



Greater Hartford Legal Aid

February 14, 2019

Testimony in support of H.B. 6913 - An Act Concerning Covenants Not to Compete.

To the members of the Labor Committee:

My name is Lisa Levy and I am an attorney at Greater Hartford Legal Aid, Inc., representing low wage workers. Thank you for the opportunity to testify in support of H.B. 6913, an Act Concerning Covenants not to compete, and to offer the attached substitute language from the employment units of Connecticut's legal services programs.

A covenant not to compete normally restricts an employee from competing with a former employer by prohibiting the employee from engaging in a particular occupation or type of work for a definite time period and in a defined geographic area. The traditional usage of the non-compete covenant was to protect an employer's competitive advantage by preventing more highly trained and compensated employees from taking a job at a competing business and disclosing specialized knowledge and skills acquired at the former employer. In recent years, however, low wage workers, from janitors to home health aides, have been required to abide by covenants not to compete. A 2016 report from the U.S. Treasury found that 18 percent of the workforce is subject to a non-compete provision. A notable portion of these workers are low wage earners: "15 percent of workers without a four-year college degree" and "14 percent of workers earning less than \$40,000" annually in the United States must adhere to non-compete provisions. *Non-compete Contracts: Economic Effects and Policy Implications*, U.S. Department of Treasury, pp. 3-4 (2016) (<https://www.treasury.gov/resource-center/economic-policy/Documents/UST%20Non-competes%20Report.pdf>).

Low wage workers do not usually possess the specialized technical skills nor are they privy to trade secrets and proprietary information held by more highly compensated employees. Nonetheless, in recent years, employers have forced low wage workers to sign non-competes, restricting them from taking a new job with an employer in the same business for a prescribed time period and geographic area of a state. This has occurred with low wage employees such as home health aides, CNAs, commercial cleaners, and fast food workers. <https://www.law.com/ctlawtribune/2019/01/11/boost-connecticuts-economy.pdf>.

Even a one year restriction on engaging in the same type of work in a 10 to 15 mile area adversely impacts the employment prospects of low wage workers. Many of these workers do not have a college education or other marketable skills, have limited ability to work varying shifts, and are dependent on public transportation. Furthermore, covenants not to compete have been associated with limiting competition by restricting employees from seeking or accepting better jobs and employers from hiring more qualified employees. U.S. Dept. of Treasury Study, pp. 1, 4. Unsurprisingly, state laws in Massachusetts, New York and 25 other states include restrictions on an employer's ability to require non-compete covenants.

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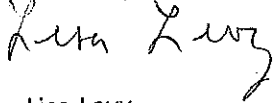
The proposed substitute language for H.B. 6913 contains restrictions to insure that both employer and employees are adequately protected. The employer has the ability to obtain a non-compete covenant in order to protect its "legitimate business interest," that is "reasonably limited in time, geographic scope and employment restrictions as necessary to protect such business interest," and "is otherwise consistent with the law and public policy." The covenant cannot restrict an employee's competitive activities for more than "one year following termination of the employee," or a maximum of "two years" where the employer compensates the former employee with her base salary and benefits for a period of no less than one year following termination of employment.

Legal Services' substitute language further states that a covenant not to compete can only be "entered into by an employee who receives compensation at an hourly rate of more than twice the minimum wage." With Connecticut's current minimum wage of \$10.10 per hour, an employee must earn more than \$42,036.80 in order to be subject to a non-compete provision. The proposed language thus safeguards low wage workers from being required to adhere to covenants not to compete, which pose a genuine threat to realistic future employment in their chosen field.

The proposed substitute language also provides additional necessary protections for all employees who are subject to a covenant not to compete. The non-compete cannot be enforceable against any employee who terminates his or her employment for "good cause attributable to the employer;" "the employee must be presented with the written covenant "no less than 10 business days prior to the date of signing;" the covenant must "state that the employee has the right to consult with counsel prior to signing;" and it must "be signed by the employee and the employer."

The proposed substitute language for H.B. 6913 therefore adequately protects employees who have no choice but to sign, or otherwise comply with a covenant not to compete.

Sincerely,



Lisa Levy  
Attorney

Enclosure : Proposed Act Concerning Covenants Not to Compete

## AN ACT CONCERNING COVENANTS NOT TO COMPETE

### Section 1. (NEW)

(a) For purposes of this section:

(1) "Base salary and benefits" means (1) the wages, as defined under section 31-71a over the course of the prior calendar year without consideration of any overtime or bonus compensation, and (2) the fringe benefits over the course of the prior calendar year, as defined in section 31-76k and (3) the health benefits commensurate with those paid to the employee over the course of the prior calendar year.

(2) "Employee" includes any person suffered or permitted to work by an employer;

(3) "Employer" includes any individual, partnership, association, joint stock company, trust, corporation, the administrator or executor of the estate of a deceased person, the conservator of the estate of an incompetent, or the receiver, trustee, successor or assignee of any of the same, employing any person, including the state and any political subdivision thereof;

(4) "Covenant not to compete" means a contract, provision, or agreement that restrains an employee from engaging in any lawful profession, occupation, trade, calling, or business of any kind in any geographic area of the state for any period of time after the termination of employment;

(5) "Separation agreement" means an agreement accompanying the termination or separation of employment without cause in which the employee releases claims or potential claims against the employer.

(b) Except as provided in section 31-50a or 31-50b of the general statutes, an employer may obtain from an employee a covenant not to compete only if it is (1) not restrictive of the employee's competitive activities for a period of more than one year following the termination of the employee as provided herein; (2) necessary to protect a legitimate business interest of the employer; (3) reasonably limited in time, geographic scope and employment restrictions as necessary to protect such business interest (4) in conformance with subsection (c) and (e) of this chapter; (5) entered into by an employee who receives compensation at an hourly rate of more than twice the minimum wage as defined by section 31-58 of the general statutes; and (6) otherwise consistent with the law and public policy. The party seeking to enforce a covenant not to compete shall have the burden of proof in any proceeding.

(c) A covenant not to compete that is entered into, amended, extended or renewed on or after July 1, 2019 shall not be enforceable against any employee if (i) such employment contract or agreement was not made in anticipation of a sale of the goodwill of a business or all of the seller's ownership interest in a business, or as part of a partnership or ownership agreement and such contract or agreement expires and is not renewed, unless, prior to such expiration, the employer makes a bona fide offer to renew the contract on the same or similar terms and conditions; or (ii) the employment or contractual relationship is terminated by the employee for good cause attributable to the employer.

(d) A covenant not to compete conforming in all respects to the requirements of subsection (b), (c) and (e) of this section shall not be invalid under the provisions of this section based upon its duration of more than one year but no longer than two years following the termination of employment if it is a part of an employment agreement or of a separation agreement under which the employer agrees to continue to compensate the employee with the employee's base salary and benefits for a period of not

less than one year following the termination of employment.

(e) Each covenant not to compete entered into, amended or renewed on or after July 1, 2019 shall (i) be provided to the employee no less than 10 business days prior to the date of signing; (ii) expressly state that the employee has the right to consult with counsel prior to signing; and (iii) be signed by the employee and the employer.

(f) The remaining provisions of any contract or agreement that includes a covenant not to compete that is rendered void and unenforceable, in whole or in part, under the provisions of this section shall remain in full force and effect, including provisions that require the payment of damages resulting from any injury suffered by reason of termination of such contract or agreement.

(g) The provisions of this section shall apply to agreements or covenants entered into, renewed or extended on or after June 30, 2019.