NATIONAL EMPLOYMENT LAW PROJECT

Testimony of Najah Farley

National Employment Law Project

In Support of Proposed S.B. 906
An Act Concerning Non-Compete Agreements
Session Year 2021

Hearing before the Connecticut General Assembly

Joint Committee on Labor and Public Employees

March 4, 2021

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Thank you Senator Kushner, Representative Porter, Senator Sampson, Representative Arora and members of the Labor & Public Employees Committee. My name is Najah Farley. I am a senior staff attorney at the National Employment Law Project (NELP). The National Employment Law Project is a non-profit, non-partisan research and advocacy organization specializing in employment policy. We regularly partner with federal, state and local lawmakers on a wide range of issues to promote workers' rights and labor standards enforcement.

I testify today in support of S.B. 906, which would significantly limit the use of non-compete covenants for employees and independent contractors in Connecticut. I first came to this issue when I was an Assistant Attorney General at the New York State Office of the Attorney General where multiple usages of these agreements were uncovered and investigated across many industries and throughout the state, including complaints from phlebotomists, IT professionals, security guards, bike messengers, school cafeteria workers amongst others. Since joining NELP, I have continued advocating against the proliferation of these agreements, having seen firsthand their deleterious effect on workers.

Non-competition agreements are imposed by employers on employees, often as a condition of getting a job, or receiving a promotion and they bar an employee or independent contractor from going to a competing employer or related business for a period following the end of an employment relationship or contract. Sometimes they are bound by either industry or geography, but some are very broad, implicating entire regions of the United States. Some may even list rival specific competitor companies that employees may not join after leaving their previous employer. 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]

Non-compete provisions are usually presented by employers in a 'take it or leave it' fashion and most employees and independent contractors do not have the power to change them or negotiate their implementation. Workers are forced to sign or forego the job opportunity, contract or promotion. Studies have shown that workers rarely negotiate on the issue of non-competes, largely because many receive the non-compete as a condition of a job offer or after accepting the job offer and lack the power to do so.[3] Of those who received the non-compete before the job offer, only 10 percent bargained over the non-compete.[4]

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[1] Starr, Evan and Prescott, J.J. and Bishara, Norman, *Noncompetes in the U.S. Labor Force* (December 24, 2017), https://ssrn.com/abstract=2625714.

[2] U.S. Department of Treasury Office of Economic Policy, *Non-compete Contracts: Economic Effects and Policy Implications* (2016), https://home.treasury.gov/system/files/226/Non_Compete_Contracts_Econimic_Effects_and_Policy_Implications_MAR2016.pdf

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

[4] Starr, Evan and Prescott, J.J. and Bishara, Norman, *Noncompetes in the U.S. Labor Force* (December 24, 2017), SSRN: https://ssrn.com/abstract=2625714.

We support S.B. 906 because it would help to mitigate the coercive nature of these agreements, not only by making them unlawful for employees and independent contractors based on a wage threshold, but also by outlining key provisions that must accompany the usage of non-competes, including making them unlawful, as opposed to unenforceable, limiting their time to one year and enshrining the right to negotiate, as well as a private right of action. These provisions are key to disrupting the coercive nature of the non-competes as they are currently used.

The wage threshold is a key component of S.B. 906, because it is high enough to exclude the workers in low wage industries entirely, and also exclude some considered to fall into the middle class category. As discussed above, many employers apply these agreements across all workers in their businesses to protect trade secrets and proprietary information. However, this rationale does not apply to most workers making below the salary threshold proposed in S.B. 906. In fact, these workers do not normally have access to trade secrets, nor do they have access to confidential and proprietary information and practices and trade secrets are protected under other Federal laws.[5] Non-competes have been shown to depress wages by reducing competition.[6] Economists have also found correlations between states with strict non-compete enforcement and those with lower wage growth and lower initial wages.[7] Prohibiting their wide usage in Connecticut, particularly in the wake of the economic recovery from Covid-19, could only serve to make the state a better place for workers within these wage thresholds.

Also allowing both government enforcement and a private right of action is another key component of this legislation because of the information gap and power differential when it comes to these agreements. As I discussed above, most non-competes are presented in a 'take it or leave it' fashion and many employers are not open to negotiations on the terms of these waivers. Second, non-competes can rarely be challenged on their face, as they require an employer to file a case against an employee claiming that the employee has violated the non-compete provisions. This leads to a power differential that allows employers to enforce the agreements through "soft" measures, such as threats, sending a cease and desist letter to the employee, or to the employee's new job. Placing the burden of proof on the party attempting to enforce the non-compete will serve to change this balance of power and make it easier for workers to challenge the imposition of a non-compete. A private right of action also allows employees to challenge the waivers and ensure that they are nullified before moving on to other employment and without the risk that they could be fired from their new occupation in light of the previously signed waiver. For these reasons, we therefore urge the passage of S.B. 906. Thank you for this opportunity to submit testimony.

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[5] 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).

[6] 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.

[7] Starr, Evan, *The Use, Abuse and Enforceability of Non-Compete and No-Poach Agreements: A Brief Review of the Theory, Evidence and Recent Reform Efforts*, February 2019 Issue Brief, p. 10, available at: https://eig.org/wp-content/uploads/2019/02/Non-Competes-Brief.pdf