

Labor and Public Employees Committee

JOINT FAVORABLE REPORT

Bill No.: SB-906

Title: AN ACT CONCERNING NON-COMPETE AGREEMENTS.

Vote Date: 3/23/2021

Vote Action: Joint Favorable Substitute

PH Date: 3/4/2021

File No.:

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SPONSORS OF BILL:

Labor and Public Employees Committee

REASONS FOR BILL:

Many workers, including many low-wage and people of color, are required to sign non-compete agreements before being hired.

RESPONSE FROM ADMINISTRATION/AGENCY:

PATRICK HULIN, GOVERNOR NED LAMONT'S ASSOCIATE POLICY DIRECTOR, STATE OF CONNECTICUT

The proliferation of noncompete agreements is harming CT's workers and the economy. Placing limits on these agreements will make a real difference for workers who are bound by them, especially low-wage workers who are disproportionately women and people of color. They inhibit economic opportunity for workers and harm the ability of businesses to innovate. They depress wages for far too many workers. A shocking number of workers, even low-wage workers, are subject to these agreements regardless of their job duties or availability to access confidential information. The bill allows workers greater freedom to change jobs and thereby gain greater bargaining power and higher wages. This is a policy that will make a real difference in workers' lives and the economic competitiveness of the State.

WILLIAM TONG, ATTORNEY GENERAL, STATE OF CONNECTICUT

This is a smart, streamlined bill that will protect workers and strengthen our economy. It will give guidance to both employers and workers, and include straightforward, commonsense mechanisms to incentivize compliance. Our economy is still recovering from the effects of the COVID pandemic and too many workers are still unemployed or underemployed. This legislation can help us respond by maximizing worker flexibility, mobility, competition and entrepreneurship so we can get more people back into the labor force. Overuse of these

provisions restrict workers liberty, limiting their ability to choose the right job and even start their own businesses. Non-compete provisions are bad for workers, businesses and for the State. Most non-competes do not work and are harmful to workers, to the free market and economy. The bill is specific. It provides that the Attorney General can bring a suit on behalf of workers who have been harmed by non-competes. It creates meaningful penalties that disincentivize indiscriminate use of non-competes in employment contracts. It is carefully crafted legislation that protects workers and promotes a strong economy by removing barriers to a free market for labor. He urges support.

CHRISTOPHER S. MURPHY, US SENATOR

The American workforce has experienced significantly reduced job mobility, tepid wage growth, and declining rate of entrepreneurship in recent decades. At the same time, non-compete clauses have become more prevalent. These inherently influence competitive labor market forces by narrowing the available employment options. They also impede entrepreneurship since firms who use them are more likely to fail. The desire to limit the use of these clauses is bipartisan in the US Senate. Banning the use of non-competes would allow workers to get better jobs, boost wages, increase entrepreneurship and spur innovation.

KURT WESTBY, COMMISSIONER, DEPARTMENT OF LABOR

They requested consideration of this bill to protect certain employees and independent contractors from onerous and unfair non-compete agreements imposed by an employer as a condition of employment. Concern about the overuse of non-competes has grown in recent years. Many states already prohibit non-compete agreements entirely since they restrict worker mobility, discourage entrepreneurship and make it harder for new businesses to attract talent. This bill recognizes the necessity of protecting legitimate business interest, such as proprietary information. It incentivizes the use of less restrictive means including nondisclosure and non-solicitation agreements. Setting limits on these clauses offers a middle ground that protects workers' rights without sacrificing business interests.

NATURE AND SOURCES OF SUPPORT:

LEWIS CHIMES, ATTORNEY

His testimony noted there is a bill adopted that places restrictions on non-competition agreements for physicians and they see no reason carpenters, veterinarians, automobile salesmen and restaurant workers should not be treated any differently than doctors. COVID-19 has created many individuals who have lost their jobs/livelihood through no fault of their own and are prohibited from finding comparable work in their chosen field. This bill has a one-year limitation on covenants not to compete. These covenants would not be imposed on low income workers or be enforceable if the employer discharges the employee or the employee leaves for good cause attributable to the employer. Employees are given a ten-day grace period to sign a covenant not to compete and are to be advised that they have the right to consult with counsel prior to signing. It doesn't affect employers' interests in protecting their existing customers, confidential information and trade secrets. This is a reasonable balance between the need of businesses to protect their legitimate interests and the compelling economic public policy of allowing workers, particularly low-income workers, free and unfettered access to our labor market.

HANNA HALLORAN, CT WOMEN'S EDUCATION AND LEGAL FUND

Non-compete agreements disproportionately affect low-wage workers, the majority being women and people of color. Low wage workers not provided with sufficient numbers of hours or shifts may need to seek additional employment at a company in the same industry. If they signed a non-compete agreement, they may be unable to earn the wages necessary to meet their family's basic needs. CT should prioritize retaining skilled workers by passing this bill and barring the use of these agreements, which restrict job mobility and reduce worker's wages. COVID-19 has limited opportunities workers have by decreasing shifts available. These agreements make it impossible to work multiple jobs. No-poaching agreements not only prevent individuals from moving to better jobs, but they also contribute to larger negative trends in the economy that are reducing economic dynamism and driving wage stagnation across the economy.

NAJAH FARLEY, NATIONAL EMPLOYMENT LAW PROJECT

She first learned of this issue while an Assistant Attorney General of New York where multiple uses of these agreements were uncovered involving many industries including phlebotomists, IT professionals, security guards, bike messengers, school cafeteria workers among others. She has seen first-hand the deleterious effect these agreements can have on workers. Some of these agreements are bound by industry or geography, but some are very broad and implicate entire regions of the United States. These agreements are usually presented by employers in a "take it or leave it" fashion and workers don't have the power to change or negotiate their implementation. This bill would mitigate the coercive nature of these agreements by making them unlawful based on a wage threshold and by outlining key provisions. These agreements often lead to power differentials that allow employers to enforce the agreements through "soft" measures, such as threats, sending a cease and desist letter, placing the burden of proof on the party attempting to enforce the agreement. This will serve to change the balance of power to make it easier for workers to challenge the position of on-competes. This bill allows employees to challenge the waivers and ensure they are nullified before moving on without a risk of being fired.

SUE GARTEN, ATTORNEY, GREATER HARTFORD LEGAL AID, INC.

In recent years, employers have required low wage workers, including fast-food workers, commercial cleaners and home health aides, to sign covenants not to compete. These include workers whose average wage per hour is less than \$13. These workers do not have specialized technical skills and are not privy to trade secrets held by higher paid employees. Even a one-year restriction in the same type of work in a 10–15 mile area adversely impacts employment opportunities. They offer suggestions they believe would improve the proposed bill. It would be inequitable to allow a non-compete agreement to be enforced against a worker who was unfairly terminated or who left a job because of intolerable or unlawful working conditions. Current laws are not enforceable for physicians, and other workers should receive this same protection. Section 2 of the bill should read:

"Even if otherwise valid under this section a covenant not to compete shall not be enforceable if (i) the employment or contractual relationship is terminated by the employer or contractor without good cause or (ii) the employment or contractual relationship is terminated by the worker for good cause attributable to the employer or contractor". The definition of a "non-solicitation agreement" should have parameters similar to those defining the non-compete provisions. They suggest it reads:

"Such agreement shall not: 1) restrict the worker's activity for more than one year or 2) be more restrictive than necessary to protect such business in terms of the agreement's

duration, geographic scope, type of work or employer". They would like the proviso "no employer or contractor who uses on-call shift scheduling as a regular business practice may require its workers to sign or agree to an exclusivity agreement".

**TERRI GERSTEIN, DIRECTOR, STATE AND LOCAL ENFORCEMENT PROJECT,
HARVARD LABOR AND WORKLIFE PROGRAM, SENIOR FELLOW, ECONOMIC POLICY
INSTITUTE**

Economists have documented employees' extensive use of non-competes, even where they're unenforceable, the lack of bargaining that typically precedes employee signing, and non-competes' adverse impact on job mobility and wages. Many harmful effects are less readily calculable. Many workers continue to experience workplace violations, like discrimination, harassment, or wage theft, because a non-compete makes them fear they'll be sued if they leave and get a new job. This can have a profound impact on a worker's life. Many people are minimum wage workers and live paycheck-to-paycheck and do not have strong bargaining power. There should be a high bar for letting companies prevent working people from earning a livelihood in their field. There are tweaks that could be considered. It would be helpful if the bill more squarely applied to non-competes existence as of July 1, 2021 or such other date after which such legacy non-competes would automatically lapse if not renewed.

**JOSHUA R. GOODBAUM, PARTNER, GARRISON, LEVIN-EPSTEIN, FITZGERALD &
PIRROTTI, P.C.**

The theoretical underpinnings of the 'at will' doctrine is that if employees are able to leave their jobs without reason or warning, then employers likewise should be free to terminate their employees without notice or cause. The growing prevalence of covenants not to compete undermines this trade-off. Employees with non-competes can leave their jobs only in theory; in practice they have no choice but to stay. This reduces employee bargaining power and contributes to reduced job mobility and stagnant wage growth. They suggest amending SB 906 to incorporate subsection © of HB 6379 which prohibits employers from enforcing non-competes against employees who have been laid off. An employee facing a layoff through no fault of their own should be able to accept any job offer they can get. They also suggest the bill be made retroactive.

SAL LUCIANO, PRESIDENT, CT AFL-CIO

These agreements were traditionally more common in professional or managerial jobs with higher rates of pay and greater levels of responsibility, but today they are becoming common in the entry-level and low-wage jobs, even in the service, restaurant and hospitality industries. This is another way of rigging the system by eliminating a worker's right to move to a better paying position. They artificially suppress wages, which in turn, reduces overall economic growth. They are concerned that the wage levels are still too low to protect professional employees who have no managerial responsibilities. They are encouraged that the Attorney General will have authority to enforce these protections.

CARLOS MORENO, STATE DIRECTOR, CT WORKING FAMILIES ORGANIZATION

Non-competes weaken the ability for workers to earn a living, advance their careers and develop more skills and mastery in their chosen professions. They weaken wage growth because changing jobs is how workers often get a raise. They contribute to the decline in entrepreneurship in the labor market. This is a good start, but it should also be prohibited among middle income workers without managerial responsibilities. They are a drag on

economic growth. This is an example of exploitation of labor. This practice should be banned altogether.

MARK LEMLEY, PROFESSOR,

WILLIAM H. NEUKOM, PROFESSOR, SANFORD LAW SCHOOL,

DURIE TANGRI, LLP,

ORLY LOBEL, WARREN DISTINGUISHED PROFESSOR OF LAW, UNIVERSITY OF SAN DIEGO

In the past decade, a wealth of research – empirical, experimental and theoretical studies- offer evidence about the key role that human capital policy, including noncompete contracts, plays in industries and regions. Non-competes favor large incumbent firms. Markets become more concentrated when the clauses are adopted and enforced. These agreements also decrease wages. Employers set compensation largely based on competing external offers. When these offers are reduced, employers face less pressure to increase wages. Restrictions on job mobility have a disproportionate negative effect on certain demographics. The modern economy depends on employee mobility. The workforce needs to be able to respond to sudden disruptions, such as COVID-19, which radically shifted the demand for workers.

SANDEEP VAHEESAN, LEGAL DIRECTOR, OPEN MARKET INSTITUTE

While they believe a full ban on non-compete clauses should be enacted, this is a step in the right direction. Making these clauses illegal, and backing this up with effective legal sanctions, is essential for deterring employers from using these contracts and also protecting workers' freedoms to switch jobs or start their own businesses. Research has found that these agreements discourage workers from leaving, even when employers can't legally enforce them in court. The existence of these contracts harms workers. The conventional employer justification ignores the availability of more effective and less restrictive alternatives. Copyright and trade secret laws can be used to protect business information. Non-competes are a deeply-flawed tool for protecting employer information. Using them to protect company know-how, no matter how discrete or trivial, does not guard against overt or covert disclosure information to rivals.

KARLA WALTER, SENIOR DIRECTOR, AMERICAN WORKER PROJECT, CENTER FOR AMERICAN PROGRESS ACTION FUND

She has conducted extensive research and developed recommendations on how state oversight of non-compete agreements can boost worker pay and freedom. While corporations have long required CEOs and top talent to sign such agreements, today more than 38% of workers across all educational levels and 35% of those without college degrees report signing a noncompete agreement at some point in their lives. Failure to address this problem now will exacerbate the effects of the economic downturn on workers. Wage growth barely outpaced inflation even before the COVID-19 pandemic began. Allowing workers to move easily between firms can stimulate the economy by fostering innovation through information-sharing. As workers leave, they can start new companies and promote regional industry development since firms can co-locate to share local talent. This bill would establish CT as a national leader. It will boost worker pay and job mobility at a time it is desperately needed and jump-start economic growth by supporting local entrepreneurs.

NATURE AND SOURCES OF OPPOSITION:

MELISSA COCUZZA, FOUNDER, A BALANCED LIFE – HEALTH EXPOS

It this bill passes, it could potentially harm her business beyond repair. She said this bill was originally aimed at the home health care agencies where she worked in an administrative staff position. She said this industry should address their own concerns through private legal avenues since this bill would adversely affect many other industries as well. She has been developing her business for 25 years. An employee can leave and can start a model of the business she has created. With non-compete protection in place, they would have to get other employment for 2 years and hopefully, by then would lose interest in competing with her company. Should this bill be passed, she may be forced to relocate, and since she can run her business from any state and hire independent contractors from other states it would mean less money to CT.

CT HOSPITAL ASSOCIATION

They urge the general statutes now in place stay intact. Throughout this pandemic and since 2020, hospitals and health systems have continued to provide high-quality care for everyone regardless of ability to pay. The provision of this bill specifically exempts, among others, covenants not to compete that are already established. The outcome is a statute that attempts to achieve a balance between the legitimate interests of both the employer and physician. To preserve the balance previously achieved, they ask that a section be amended to include an exemption for covenants not to compete already established by adding the following: *This section shall not apply to any covenant not to compete as defined in section 20-14p of the General Statutes.*

DEBORAH McKENNA, VICE-PRESIDENT, CT EMPLOYMENT LAWYERS ASSOCIATION

This bill addresses the issue of non-competition agreements and the chilling effect they can have on employees to earn a livelihood once the employment relationship has been severed. There may be a general idea that non-competition agreements are limited to the highest paid executives or salespeople, but this is simply not the case. These employees run the gamut from the low-wage hourly workers who sign these agreements to more highly paid executives. This places an enormous burden on low and middle wage workers who are at a disadvantage in terms of bargaining power. This bill takes important steps to address the disparity in bargaining power. Raising the income threshold would be an important step to protect vulnerable workers. They ask modification of subsection (c) of HB 6379 regarding termination of the employment relationship. It should include a subsection to provide greater protection for workers. It is too limited because it only invalidates a non-compete agreement that is "predicated on ownership interest". This is too restrictive and leaves many clients out and doesn't address employees who remain bound by non-competes. If modifications are made, it will go a long way in balancing the inequities inherent in non-competition agreements and free employees from restrictive covenants.

ERIC GJEDE, VICE PRESIDENT OF GOVERNMENT AFFAIRS, CBIA

These agreements provide protection for businesses from the loss of trade secrets, emerging technologies, client lists, and other confidential and proprietary information. They are heavily restricted by the courts to balance the interests of employers and employees while ensuring appropriateness of scope, geography and duration. This bill invalidates all noncompete

agreements as of July 1, 2021 if the employee is a non-exempt (hourly) employee, or the employee is an exempt employee (salaried) who earns less than 3X the minimum wage (\$93,600 / year for a full-time employee at \$15 an hour) or the independent contractor earning less than 5X the minimum wage (\$75 per hour at \$15 per hour). Using a multiple of the minimum wage as a threshold to invalidate these agreements is problematic because the minimum wage is indexed, resulting in a moving target whereby an agreement may become invalidated over time due to increases in the wage. This ignores the needs of many industries providing good middle-class jobs that use geographically and durationally limited noncompete agreements, such as hair care professionals, golf course pros and even clergy members. It invalidates the agreements for very highly-skilled individuals that have access to sensitive information including design engineers, skilled tradesmen and software developers. Good cause aspects should be considered. An employee terminated for misconduct would not be prohibited from stealing a former employer's clients or revealing trade secrets. These agreements provide critical protections for many industries and are already highly restricted to protect employees.

JOHN LETTIERI, PRESIDENT/CEO, ECONOMIC INNOVATION GROUP

Non-compete agreements limit worker mobility and dampen the dynamism of the U.S. economy. Once reserved for senior executives and those possessing valuable trade secrets, these provisions are now used extensively throughout the labor market and affect millions of low wage and highly skilled workers alike – with profoundly detrimental results for the broader economy. These clauses hurt workers and the broader economy primarily through reduced wages and less entrepreneurship agreements and nearly twice as many have signed one at some point in the past. Workers should be free to seek better jobs and compete in the marketplace without needing permission from their former employers.

MATTHEW JOHNSON
EVAN STARR, ECONOMISTS

They have conducted research to determine how common non-competes are, how they influence workers and firms and what sort of effects their legal enforceability had on economic activity. Non-competes are everywhere. Doggy daycare workers, unpaid interns, volunteer coaches, hair stylists and janitors are just some of the jobs where they are found. They are frequently found in low-wage jobs. Just 10% of noncompete-bound workers report negotiating over the terms of the contract or for additional benefits in exchange for signing. Employers often compel workers to sign which limits the bargaining power of the employee. Despite reasonable arguments that non-competes could potentially benefit workers and firms, most research suggests that the use and enforceability of non-competes reduces wages, entrepreneurship, and job-to-job mobility, making it harder for firms to hire. In states where non-competes are per se unenforceable, they still cover 19—23% of the workforce. The negative effects of non-competes are born not only by those who sign them, but also have negative "spillover" effects on the wages of other workers in the labor market. Other tools can do similar jobs for the firm without constraining worker options so severely. Nondisclosure agreements and trade secret laws can protect trade secrets. This is not a classic firm vs. worker issue. Firms are on both sides of the equation: firms don't want to lose workers to competitors, but they would like to hire from competitors. Firms benefit more broadly from being integrated in a dynamic environment and the evidence overwhelmingly shows that non-competes reduce dynamism by chilling mobility and entrepreneurship.

KATHLEEN SILARD, PRESIDENT/CEO, STAMFORD HEALTH

They urge keeping the current statute intact. This statute addresses physicians not to compete. They have concerns about the provisions that would impact the ability to use this agreement for executives and non-physician independent contractors. Noncompete agreements used in the executive context protect the employing or other organization from having an employee or long-time contractor with substantial information about strategies and objectives leave to work for a competitor within a certain time frame and geographical location. Defined terms in this proposal require clarification to ensure that the context of each restriction is clear. They want the current statute regarding physicians left intact and to consider a standard that is fair and contains clear standards with respect to covered employers and employees.

Reported by: Marie Knudsen, Assistant Clerk

Date: April 2, 2021