COUNCIL OF THE DISTRICT OF COLUMBIA
COMMITTEE ON LABOR AND WORKFORCE DEVELOPMENT
COMMITTEE REPORT
1350 Pennsylvania Avenue, NW, Washington, D.C. 20004

TO: All Councilmembers

FROM: Councilmember Elissa Silverman,
Chairperson, Committee on Labor and Workforce Development

DATE: November 19, 2020

SUBJECT: Report on B23-0494, the "Ban on Non-Compete Agreements Amendment Act of 2020"

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

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I. BACKGROUND AND NEED

Executive Summary

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

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

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

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

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

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

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

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

[2] Alexander J.S. Colvin and Heidi Shierholz, "Report: Noncompete agreements," Economic Policy Institute, December 10, 2019, available at: https://files.epi.org/pdf/179414.pdf.
[3] Michael Lipsitz and Evan Starr, "Low-Wage Workers and the Enforceability of Non-Compete Agreements," April 20, 2020, available at: https://ssrn.com/abstract=3452240.
[4] Michael Lipsitz and Evan Starr, "Low-Wage Workers and the Enforceability of Non-Compete Agreements" April 20, 2020, available at https://ssrn.com/abstract=3452240.

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

Background

As an initial matter, what constitutes a "non-compete agreement" can be misunderstood. Often the non-competition requirement is contained within a broader agreement that also restrains the employee from taking customers or stealing confidential information. Accordingly, many people erroneously believe that non-compete agreements protect against these other harms. But those problems can be avoided through trade secrets laws,[7] non-disclosure agreements, and non-solicitation agreements[8] which specifically target these business risks.[9]

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

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

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

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

[8] Lisa Guerin, "Understanding Non-Solicitation Agreements," available at : https://www.nolo.com/legal-encyclopedia/understanding-nonsolicitation-agreements.html.

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

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

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

[12] Due to the burden a non-compete imposes on an individual's livelihood, where an employer can show that the agreement is protecting a legitimate business interest, courts will generally limit a non-compete agreement to one or two years' duration, and only for the geographic region where the former employee worked or was assigned. See

several witnesses appearing before the Committee noted, that doesn't matter to a worker who is afraid of being sued by their previous employer and can't afford a lawyer. When the time comes to leave a job, workers abide by the terms of the non-compete agreement they signed and lose the ability to draw on their accrued knowledge and skills to advance to a better job.[13]

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

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

Employers that use non-compete agreements with their more highly-paid workers harm their local economies by driving away highly-skilled workers and depressing wages.[15] Hawaii, for example, implemented a ban on non-competes for the technology industry in order to protect and grow that sector.[16] The legislature said that "restrictive employment covenants impede the

generally Kelly, Catherine Pastrikos, American Bar Association, "Non-Compete Agreements: What Every Company and Employee Should Know," July 26, 2016.

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

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

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

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

development of technology businesses within the State by driving skilled workers to other jurisdictions." The state also wanted to protect Hawaiians' pathway into those local jobs.

Similarly, when physicians sign non-competes, they are prevented from opening or joining medical offices even where there is a demonstrated need. Qualified health care workers who cannot advance in their field within the same job market due to a restrictive non-compete have no choice but to leave the region altogether.[17] Hospitals use non-competes to bind workers to their institutions; however, doctors bound by non-competes are dissuaded from speaking out about unsafe conditions.[18] Hospitals' and clinics' ability to recruit is also impaired when their competitors use non-competes and can exacerbate the growing shortage of doctors.[19] Finally, it is also harmful to patients when they are prevented from continuing to see their preferred doctor due to a non-compete agreement, and must instead start over with a doctor who lacks the cumulative knowledge and skill to care for that patient.[20] In order to ensure adequate medical care for patients and safety within institutions, it is the best policy for the District of Columbia to ban the use of non-competes for medical professionals.[21]

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

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

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

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

[20] AnneMarie Schieber, "How Non-Compete Provisions Shackle Physicians & Hurt Patients," The Hill, January 7, 20202, available at: https://thehill.com/opinion/healthcare/477180-how-non-compete-clauses-shackle-physicians-and-hurt-patients.

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

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

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

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

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

> The record reveals that noncompete clauses are not necessary for a healthy, competitive broadcast industry, but they do cause unfairness and hardship to employees. The threat of being forced to either move to a different market or being prohibited from working in one's profession can force employees to accept less favorable terms than would be available in an otherwise free market. In short: non-compete provisions limit competition, serve as a restraint of trade, and unfairly treat workers.[25]

COMMITTEE PRINT:

Definitions

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

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

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

Prohibition on use of non-competes

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

[25] Council of the District of Columbia, Subcommittee on labor, voting rights, and redistricting, "Committee Report on Bill 14-812, the Broadcast Industry Contract Freedom Act of 2002," October 10, 2002.
[26] The clarification was made even though the plain terms of the law's prohibitions only restrict employers (including prospective employer); they do not restrict employees.
[27] See Attachment 7: The White House, *Non-Compete Agreements: Analysis of the Usage, Potential Issues, and State Responses*, May 2016, page 5.

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

The introduced version of B23-494 established a salary threshold below which the non-compete prohibition would apply. That version of the bill applied to any District worker earning three times the minimum wage per hour or less, according to the hourly rate of pay the worker earned from the employer per hour as calculated per calendar quarter. At the Committee hearing, the Committee heard so much evidence of the harms that non-compete agreements can cause,[28] and no consensus on where to set the wage threshold, that the threshold was eliminated in the committee print of the bill.

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

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

[28] See, for example, footnotes 1, 2, 3, 6, 7, and 8.
[29] See, for example, US Department of Labor, *Fact Sheet 56A: Overview of the Regular Rate of Pay Under the Fair Labor Standards Act (FLSA),* December 2019, available at: https://www.dol.gov/agencies/whd/fact-sheets/56a-regular-rate.

are not bound to the non-compete, or create an easily provable violation of the law that should trigger an investigation by DOES.

Prohibition on retaliation

The print prohibits employers from retaliating or threatening retaliation against employees for seeking information about their rights, filing a complaint, or otherwise exercising their rights, such as cooperating with an investigation. Retaliation is an adverse action, and includes such things as threatening an employee, reducing their hours, or issuing a written warning, or anything else an employee in the same situation would interpret as an adverse action. Most commonly, retaliation occurs after the employer learns – or comes to believe – that an employee has exercised their rights. But the bill also protects against an employer that threatens future retaliation, such as a lawsuit if the employee takes another job.[30] If an employer warns an employee or group of employees that the employer plans to retaliate in the future, for example, this chills all employees' willingness to fully exercise their rights and to report violations to enforcement entities. This kind of threat also impedes the government's ability to fully investigate because it makes workers less likely to inform those entities of violations.

Enforcement

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

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

[30] Regardless of whether the employee actually has exercised their rights, the employer may retaliate based on that belief.
[31] D.C. Code § 32–1306.
[32] *See* U.S. Equal Employment Opportunity Commission, "Retaliation- Making it Personal", available at https://www.eeoc.gov/retaliation-making-it-personal ("If retaliation for [filing a complaint of discrimination, participating in a discrimination proceeding, or otherwise opposing discrimination] were permitted, it would have a

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

The bill provides for greater relief and penalties where an employer was previously found to have violated the law. Also, any time the employer takes an adverse action against an employee or group of employees, it is chargeable as a separate instance of retaliation for each employee who experienced the action.[33] The enforcement agency or court finding a violation of the bill can exercise its discretion when applying the statutory relief and penalty provisions depending on the facts of any particular case. Finally, the print conforms with the District's Administrative Procedure Act to protect employers' due process rights to be notified of the charges brought against them and to request and appear at a fair hearing.

II. LEGISLATIVE CHRONOLOGY

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

III. POSITION OF THE EXECUTIVE

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

chilling effect upon the willingness of individuals to speak out against employment discrimination or to participate in the EEOC's administrative process or other employment discrimination proceedings.")

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

IV. HEARING RECORD AND SUMMARY OF TESTIMONY

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

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

A. Hearing Testimony

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

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

Daniel Katz, Senior Counsel, Washington Lawyers' Committee for Civil Rights and Urban Affairs testified in support of the legislation. He said his legal clinic has encountered some of the low-wage workers who have been subject to non-compete agreements. He cited the significant numbers of low wage workers restricted by noncompete agreements and pointed out that these

employees lack bargaining power in order to reject unfair terms an employer might impose. He noted the law would help to remove barriers to opportunity for workers and translate into increased mobility for women workers and workers of color.

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

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

Dan Essrow, Public Witness, supported the legislation because he said it would help workers trapped in undesirable or low-paying jobs because they are bound by non-compete agreements. He framed his support as consistent with the values that workers have a right to respect, to receive a living wage for their labor, and to freely pursue better job opportunities when they arise.

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

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

B. Written Testimony

Written testimony regarding the legislation was submitted by four witnesses:

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

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

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

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

VI. IMPACT ON EXISTING LAW

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

the Fund can be used to enforce this law. For the sake of clarity in applying the law, B23-0494 repeals the Broadcast Industry Contracting Freedom Act of 2002 which previously banned the use of non-competes.

VII. FISCAL IMPACT STATEMENT

The attached fiscal impact statement issued by the District's Chief Financial Officer states that funds are not sufficient in the FYxxxx budget and proposed FY xxxx through FY xxxx budget and financial plan to implement the bill. An additional $__ in FY 2018 and $___for the four-year plan are necessary to fund B23-0494.

VIII. SECTION BY SECTION ANALYSIS

Section 101 defines terms used in the bill.

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

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

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

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

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

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

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

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

Subsection b details the penalties the Mayor can obtain for any violation of the bill, ranging from $350 to $1,000 for an initial violation of most provisions; however, the minimum penalty for

a violation of the bill's anti-retaliation provisions shall be $1,000. The subsection also details procedures the Mayor must follow before collecting penalties.

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

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

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

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

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

Section xxx adopts the fiscal impact statement… [etc]

Section xxx establishes the effective date.

IX. COMMITTEE ACTION

The Committee on Labor and Workforce Development convened at ___ a.m. on November 19, 2020, to consider and vote on B23-0494. Chairperson Silverman recognized the presence of a quorum, consisting of herself and Councilmembers XXXXX.

Chairperson Silverman moved B23-0494 and opened the floor for discussion.

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

After opportunity for discussion, the members voted as follows:

Vote

Chairperson Elissa Silverman

Councilmember Charles Allen

Councilmember David Grosso

Councilmember Kenyan McDuffie

Councilmember Robert C. White

Thus, the committee print and accompanying report were passed, with the Members present voting _____.

The committee meeting adjourned at ___ p.m.

X. ATTACHMENTS

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