

Testimony of Najah Farley

National Employment Law Project

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

Hearing before the Council of the District of Columbia

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

⁶ *Id.*

⁷ *Id.*

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

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

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

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

IV. Policy Recommendations

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

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

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

complete ban on non-competes nationwide through its support of the Workforce Mobility Act introduced in October by Senators Todd Young and Chris Murphy. In addition, the DC Council could make this bill even stronger by increasing the penalties for usage of an unlawful non-compete and adding a notice and posting requirement. Currently, the penalty amount is

V. Recent State Legislation in the Arena

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

- Massachusetts recently passed one of the most comprehensive non-compete laws in the country and it went into effect on October 1st of 2018.¹⁴ The Massachusetts law limits non-competes to one year, requires notice for new employees and also restricts the usage of non-competes to not being broader than necessary to protect legitimate business interests.¹⁵
- In August 2016, Illinois Governor Bruce Rauner signed the “Illinois Freedom to Work Act.”¹⁶ This Act prohibits private-sector employers from entering into a covenant not to compete with any of their low-wage employees. The Act defines a low-wage employee as a worker making the greater of the minimum wage or \$13 per hour. It followed an Illinois Appellate District Court decision that held that continued at-will employment was insufficient consideration to support a non-compete under Illinois law.¹⁷ As such, a non-compete must be accompanied by either 1) independent consideration or 2) two or more years of continuous employment.
- Oregon passed a law limiting non-competes to 18 months in duration. In 2020 employers will be required to present non-competes within 30 days of termination of employment. A previous Oregon law limited non-compete provisions to workers over the income level of \$97,000 per year and employers are required to present them before an offer of employment as well.¹⁸
- New Mexico restricted the usage of non-competes among health care workers.¹⁹
- Hawaii prohibited the usage of non-competes in the technology industry.²⁰

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

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

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

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

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

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

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

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

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

Proposed Legislation

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

VI. Conclusion

Thank you for the opportunity to submit this testimony.

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

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

²³

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

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

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