make up the highest percentage of the

FIGURE 1

MEDIAN HOUSEHOLD INCOME IN DC BY RACE/ETHNICITY	
White	\$160,914
Native Hawaiian/Pacific Islander	\$147,368
Asian	\$123,057
2+ Races	\$110,540
Non-Hispanic/Latino	\$103,991
All	\$102,806
Hispanic/Latino	\$93,846
Some Other Race	\$69,198
Black/African American	\$53,629
American Indian/Alaskan Native	\$50,850

Source: [DC Health Matters Demographic Data](#)

²¹ Washington Lawyers’ Committee for Civil Rights and Urban Affairs. Ban on Non-Compete Agreements Amendment Act of 2020, § Committee on Labor and Workforce Development (2020).

²² MITRE Corporation. “[The Racial Wealth Gap in Washington, D.C. - Research and Analysis in Support of the Council Office of Racial Equity, Council of the District of Columbia](#),” December 2021.

²³ Moore, Kyle K. “[State Unemployment by Race and Ethnicity](#).” Economic Policy Institute, May 2022.

²⁴ Ibid.

²⁵ This source did not include unemployment data for any other races or ethnicities.

²⁶ DC Health Matters. “[DC Health Matters :: Demographics :: City :: District of Columbia :: Households/Income](#).”

²⁷ Ibid.

District’s population, are overrepresented in low-income brackets...[and] white households...are overrepresented in higher income brackets.”²⁸

- The difference in income between workers across races is not solely due to occupational segregation—or “a group’s overrepresentation or underrepresentation in certain jobs or fields of work.”²⁹ People in the same role but of different races also make different amounts. One study compared what Black men earned in relation to white men “with the same experience and education doing the same job in the same geographic location...[and] showed that [Black] men earned 98 cents for every dollar earned by white men with the same qualifications.”³⁰ Over time, the difference “adds up to [Black] men taking home significantly less pay than their white male peers.”³¹

Income, Gender, and Race

- In 2020, women earned 83 cents for every dollar earned by men.³²
- In the same year, Hispanic women earned “57 cents for every dollar earned by white, non-Hispanic men” and Black women earned “64 cents for every dollar earned by white, non-Hispanic men.”³³
- The interaction between gender, race, and income can be seen even more starkly when disaggregating by subpopulation. For example, the broad group of Asian American Pacific Islander women make 85 cents per dollar, but Burmese women make 52 cents for every dollar earned by white, non-Hispanic men.³⁴
- One study estimated that over a lifetime, women of color would lose hundreds of thousands of dollars due to this gender and race wage gap. For Latinas, the “typical lifetime loss” was estimated to be \$1.1 million, for Black women, \$964,000, and for Native American women, \$986,240.³⁵

RACIAL EQUITY IMPACTS

The bill will have a positive impact on employment and economic outcomes for Black, Indigenous, and other residents of color in the District of Columbia. Research shows that banning non-competes increases wages for hourly-paid workers—and in the District, Black residents are overrepresented in service and manual labor jobs,³⁶ roles which are often paid hourly. One Oregon-based study found that “banning [non-compete agreements] for hourly workers increased hourly wages by 2-3% on average.”³⁷ The study also found that the ban “improved average occupational status in Oregon, raised job-to-job mobility, and increased the proportion of salaried workers without affecting hours worked.” Practically, this means that workers in Oregon moved into other roles in their industry and roles that paid more.³⁸

Second, without a non-compete agreement, workers of color take on additional roles to earn more or explore other professional opportunities if they choose.

²⁸ “[DC Racial Equity Profile](#).” D.C. Policy Center.

²⁹ Bahn, Kate and Carmen Sanchez Cumming. “[Factsheet: U.S. Occupational Segregation by Race, Ethnicity, and Gender](#),” July 1, 2020.

³⁰ Miller, Stephen. “[Black Workers Still Earn Less than Their White Counterparts](#).” SHRM, June 26, 2020.

³¹ Ibid.

³² Bleiweis, Robin, Rose Khattar, and Jocelyn Frye. “[Women of Color and the Wage Gap](#).” Center for American Progress, Nov. 2021.

³³ Ibid.

³⁴ Ibid.

³⁵ Tucker, Jasmine. “[The Wage Gap Has Robbed Women of Their Ability to Weather COVID-19](#).” National Women’s Law Center, March 2021.

³⁶ “[DC Racial Equity Profile](#).” D.C. Policy Center.

³⁷ Lipsitz, Michael, and Evan Starr. “[Low-Wage Workers and the Enforceability of Non-Compete Agreements](#),” August 2020.

³⁸ Ibid.

Third, banning non-competes removes an additional barrier to employment, on top of the many barriers faced by Black residents, Indigenous residents, and other residents of color, including: hiring biases, restrictions on occupational licenses based on interactions with the criminal legal system,³⁹ inequities in higher education access due to cost, among other structural obstacles. This is particularly important given the high rates of unemployment faced by the District’s Black residents.

Concerningly, the bill does not support workers of color who are affected by existing non-compete agreements. Workers in the District who have already signed a non-compete agreement must continue to bear the consequences, even if this bill is passed. Given how common these agreements are, this could amount to a significant number of workers who will still suffer the consequences of lower wages, a lack of job mobility, and potentially unsafe conditions.

Workers of color are likely to be disproportionately impacted because they have less of a financial cushion in the form of savings from income⁴⁰ and wealth⁴¹—meaning it would be harder for them to wait out a non-compete time limit, move out of an area, or risk being sued to leave a job with a non-compete agreement.

Concerningly, violation fines are the same for all businesses, which may disproportionately penalize businesses run by people of color. It is important to understand the role that fines play in outcomes for Black, Indigenous, and other residents of color.⁴² Research has found that penalties, fines, and fees “can disproportionately harm families of color, both due to discriminatory practices in issuing fines and fees and in the systemic issues of income and wealth inequities that make it more difficult for these families to pay.”^{43 44} While most research on fines in the District are related to individual traffic violations, the overarching theme of how fines interact with income, wealth, and race is important context for analyzing the bill given its civil fines component.

The fines in Bill 24-0256 are applied to all business owners equally, regardless of revenue. This means that fines may be easier for a larger company to absorb, but smaller businesses run by people of color—which typically have less access to capital, pay higher interest rates on smaller loans, have fewer employees, and earn less revenue⁴⁵—could be disproportionately penalized by the fees outlined in the bill. Based on a recent measure, “the average annual revenue of Black-owned businesses (\$125,371) is less than 15 percent that of white-owned businesses.”⁴⁶

³⁹ “[DC Racial Equity Profile](#).” D.C. Policy Center.

⁴⁰ Washington Lawyers’ Committee for Civil Rights and Urban Affairs. Ban on Non-Compete Agreements Amendment Act of 2020, § Committee on Labor and Workforce Development (2020).

⁴¹ MITRE Corporation. “[The Racial Wealth Gap in Washington, D.C. - Research and Analysis in Support of the Council Office of Racial Equity, Council of the District of Columbia](#),” December 2021.

⁴² The racial equity impact of fines and fees is a recurring theme in our Racial Equity Impact Assessments (REIAs). For additional reference, please see our discussion of the topic in REIAs for: [Bill 24-0096](#) (on fairness in renting), [Bill 24-0111](#) (on motor vehicle accident prevention), [Bill 24-0236](#) (on the Child Trust Fund program), [Bill 24-0020](#) (on banning the sale of flavored tobacco), [Bill 24-0302](#) (on removing abandoned vehicles), and [Bill 24-0511](#) (on extending DMV deadlines), and [Bill 24-0444](#) (on preserving DC trees).

⁴³ Zicuhr, Kathryn. “[Applying a Racial Equity Lens to Fines and Fees in the District of Columbia](#).” D.C. Policy Center.

⁴⁴ CORE is citing the original source in this sentence, which has led us to use the term “families of color”. When CORE uses terms such as “communities of color” or “families of color” to match the original source, we are referring to Black, Indigenous, Latinx, Asian American, Pacific Islander, and Native Hawaiian populations. We match the original source in this situation but also acknowledge that each community of color has a unique history and experience of racism in the United States, and particularly, in the District of Columbia. While it is sometimes more efficient to reference “people of color” in narrative text, policies and actions must respond to the historical trauma each community has faced by naming individual communities.

⁴⁵ “[DC Racial Equity Profile](#).” D.C. Policy Center.

⁴⁶ Ibid.

FURTHER CONSIDERATIONS

As many witnesses testified, the bill—at its core—is about the power imbalance between employees and employers.⁴⁷

As Sandeep Vaheesan, Legal Director of the Open Markets Institute testified, “in general, workers need wages and salaries to subsist and do not have significant non-labor income. In addition to paying for housing, food, and other essentials, millions of workers have substantial amounts of debt to service every month, including credit card balances, car loans, student loans.”⁴⁸ Vaheesan’s testimony points to an employee’s reliance on their role for income and benefits—and therefore their concerns about pushing back when confronted with a challenge at work. In the case of this bill, when confronted with a non-compete clause.

For workers of color, who earn less on average, these concerns can be particularly critical.⁴⁹ Being able to seek other employment is one way that employees can exercise their power in an employment situation. Therefore, it is important to consider the goals of exceptions to the non-compete ban—and if other legal tools could address those goals while not stripping an employee of their power and agency.⁵⁰

This protection does not apply to workers of color who are independent contractors. This is important because independent contractors can often be denied certain worker rights, benefits, and protections⁵¹ and nationally, “Hispanic and Black Americans are more likely than [white] Americans to have ever earned money doing any online gig platform work.”⁵²

In cases where non-competes are allowed, there does not appear to be a way out for employees experiencing racial discrimination. A 2021 poll showed that about “one in four Black (24%) and Hispanic employees (24%) in the U.S. report having been discriminated against at work in the past year.”⁵³ Of those who experienced discrimination, 3 in 4 Black workers stated that it was race or ethnicity-based.⁵⁴ 61 percent of Hispanic workers said the same.⁵⁵

Given the prevalence of racial discrimination, the consequences of racial discrimination in the workplace, and the additional barriers that workers of color face when job hunting,⁵⁶ even a legal non-compete agreement under this law may prove disproportionately burdensome to a worker of color facing racial discrimination at work. A provision cancelling the non-compete due to racial discrimination could be preemptively included by an employer or negotiated by an employee, but employees rarely negotiate non-competes.⁵⁷

⁴⁷ For example, see the testimony of Daniel Essrow of the Nonprofit Professional Employees Union (2021).

⁴⁸ Vaheesan, Sandeep. Non-Compete Clarification Amendment Act of 2022, § Committee on Labor and Workforce Development (2021).

⁴⁹ Washington Lawyers’ Committee for Civil Rights and Urban Affairs. Ban on Non-Compete Agreements Amendment Act of 2020, § Committee on Labor and Workforce Development (2020).

⁵⁰ Vaheesan, Sandeep. Non-Compete Clarification Amendment Act of 2022, § Committee on Labor and Workforce Development (2021).

⁵¹ Economic Policy Institute, “[Misclassification, the ABC Test, and Employee Status: The California Experience and Its Relevance to Current Policy Debates](#),” June 16, 2021.

⁵² “[Racial and ethnic differences stand out in the U.S. gig workforce](#),” Pew Research Center. December 15, 2021.

⁵³ Lloyd, Camille. “[One in Four Black Workers Report Discrimination at Work](#),” *Gallup.Com*, January 12, 2021, sec. Economy.

⁵⁴ Ibid.

⁵⁵ Ibid.

⁵⁶ Strauss, Becky. “[Battling Racial Discrimination in the Workplace](#),” D.C. Policy Center, January 24, 2019.

⁵⁷ Starr, Evan. Ban on Non-Compete Agreements Amendment Act of 2020, § Committee on Labor and Workforce Development (2020).

The bill only requires employers give notice about the law when an employer is legally requiring a non-compete agreement, but not in all instances. While ensuring that employers provide notice on certain occasions is beneficial, there is an opportunity to require employers to educate *all* workers about what the employer can and cannot do. A universal notice requirement may:

- 1) help workers understand their rights as an employee (especially given the common nature of non-compete agreements to date)
- 2) help workers understand that non-compete rules may differ across their workplace
- 3) discourage employers from breaking the law. Consider that in California, “non-competes have been unenforceable for over 100 years, but research showed that 19 percent of workers had signed unenforceable non-competes.”⁵⁸ It would be incredibly difficult for an employer to require an illegal non-compete clause alongside mandatory notice text that the practice is not allowed in the District.⁵⁹

There is no public education component to the bill. Employers are only required to tell *some* employees and hires about these protections, not all. In addition, there isn’t a general education campaign about this worker protection to target employers without legal teams and soon-to-be job seekers, such as students or returning citizens.

Should this bill pass—and given how common non-compete agreements are currently—residents should be proactively made aware of their rights and responsibilities. As Daniel Essrow of Nonprofit Professional Employees Union testified, “there is no level of pay or education at which employees automatically know their rights.”⁶⁰ Workers of color employed in lower-wage roles can be especially hindered by non-compete agreements,⁶¹ so a proactive education effort is key.

In addition, this bill is much more complex than the version that was passed in 2020, which was purposefully simple to communicate the protection.⁶²

The bill does not establish a time frame for the Mayor to write regulations. Regulations can help ensure a law is implemented to realize its intent, clarify the law for employers trying to adhere to it, and make it clear for employees trying to understand their protections. In addition, regulations written with a racial equity lens can help ensure the protection is as strong and equal as possible for Black residents, Indigenous residents, and other residents of color.

ASSESSMENT LIMITATIONS

Alongside the analysis provided above, the Council Office of Racial Equity encourages readers to keep the following limitations in mind:

We generally do not provide policy solutions or alternatives to address our racial equity concerns.

While Council Period 24 Rules allow our office to make policy recommendations, we focus on our role as policy analysts—we are not elected policymakers or committee staff. In addition, and more importantly,

⁵⁸ Farley, Najah. “[How Non-Competes Stifle Worker Power and Disproportionately Impede Women and Workers of Color](#).” National Employment Law Project, May 18, 2022.

⁵⁹ Farley, Najah. Ban on Non-Compete Agreements Amendment Act of 2020, § Committee on Labor and Workforce Development (2020).

⁶⁰ Essrow, Dan. Non-Compete Clarification Amendment Act of 2022, § Committee on Labor and Workforce Development (2021).

⁶¹ Washington Lawyers’ Committee for Civil Rights and Urban Affairs. Ban on Non-Compete Agreements Amendment Act of 2020, § Committee on Labor and Workforce Development (2020).

⁶² Councilmember Elissa Silverman. “[Report on B23-0494, the ‘Ban on Non-Compete Agreements Amendment Act of 2020,’](#)” November 19, 2020.

racially equitable policymaking takes time. Because we only have ten days for our review, we would need more time to ensure comprehensive research and thorough community engagement inform our recommendations.

Assessing legislation’s potential racial equity impacts is a rigorous, analytical, and organized undertaking—but it is also an exercise with constraints. It is impossible for anyone to predict the future, implementation does not always match the intent of the law, critical data may be unavailable, and today’s circumstances may change tomorrow. Our assessment is our most educated and critical hypothesis of the bill’s racial equity impacts.

Regardless of the Council Office of Racial Equity’s final assessment, the legislation can still pass. This assessment intends to inform the public, Councilmembers, and Council staff about the legislation through a racial equity lens. However, a REIA is not binding.

This assessment aims to be accurate and useful, but omissions may exist. Given the density of racial equity issues, it is unlikely that we will raise *all* relevant racial equity issues present in a bill. In addition, an omission from our assessment should not: 1) be interpreted as a provision having no racial equity impact or 2) invalidate another party’s racial equity concern.

FIGURE A **Key Terms** For official definitions, see the bill or if passed, the law.

TERM	DEFINITION
Broadcast Employee	An employee (except a sales representative) of a company that “owns or operates one or more of the following: television stations or networks, radio stations or networks, cable stations or networks, 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.” (source: Committee Print)
Compensation	All “money paid for work or a service” that “an employer may pay or promise an employee, including: hourly wages, salary, bonuses or cash incentives, commissions, overtime premiums, and vested stock, including restricted stock units,” not including non-cash fringe benefits (sources: Oxford English Dictionary, Committee Print)
Confidential Employer Information	“Information owned or possessed by an employer which is not available to the general public and which the employer has taken reasonable steps to ensure is protected from improper disclosure” (source: Committee Print)
Conflict of Commitment	“Conduct that would compromise the ability of an employee at a higher education institution [like a college or university] to perform employment duties for the institution because the activities risk interfering with the employee’s primary duties for the institution.” (source: Committee Print)
	<p>If the employee has started working for the employer:</p> <p>An employee (who is not highly compensated):</p> <ul style="list-style-type: none"> • who spends 50% of their work time in the District of Columbia <i>or</i> • whose employment is based in the District, and who spends a substantial amount of work time for that employer in the District and “not more than 50% of [their] work time for that employer in another jurisdiction.”
Covered Employee	<p>If the employee has not started working for the employer:</p> <p>An employee (who is not highly compensated):</p> <ul style="list-style-type: none"> • who the employer reasonably anticipates will spend more than 50% of their work time in the District <i>or</i> • whose employment will be based in the District and who the employer anticipates will regularly spend a substantial amount of their work time in the District and “not more than 50% of [their] work time for that employer in another jurisdiction.” (source: Committee Print)
Employee	<p>“An individual who performs work for pay in the District on behalf of an employer” <i>or</i> an individual who has received an offer and “whom an employer reasonably anticipates will perform work for pay on behalf of the employer in the District.”</p> <p>However, casual babysitters and a partner in a partnership are excluded from this definition. (source: Committee Print)</p>
Employer	<p>“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.”</p> <p>However, the District Government and federal government are excluded from this definition. (source: Committee Print)</p>

Higher Education Institution	<p>“A postsecondary educational institution accredited by the US Department of Education.” (source: Committee Print)</p> <p>“Postsecondary education includes non-degree programs that lead to certificates and diplomas plus six degree levels: associate, bachelor, first professional, master, advanced intermediate, and research doctorate.” (source)</p>
Highly Compensated Employee	<p>An employee (who is not a broadcast employee):</p> <ul style="list-style-type: none"> ▪ who is expected to earn the <i>minimum qualifying annual compensation</i> or more in a consecutive twelve month period or ▪ who earned the <i>minimum qualifying annual compensation</i> or more in the twelve months before the non-compete term begins (source: Committee Print)
Minimum Qualifying Annual Compensation	<p>\$250,000 in the calendar year that this bill goes into effect.</p> <p>In 2024 (and every year after) the amount will be equal to the previous year’s amount, “increased in proportion to the annual average increase, if any, in the Consumer Price Index” for the Washington region as published by the federal Department of Labor Statistics. (source: Committee Print)</p>
Non-compete Agreement	<p>A contract between an employer and an employee that has one or more <i>non-compete provisions</i> (source: Committee Print)</p>
Non-compete Provision	<p>A provision (or part) in a written agreement or workplace policy that says an employee is not allowed to 1) work for another employer for pay or 2) run their own business.</p> <p>The following do not count as non-compete provisions:</p> <ul style="list-style-type: none"> ▪ an agreement between the seller and buyer(s) of a business saying that the seller will not compete with the buyer’s business ▪ an agreement that an employee will give up “equity compensation or a bonus...if the employee engages in competitive activity” ▪ an agreement that prohibits the employee from: <ul style="list-style-type: none"> ○ “disclosing, using, selling, or accessing the employer’s confidential employer information” ○ “accepting money or a thing of value for performing work for [someone] other than the employer, during [their employment], because the employer reasonably believes the employee’s acceptance of money or a thing of value...will:” result in the employee sharing confidential information, conflict with relevant conflict of interest rules, count as a conflict of commitment at a college or university, or negatively affect the employer’s ability to comply with District or federal laws, a contract, or a grant agreement. (source: Committee Print)
Proprietary Employer Information	<p>“Information unique to an employer that is compiled, created, or solicited by the employer, including customer lists, client lists, and trade secrets as that term is defined in [DC Law].” (source: Committee Print)</p>
Retaliate	<p>“To take an adverse action, including a threat, verbal warning, written warning, reduction of work hours, suspension, or termination against one or more employees” (source: Committee Print)</p>
Term of Non-competition	<p>“The period of time specified in a non-compete provision during which the employee’s work for a person other than the employer is prohibited.” (source: Committee Print)</p>
Workplace Policy	<p>“Rules or restrictions, whether written or as a matter of practice, implemented by an employer to govern the conduct of the employer’s employees.” (source: Committee Print)</p>

Attachment 9

Comparative Print of B24-256

Comparative Print
Committee on Labor and Workforce Development
B24-256
June 16, 2022

“TITLE I. BAN ON NON-COMPETE AGREEMENTS

§32-581.01

“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” “Broadcast employee” means an employee, other than a sales
representative, of a legal entity that owns or operates one or more of the following:

“(A) Television stations or networks;

“(B) Radio stations or networks;

“(C) Cable stations or networks;

“(D) Satellite-based services similar to a broadcast station or network; or

“(E) Any other entity that provides broadcasting services such as news,
weather, traffic, sports, or entertainment programming.

“(3) “Compensation” means all monetary remuneration an employer may pay or
promise an employee.

“(A) The term includes:

“(i) Hourly wages;

“(ii) Salary;

“(iii) Bonuses or cash incentives;

“(iv) Commissions;

“(v) Overtime premiums; and

“(vi) Vested stock, including restricted stock units.

“(B) The term does not include fringe benefits other than those paid to the
employee in cash or cash equivalents.

“(4) “Confidential employer information” means information owned or possessed
by the employer which is not available to the general public and which the employer has taken
reasonable steps to ensure is protected from improper disclosure.

“(5) “Conflict of commitment” means conduct that would compromise the ability
of an employee of a higher education institution to perform employment duties for the institution
because the activities risk interfering with the employee’s primary duties for the institution.

“(6) “Covered employee” means an employee who is not a highly compensated
employee and:

“(A) If the employee has commenced work for the employer:

“(i) The employee spends more than 50% of his or her work time
for the employer working in the District; or

“(ii) Whose employment for the employer is based in the District
and the employee regularly spends a substantial amount of his or her work time for the employer
in the District and not more than 50% of his or her work time for that employer in another
jurisdiction; or

“(B) If the employee has not yet commenced work for the employer:

“(i) The employer reasonably anticipates that the employee will
spend more than 50% of his or her work time for the employer working in the District; or

“(ii) Whose employment for the employer will be based in the District and the employer reasonably anticipates that the employee will regularly spend a substantial amount of his or her work time for the employer in the District and not more than 50% of his or her work time for that employer in another jurisdiction.

“(7) “Employee”:

“(A) Means:

“(i) An individual who performs work for pay in the District on behalf of an employer; or

“(ii) An individual to whom the employer has made an offer of employment and any prospective employee whom an employer reasonably anticipates will perform work for pay on behalf of the employer in the District; except, that this term shall not include;

~~“(A) An 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) A lay member elected or appointed to office within the discipline of any religious organization and engaged in religious functions;~~

~~“(C) ”~~ “(B) Does not mean:

“(i) An individual employed as a casual babysitter, in or about the residence of the employer; or

~~“(D) A medical specialists.~~

~~“(3) ”~~ “(ii) A partner in a partnership.

“(8) “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)~~ “(9) “Higher education institution” means a postsecondary educational institution accredited by an agency that the United States Department of Education recognizes as an accrediting agency.

“(10) “Highly compensated employee” means an employee, other than a broadcast employee:

“(A) Who is reasonably expected to earn from the employer, in a consecutive 12-month period, compensation greater than or equal to the minimum qualifying annual compensation; or

“(B) Whose compensation earned from the employer in the consecutive 12-month period preceding the date on which the proposed term of non-competition is to begin is greater than or equal to the minimum qualifying annual compensation.

~~“(11) “Medical specialist” means an individual who performs work in the District on behalf of an employer”~~ means a highly compensated employee engaged primarily in the delivery of medical services ~~and,~~ who:

~~“(A)-~~ Holds a license to practice medicine;

~~“(B)-~~ Is a physician; and

~~“(C)-~~ Has completed a medical residency; ~~and,~~

~~(D) Has total~~ “(12) “Minimum qualifying annual compensation of at least” means:

“(A) Beginning with the calendar year in which this title becomes applicable, \$250,000 per year.

~~(5)~~ "_____(B) For the calendar year beginning January 1, 2024, and each calendar year thereafter, an amount equal to the previous calendar year's minimum qualifying annual compensation, increased in proportion to the annual average increase, if any, in the Consumer Price Index for All Urban Consumers in the Washington Metropolitan Statistical Area published by the Bureau of Labor Statistics of the United States Department of Labor for the previous calendar year adjusted to the nearest whole dollar.

_____"(13) "Non-compete agreement" means a contract between an employer and employee that has one or more non-compete provisions.

_____"(14) "Non-compete provision" means a provision ~~of~~in a written agreement ~~between an employer and an employee or a workplace policy~~ that prohibits ~~the~~an employee from ~~being simultaneously or subsequently employed by another person,~~ performing work ~~or providing services for another~~ for pay ~~for another person,~~ or from operating the ~~employee's~~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, client list, customer list, 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~~_____"(A) 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~~buyer's business; or

_____"(B) That prohibits or restricts an employee from:

_____"(i) Disclosing, using, selling, or accessing the employer's confidential employer information or proprietary employer information;

_____"(ii) Accepting money or a thing of value for performing work for a person other than the employer, during the employee's employment with the employer.

because the employer reasonably believes the employee's acceptance of money or a thing of value under such circumstances will:

“(I) Result in the employee's disclosure or use of confidential employer information or proprietary employer information;

“(II) Conflict with the employer's, industry's, or profession's established rules regarding conflicts of interest;

“(III) Constitute a conflict of commitment if the employee is employed by a higher education institution; or

“(IV) Impair the employer's ability to comply with District or federal laws or regulations; a contract; or a grant agreement.”

“(15) “Proprietary employer information” means information unique to an employer that is compiled, created, or solicited by the employer, including customer lists, client lists, and trade secrets 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(5)-)).

“(16) “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~~or medical specialists.~~

~~(6)”~~ “(17) “Term of non-competition” means the period of time specified in a non-compete provision during which the employee's work for a person other than the employer is prohibited.

“(18) “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~~employer's~~ employees.

§32-581.02

~~“Sec. 102. Non-Prohibition on non-compete rights and restrictions provisions for covered employees.~~

~~(a) No~~ “(a)(1) Beginning October 1, 2022, no employer may require or request that ~~an~~ a covered employee sign an agreement or comply with a workplace policy that includes a non-compete provision.

~~(b)~~ “(2) A non-compete provision that violates paragraph (1) of this subsection contained in an agreement between a covered employee and an employer that was entered into on or after ~~the applicability date of this title between an employee and an employer~~ October 1, 2022 shall be void as a matter of law and unenforceable.

~~(c)~~ “(b) No employer may ~~have~~ retaliate or threaten to retaliate against a workplace policy that prohibits an ~~covered~~ 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~~ covered employee's refusal to agree to a non-compete provision or non-compete agreement that is prohibited under subsection (a) of this section;

~~€~~ “(2) The covered employee's alleged failure to comply with a non-compete provision or ~~a workplace policy made unlawful by this title;~~ non-compete agreement that is prohibited under subsection (a) of this section;

~~€~~ “(3) Asking, informing, or complaining about the existence, applicability, or validity of a ~~non-compete~~ provision ~~or in~~ a workplace policy or employment agreement that the

employee reasonably believes is prohibited under ~~this title~~ subsection (a) of this section, or making a request for a copy of such a provision, to any of the following:

“(A)- An employer, including the ~~employee's~~ covered employee's employer;

“(B)- A coworker; _____

“(C)- The ~~employee's~~ covered employee's lawyer or agent; or

“(D)- A governmental entity; or

“(4) ~~Requesting from~~ Asking the employer for the information required to be provided to the employee pursuant to ~~subsection (e) of this~~ section 103a.

~~(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."~~

§32-581.03

~~“Sec. 103. Protections for medical specialists.~~

~~(a) An employer that seeks to have a medical specialist execute a non-compete provision as a condition of employment shall provide:~~

~~(1) The proposed non-compete provision directly to the medical specialist at least 14 days before execution of the agreement containing the provision; and~~

~~(2) The following written notice to the medical specialist at the same time the employer provides the proposed non-compete provision to the medical specialist: "The Ban Limitations on Non-~~

~~Compete Agreements Amendment Act of 2020 allows employers operating in the District of Columbia to request non-compete terms or agreements (also known as "covenants not to compete") from medical specialists they plan to employ. The prospective employer must provide the proposed non-compete provision directly to the medical specialist at least 14 days before execution of the agreement containing the provision. Medical specialists are individuals who: (1) perform work on behalf of an employer engaged primarily in the delivery of medical services; (2) hold a license to practice medicine; (3) have completed a medical residency; and (4) have total compensation of at least \$250,000 per year. "non-compete provisions for highly compensated employees.~~

~~€ “(a) For a non-compete agreement between an employer and a highly compensated employee executed on or after October 1, 2022 to be valid and enforceable::~~

~~“(1) The agreement must specify:~~

~~“(A) The functional scope of the competitive restriction including what services, roles, industry, or competing entities the employee is restricted from performing work in or on behalf of;~~

~~“(B) The geographical limitations of the work restriction; and~~

~~“(C)(i) If the employee is not a medical specialist, a term of non-competition that does not exceed 365 calendar days from the date the employee separates from employment with the employer; or~~

~~(ii) If the employee is a medical specialist, a term of non-competition that does not exceed 730 calendar days from the date the employee separates from employment with the employer; and~~

_____(2) The employer shall provide the non-compete provision to the employee in writing:

_____(A) At least 14 days before the individual commences employment for the employer; or

_____(B) If the employer already employs the highly compensated employee, at least 14 days before the employee must execute the agreement.

_____(b)-(1) No employer may retaliate or threaten to retaliate against a ~~medical specialist~~ highly compensated employee who has executed a non-compete agreement with the employer for:

~~(1) Asking, informing, or complaining about conduct required or prohibited under this section to:~~

~~(A) An employer, including the medical specialist's employer;~~

~~(B) A coworker;~~

~~(C) The medical specialist's lawyer or agent; or~~

~~(D) A governmental entity; asking for a copy of a proposed non-compete provision or non-compete agreement, or for a copy of a non-compete provision or non-compete agreement that the employee executed;~~

~~(2) Requesting from~~ No employer may retaliate or threaten to retaliate against a highly compensated employee for:

_____(A) Asking the employer for the information required to be provided to the ~~medical specialist~~ employee pursuant to ~~subsection (a) of this section, 103a; or~~

§32-581.04

_____(B) Asking about or objecting to a proposed non-compete provision or agreement because the employee reasonably believes that the provision or agreement does not conform to the requirements of subsection (a)(1) of this section, or reasonably believes that the

240 employer has failed to comply with the requirements of subsection (a)(2) of this section, to any
241 of the following:

242 “(i) An employer, including the highly compensated employee’s
243 employer;

244 “(ii) A coworker;

245 “(iii) The highly compensated employee’s lawyer or agent; or

246 “(iv) A governmental entity.

247 “Section 103a. Disclosures to employees.

248 “(a) An employer with a workplace policy that includes one or more of the
249 exceptions to the definition of “non-compete provision” detailed in section 101(14) shall provide
250 a written copy of such provisions to an employee:

251 “(1) Within 30 days after the employee’s acceptance of employment with the
252 employer;

253 “(2) Within 30 days after October 1, 2022; and

254 “(3) Any time such policy changes.

255 “(b) A highly compensated employee’s employer shall provide the following notice to the
256 employee whenever a non-compete provision is proposed to the employee:

257 ““The District of Columbia Ban on Non-Compete Agreements Amendment Act
258 of 2020 limits the use of non-compete agreements. It allows employers to request non-compete
259 agreements from “highly compensated employees” under certain conditions. [Name of
260 employer] has determined that you are a highly compensated employee. For more information
261 about the Ban on Non-Compete Agreements Amendment Act of 2020, contact the District of
262 Columbia Department of Employment Services (DOES).”.

_____~~“~~Sec. 104.~~”~~ Relief and penalties.

~~“(a)(1)-~~The Mayor and Attorney General for the District of Columbia ~~“(Attorney General”)~~ shall administer and enforce ~~this title~~ consistent with their respective powers and rights under ~~section 6(a),~~ ~~(a-1),~~ (b), and (c) of An Act.

~~“(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~~ 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 on 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 the penalty for each violation of ~~section 102(d)~~ section 102(b) and ~~103(b)~~ 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. 1204; D.C. Official Code § 2-501-*et seq.*), and section 8a(e) of An Act.

“(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)- through (m)- of An Act, shall govern the conciliation, resolution, and enforcement of an administrative complaint filed pursuant to paragraph (1)(A) of this subsection; except, that section 8a(e)(4)- and (5)- of An Act, 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 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, in addition to administrative penalties authorized pursuant to this section, an employer found to have violated section 102-~~or,~~ 103-, or 103a shall be liable for relief payable to an employee ~~or medical specialist~~ as follows:

“(1)(A)- An employer that violates section 102(a), ~~(c), or (e), or section 103(a)-(1)~~ shall be liable for each violation to each employee ~~or medical specialist~~ 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), or section 103(a), 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 or medical specialist.~~

~~“(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.

~~“(2)(A)-~~ An employer that attempts to enforce a non-compete provision that is unenforceable or void as provided in section 102(a)(2) and section 103(a) shall be liable to each employee against whom the employer attempted to enforce the invalid non-compete provision for relief in an amount not less than \$1,500.

“(B) For any subsequent violation of section 102(a)(2) or section 103(a), 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) or section 103(b)) or section 103(b) shall be liable for each instance of retaliation to each employee ~~or medical specialist~~ 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) or section 103(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 ~~or medical specialist.~~

§32-581.05

“(4) An employer that violates section 103a shall be liable for each violation to each employee subjected to the violation for monetary relief in an amount of \$250.

“Sec. 104a. Collective bargaining agreements.

“Nothing in this title shall be interpreted as superseding the terms of a valid collective bargaining agreement.

“Sec. 104b. ~~405.~~ Rules of construction.

The rights, remedies, and prohibitions accorded by the provisions of this title are in addition to and cumulative of any right, remedy, or prohibition accorded by the common law, federal law, or any District statute, and nothing contained herein shall be construed to deny, abrogate, or impair any such common law or statutory right, remedy, or prohibition.

“Sec. 105. 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:

§32-1307.01

(a) Subsection (b) is amended by striking the phrase "section 7" and inserting the phrase "section 7 and section 104(a) and (b) of the Ban on Non-Compete Agreements Amendment Act of 2020, passed on 2nd reading on December 15, 2020 (Enrolled version of Bill 23-494) ("Ban on Non-Compete Agreements Act")" in its place.

§32-1307.01

(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

Repeal § 32-571

Sec. 301. The Broadcast Industry Contracting Freedom Act of 2002, effective March 27, 2003 (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.

Attachment 10

Committee Print of B24-256

1 **COMMITTEE PRINT**
2 **Committee on Labor and Workforce Development**
3 **B24-256**
4 **June 16, 2022**
5
6
7
8
9

10
11 **A BILL**
12
13

14 **IN THE COUNCIL OF THE DISTRICT OF COLUMBIA**
15
16

17 To amend the Ban on Non-Compete Agreements Amendment Act of 2020 to clarify which
18 provisions in workplace policies or employment agreements will not violate the law's
19 restrictions on the use of non-compete provisions and agreements; to clarify that
20 employers may bar an employee's use, in addition to the disclosure, of confidential and
21 proprietary information during or after the employee's employment for the employer; to
22 create a limited exception allowing the use of non-compete provisions with highly-
23 compensated employees, including medical specialists, under specified circumstances; to
24 specify what must be contained in a non-compete agreement for it to be valid and
25 enforceable; to clarify remedies for violations of the act; to clarify how the Act relates to
26 a collective bargaining agreement; to clarify how the law applies relative to other District
27 laws; and to clarify rulemaking requirements.
28

29 **BE IT ENACTED BY THE COUNCIL OF THE DISTRICT OF COLUMBIA, That this**
30 **act may be cited as the "Non-Compete Clarification Amendment Act of 2022".**

31 **Sec. 2. The Ban on Non-Compete Agreements Amendment Act of 2020, effective March**
32 **16, 2021 (D.C. Law 23-209; 68 DCR 782), is amended as follows:**

33 (a) Title I (D.C. Official Code § 32-581.01 *et seq.*), is amended to read as follows:

34 **"TITLE I. BAN ON NON-COMPETE AGREEMENTS**

35 **"Sec. 101. Definitions.**

36 **"For the purposes of this title, the term:**

37 “(1) “An Act” means An Act To provide for the payment and collection of wages
38 in the District of Columbia, approved August 3, 1956 (70 Stat. 976; D.C. Official Code § 32-
39 1301 *et seq.*).

40 “(2) “Broadcast employee” means an employee, other than a sales representative,
41 of a legal entity that owns or operates one or more of the following:

42 “(A) Television stations or networks;

43 “(B) Radio stations or networks;

44 “(C) Cable stations or networks;

45 “(D) Satellite-based services similar to a broadcast station or network; or

46 “(E) Any other entity that provides broadcasting services such as news,
47 weather, traffic, sports, or entertainment programming.

48 “(3) “Compensation” means all monetary remuneration an employer may pay or
49 promise an employee.

50 “(A) The term includes:

51 “(i) Hourly wages;

52 “(ii) Salary;

53 “(iii) Bonuses or cash incentives;

54 “(iv) Commissions;

55 “(v) Overtime premiums; and

56 “(vi) Vested stock, including restricted stock units.

57 “(B) The term does not include fringe benefits other than those paid to the
58 employee in cash or cash equivalents.

59 “(4) “Confidential employer information” means information owned or possessed
60 by the employer which is not available to the general public and which the employer has taken
61 reasonable steps to ensure is protected from improper disclosure.

62 “(5) “Conflict of commitment” means conduct that would compromise the ability
63 of an employee of a higher education institution to perform employment duties for the institution
64 because the activities risk interfering with the employee’s primary duties for the institution.

65 “(6) “Covered employee” means an employee who is not a highly compensated
66 employee and:

67 “(A) If the employee has commenced work for the employer:

68 “(i) The employee spends more than 50% of his or her work time
69 for the employer working in the District; or

70 “(ii) Whose employment for the employer is based in the District
71 and the employee regularly spends a substantial amount of his or her work time for the employer
72 in the District and not more than 50% of his or her work time for that employer in another
73 jurisdiction; or

74 “(B) If the employee has not yet commenced work for the employer:

75 “(i) The employer reasonably anticipates that the employee will
76 spend more than 50% of his or her work time for the employer working in the District; or

77 “(ii) Whose employment for the employer will be based in the
78 District and the employer reasonably anticipates that the employee will regularly spend a
79 substantial amount of his or her work time for the employer in the District and not more than
80 50% of his or her work time for that employer in another jurisdiction.

81 “(7) “Employee”:

82 “(A) Means:

83 “(i) An individual who performs work for pay in the District on
84 behalf of an employer; or

85 "(ii) An individual to whom the employer has made an offer of
86 employment and whom an employer reasonably anticipates will perform work for pay on behalf
87 of the employer in the District.

88 “(B) Does not mean:

89 “(i) An individual employed as a casual babysitter, in or about the
90 residence of the employer; or

91 “(ii) A partner in a partnership.

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

97 “(9) “Higher education institution” means a postsecondary educational institution
98 accredited by an agency that the United States Department of Education recognizes as an
99 accrediting agency.

100 “(10) “Highly compensated employee” means an employee, other than a
101 broadcast employee:

102 “(A) Who is reasonably expected to earn from the employer, in a
103 consecutive 12-month period, compensation greater than or equal to the minimum qualifying
104 annual compensation; or

“(B) Whose compensation earned from the employer in the consecutive 12-month period preceding the date on which the proposed term of non-competition is to begin is greater than or equal to the minimum qualifying annual compensation.

“(11) “Medical specialist” means a highly compensated employee engaged primarily in the delivery of medical services, who:

“(A) Holds a license to practice medicine;

“(B) Is a physician; and

“(C) Has completed a medical residency.

“(12) “Minimum qualifying annual compensation” means:

“(A) Beginning with the calendar year in which this title becomes applicable, \$250,000.

“(B) For the calendar year beginning January 1, 2024, and each calendar year thereafter, an amount equal to the previous calendar year’s minimum qualifying annual compensation, increased in proportion to the annual average increase, if any, in the Consumer Price Index for All Urban Consumers in the Washington Metropolitan Statistical Area published by the Bureau of Labor Statistics of the United States Department of Labor for the previous calendar year adjusted to the nearest whole dollar.

“(13) “Non-compete agreement” means a contract between an employer and employee that has one or more non-compete provisions.

“(14) “Non-compete provision” means a provision in a written agreement or a workplace policy that prohibits an employee from performing work for another for pay or from operating the employee’s own business. The term “non-compete provision” does not include an otherwise lawful provision:

128 “(A) Contained within or executed contemporaneously with an agreement
129 between the seller of a business and one or more buyers of that business wherein the seller agrees
130 not to compete with the buyer’s business; or

131 “(B) That prohibits or restricts an employee from:

132 “(i) Disclosing, using, selling, or accessing the employer’s
133 confidential employer information or proprietary employer information;

134 “(ii) Accepting money or a thing of value for performing work for
135 a person other than the employer, during the employee’s employment with the employer,
136 because the employer reasonably believes the employee’s acceptance of money or a thing of
137 value under such circumstances will:

138 “(I) Result in the employee’s disclosure or use of
139 confidential employer information or proprietary employer information;

140 “(II) Conflict with the employer’s, industry’s, or
141 profession’s established rules regarding conflicts of interest;

142 “(III) Constitute a conflict of commitment if the employee
143 is employed by a higher education institution; or

144 “(IV) Impair the employer’s ability to comply with District
145 or federal laws or regulations; a contract; or a grant agreement.”

146 “(15) “Proprietary employer information” means information unique to an
147 employer that is compiled, created, or solicited by the employer, including customer lists, client
148 lists, and trade secrets as that term is defined in section 2(4) of the Uniform Trade Secrets Act of
149 1988, effective March 16, 1989 (D.C. Law 7-216; D.C. Official Code § 36-401(4)).

“(16) “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.

“(17) “Term of non-competition” means the period of time specified in a non-compete provision during which the employee’s work for a person other than the employer is prohibited.

“(18) “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. Prohibition on non-compete provisions for covered employees.

“(a)(1) Beginning October 1, 2022, no employer may require or request that a covered employee sign an agreement or comply with a workplace policy that includes a non-compete provision.

“(2) A non-compete provision that violates paragraph (1) of this subsection contained in an agreement between a covered employee and an employer that was entered into on or after October 1, 2022 shall be void as a matter of law and unenforceable.

“(b) No employer may retaliate or threaten to retaliate against a covered employee for:

“(1) The covered employee’s refusal to agree to a non-compete provision or non-compete agreement that is prohibited under subsection (a) of this section;

“(2) The covered employee's alleged failure to comply with a non-compete provision or non-compete agreement that is prohibited under subsection (a) of this section;

“(3) Asking, informing, or complaining about the existence, applicability, or validity of a provision in a workplace policy or employment agreement that the employee

reasonably believes is prohibited under subsection (a) of this section, or making a request for a copy of such a provision, to any of the following:

“(A) An employer, including the covered employee’s employer;

“(B) A coworker;

“(C) The covered employee’s lawyer or agent; or

“(D) A governmental entity; or

“(4) Asking the employer for the information required to be provided to the employee pursuant to section 103a.

“Sec. 103. Limitations on non-compete provisions for highly compensated employees.

“(a) For a non-compete agreement between an employer and a highly compensated employee executed on or after October 1, 2022 to be valid and enforceable::

“(1) The agreement must specify:

“(A) The functional scope of the competitive restriction including what services, roles, industry, or competing entities the employee is restricted from performing work in or on behalf of;

“(B) The geographical limitations of the work restriction; and

“(C)(i) If the employee is not a medical specialist, a term of non-competition that does not exceed 365 calendar days from the date the employee separates from employment with the employer; or

(ii) If the employee is a medical specialist, a term of non-competition that does not exceed 730 calendar days from the date the employee separates from employment with the employer; and

“(2) The employer shall provide the non-compete provision to the employee in writing:

197 “(A) At least 14 days before the individual commences employment for
198 the employer; or

199 “(B) If the employer already employs the highly compensated employee,
200 at least 14 days before the employee must execute the agreement.

201 “(b)(1) No employer may retaliate or threaten to retaliate against a highly compensated
202 employee who has executed a non-compete agreement with the employer for asking for a copy
203 of a proposed non-compete provision or non-compete agreement, or for a copy of a non-compete
204 provision or non-compete agreement that the employee executed;

205 “(2) No employer may retaliate or threaten to retaliate against a highly
206 compensated employee for:

207 (A) Asking the employer for the information required to be provided to the
208 employee pursuant to section 103a; or

209 (B) Asking about or objecting to a proposed non-compete provision or
210 agreement because the employee reasonably believes that the provision or agreement does not
211 conform to the requirements of subsection (a)(1) of this section, or reasonably believes that the
212 employer has failed to comply with the requirements of subsection (a)(2) of this section, to any
213 of the following:

214 “(i) An employer, including the highly compensated employee’s
215 employer;

216 “(ii) A coworker;

217 “(iii) The highly compensated employee’s lawyer or agent; or

218 “(iv) A governmental entity.

219 “Section 103a. Disclosures to employees.

220 “(a) An employer with a workplace policy that includes one or more of the
221 exceptions to the definition of “non-compete provision” detailed in section 101(14) shall provide
222 a written copy of such provisions to an employee:

223 “(1) Within 30 days after the employee’s acceptance of employment with the
224 employer;

225 “(2) Within 30 days after October 1, 2022; and

226 “(3) Any time such policy changes.

227 “(b) A highly compensated employee’s employer shall provide the following notice to the
228 employee whenever a non-compete provision is proposed to the employee:

229 ““The District of Columbia Ban on Non-Compete Agreements Amendment Act
230 of 2020 limits the use of non-compete agreements. It allows employers to request non-compete
231 agreements from “highly compensated employees” under certain conditions. [Name of
232 employer] has determined that you are a highly compensated employee. For more information
233 about the Ban on Non-Compete Agreements Amendment Act of 2020, contact the District of
234 Columbia Department of Employment Services (DOES).”.

235 “Sec. 104. Relief and penalties.

236 “(a)(1) The Mayor and Attorney General for the District of Columbia (“Attorney
237 General”) shall administer and enforce this title consistent with their respective powers and
238 rights under section 6(a), (a-1), (b), and (c) of An Act.

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

statement of records and information on 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 the penalty for each violation of section 102(b) and 103(b) 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. 1204; D.C. Official Code § 2-501 *et seq.*), and section 8a(e) of An Act.

“(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) through (m) of An Act, shall govern the conciliation, resolution, and enforcement of an administrative complaint filed pursuant to paragraph (1)(A) of this subsection; except, that section 8a(e)(4) and (5) of An Act, 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 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, in addition to administrative penalties authorized pursuant to this section, an employer found to have violated section 102, 103, or 103a shall be liable for relief payable to an employee as follows:

“(1)(A) An employer that violates section 102(a)(1) 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)(1), 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(a)(2) and section 103(a) shall be liable to each employee against whom the employer attempted to enforce the invalid non-compete provision for relief in an amount not less than \$1,500.

“(B) For any subsequent violation of section 102(a)(2) or section 103(a), 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(b) or section 103(b) 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.

291 “(B) For any subsequent violation of section 102(b) or 103(b), an
292 employer that has been found liable pursuant to subparagraph (A) of this paragraph shall be
293 liable for relief in an amount not less than \$3,000 to each affected employee.

294 “(4) An employer that violates section 103a shall be liable for each violation to
295 each employee subjected to the violation for monetary relief in an amount of \$250.

296 “Sec. 104a. Collective bargaining agreements.

297 “Nothing in this title shall be interpreted as superseding the terms of a valid collective
298 bargaining agreement.

299 “Sec. 104b. Rules of construction.

300 The rights, remedies, and prohibitions accorded by the provisions of this title are in
301 addition to and cumulative of any right, remedy, or prohibition accorded by the common law,
302 federal law, or any District statute, and nothing contained herein shall be construed to deny,
303 abrogate, or impair any such common law or statutory right, remedy, or prohibition.

304 “Sec. 105. Rules.

305 “The Mayor, pursuant to Title I of the District of Columbia Administrative Procedure
306 Act, approved October 21, 1968 (82 Stat. 1204; D.C. Official Code § 2-501 *et seq.*), shall issue
307 rules to implement the provisions of this title, including:

308 “(1) Annual changes to the minimum qualifying annual compensation; and

309 “(2) Rules requiring the preservation and retention of workplace policies, non-
310 compete provisions, non-compete agreements, the written disclosures required by section 103a,
311 and other records related to demonstrating compliance with this title.”.

312 (b) Section 302 is amended to read as follows:

313 “Sec. 302. Applicability.

314 “This act shall apply as of October 1, 2022.”.

315 Sec. 3. Fiscal impact statement.

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

319 Sec. 4. Effective date.

320 This act shall take effect following approval by the Mayor (or in the event of veto by the
321 Mayor, action by the Council to override the veto), a 30-day period of congressional review as
322 provided in section 602(c)(1) of the District of Columbia Home Rule Act, approved December
323 24, 1973 (87 Stat. 813; D.C. Official Code § 1-206.02(c)(1)), and publication in the District of
324 Columbia Register.