

**Testimony of
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Legislature Should Leave Enforcement of Non-Competes to the Courts

H.B. 6989 AAC Non-compete Agreements (Opposed)

Connecticut would be best served by rejecting these legislative proposals and continuing to allow the Judiciary to weigh and balance the competing interests for and against enforcement of noncompete agreements, on a case-by-case basis.

Connecticut courts have been enforcing noncompetition agreements that are “reasonable” for well over 125 years. In 1879, the Connecticut Supreme Court upheld a covenant in a simple buy-sell agreement restricting the seller from practicing dentistry within a radius of ten miles from the center of the village of Litchfield. The Supreme Court then articulated the standard for enforcing noncompete agreements in this way: “1st. It must be partial, or restricted in its operation in respect either to time or place. 2d. It must be on some good consideration. 3d. It must be reasonable, that is, it should afford only a fair protection to the interests of the party in whose favor it is made, and must not be so large in its operation as to interfere with the interests of the public.”

This standard was applied again by the Connecticut Supreme Court 100 years ago in favor of an older physician practicing in New Britain who had engaged a young physician as an assistant under a written contract restricting the young physician from locating or opening an office for the practice of medicine within the town of New Britain for one year. The Supreme Court noted that it was balancing “the necessity of preserving inviolable the agreements of men so far as they be reasonable” while “maintaining the freedom of individuals to pursue their ordinary vocations”.

The standard by which Connecticut courts evaluate the reasonableness of noncompetition covenants has changed very little in the last century, as evidenced by the Supreme Court’s most recent pronouncement on the subject in September 2006. Our modern Supreme Court recognizes that “[b]y definition, covenants by employees not to compete with their employers after termination of their employment restrain trade in a free market.” Therefore, they are enforceable “only if their imposed restraint is reasonable”, which requires an assessment of competing interests.

In this most recent case, the Supreme Court applied the exact same considerations it had applied thirty years earlier, and which has been applied in every Connecticut case in the last thirty years: (1) the employer’s need to protect legitimate business interests; (2) the employee’s need to earn a living; and (3) the public’s need to secure the employee’s presence in the labor pool.

Connecticut courts scrutinize the geographic area covered by the noncompetition agreement as well as the length of time it operates with regard to these three competing considerations. Under this standard, many noncompetition covenants have been enforced over a period of many decades and many others have been stricken or modified.

Presently, the General Assembly's Labor and Public Employee Committee is holding hearings on a bill that would ban employers from forcing workers to enter noncompete agreements that prohibit workers from doing the same or similar job at the same location for another employer, unless the worker has obtained trade secrets, the so-called "Guardsmark bill" because it was introduced as a result of the noncompete agreements applicable to guards assigned by Guardsmark to ESPN. When Guardsmark lost the contract to a competitor, Securitas Security, in December 2006, Guardsmark objected to the hiring of its employees by Securitas to fill the positions at ESPN, citing the noncompete agreements. Without taking sides in that particular dispute, the proposed legislation is objectionable because it fails to attempt to balance the competing interests involved in the controversy, as Connecticut jurisprudence has recognized decade after decade without much deviation in approach. It is also dangerous to attempt to "fix" one particular perceived problem with a general legislative pronouncement that is bound to have unintended consequences.

Senator Prague was quoted in the *New Haven Register* on February 21st as saying that it "seems pretty straight-forward" that "in a free market economy, workers should be free to pursue employment as they see fit, and take a better offer if and when it becomes available, even if it's from an across-the-street rival." Senator Prague invokes one very important principle but she does not balance that principle with competing ones. If an employer invests time and money in training employees, introducing them to customers or clients, and/or providing them with proprietary information, shouldn't the employer have some measure of protection against that investment being transferred to a competitor?

In a bidding situation, if the new bidder has unfettered discretion to assume it can hire away the existing contractor's employees, does the new bidder have an unfair advantage in that it did not have to make the investment in training the employees and in making sure that the customer was satisfied with the particular employees assigned to that account? Can we even assume that the employees will be better off in this situation? Suppose the new bidder cuts its bid to the bone to win the contract, knowing that it does not have to invest in hiring and training new employees, win or lose, and then after winning the bid reduces the pay of the employees to realize an anticipated profit margin?

A Guardsmark noncompete agreement was scrutinized by the Superior Court in 1992 and in that case the court upheld the agreement because enforcement left the employees free to "work as security guards any place in Connecticut" *except* the site (Hamden or Milford) where they had been employed by Guardsmark, and, on the other hand, the agreement had "a direct bearing on the plaintiff's business", serving to protect its "legitimate business interest in preventing an unfair appropriation of [Guardmark's] goodwill while discouraging the kind of unfair competition that would benefit no one." Of course, the situation in Bristol in 2006 may be completely different than the one in Hamden or Milford in 1992. That is precisely why these controversies should be decided by the courts on a case by case basis. If these guards cannot

find similar work near home, that would be a factor for a court's consideration in balancing the equities in the case.

Far more dangerous than the "Guardsmark bill" is the one Attorney General Richard Blumenthal says he will introduce. See "Blumenthal to Widen Scope of Bill" (*Hartford Courant*, Feb. 21, 2007). According to the *Courant*, Mr. Blumenthal urged state legislators on February 20 to adopt a law that would prohibit non-compete agreements except in cases in which employees possess trade secrets, apparently narrowly-defined, like "the formula for Coca-Cola", other "proprietary information" or other "legitimate business interests". Connecticut already has a Trade Secrets Protection statute and much case law interpreting that statute.

The advocates for this legislation seem to presume that it would benefit rank-and-file employees and curb abuses by corporations. That is an over-simplistic and distorted point of view. Non-compete agreements can effectively limit high-earning sales professionals from taking key customers to a competitor, protecting the jobs of the rank-and-file who depend on the sales for the success of the company. Similarly, rank-and-file employees are harmed if technical employees take their know-how to a competitor. In a time when Connecticut is bleeding manufacturing jobs, the Legislature should not make it more difficult for Connecticut companies to protect their investments in know-how, customer relationships and employees with special skills and knowledge. Consider one very realistic scenario: suppose key financial, engineering and technical employees of a local manufacturer all receive offers from a company in China or India and take their expertise and establish a sales office in the United States for the foreign concern that transfers all manufacturing off-shore. The result is job losses for the rank-and-file while the small group of key employees, and the foreign manufacturer, realize an enormous benefit.

The Connecticut courts, as briefly noted above, have articulated the "legitimate business interests" of employers and have balanced those interests, on a case-by-case basis, against the interests of employees and the public interest. According to the *Courant*, Mr. Blumenthal did not disclose the details of his amended bill, but said it would resemble existing laws in Florida and California. California is at the far extreme of state law on non-competition agreements, effectively banning them. The overwhelming majority of states, including all the New England and mid-Atlantic states, enforce noncompete agreements, or not, through the application of a "rule of reason" similar to Connecticut's, on a case-by-case basis, through the courts.

Connecticut should not abandon its long-standing approach to determining whether a noncompete agreement is enforceable.

