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Marcy L. Karin

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December 20, 2019

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

Dear Chair Silverman and other Committee Members:

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

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

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

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

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

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

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

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

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

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

Sincerely,

A handwritten signature in black ink that reads "Marcy L. Karin". The signature is written in a cursive, flowing style.

Marcy L. Karin

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

STATE PROVISIONS THAT RESTRICT THE USE OF NON-COMPETE AGREEMENTS

Prepared by Lara Bollinger & Marcy Karin, Dec. 2019

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

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

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

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

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