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Testimony of Garrison, Levin-Epstein, Fitzgerald & Pirrotti, P.C.
Before the Labor & Public Employees Committee
Submitted by Joshua R. Goodbaum, Esq., Partner
February 10, 2021

Testifying in support of
HB 6379: An Act concerning Workers' Rights

Garrison, Levin-Epstein, Fitzgerald & Pirrotti, P.C. has been recognized for more than 40 years as a preeminent law firm representing and advocating for employees in Connecticut. Our six current partners include the president and two past presidents of the Connecticut Employment Lawyers Association (CELA); our former partners include two federal judges and the retired Presiding Civil Judge of the New Haven Superior Court. Our practice covers all aspects of employment law, including counseling employees about their obligations under covenants not to compete and representing employees in litigation and arbitration concerning restrictive covenants. It is based on that experience that we respectfully offer this testimony in support of HB 6379.

Employment in Connecticut – as in almost every other U.S. state and territory – is "at-will." This means that, unless they have the benefit of a collective bargaining agreement or another form of employment contract, Connecticut's workers can be terminated from their jobs for any reason or no reason at all, so as long as the reason is not an unlawful one. The theoretical underpinning of this doctrine is that, if employees are entitled 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 in Connecticut and around the country undermines this theoretical trade-off. For while employers remain free to terminate their employees at-will, employees increasingly are unable to leave their employment for a better position in their same industry because doing so would violate their non-competes. Employees with non-competes, in other words, can leave their jobs only in theory; in practice, they have no

choice but to stay. This dynamic reduces employees' bargaining power and contributes, in the aggregate, to reduced job mobility and stagnant wage growth.[1]

Among the commendable provisions in HB 6379 is subsection (c), which effectively prohibits employers from enforcing non-competes against employees who have been laid off. After all, if an employee is so unessential that the employer can manage without her services, then there is no reasonable basis for that same employer to prohibit the employee from earning a living by offering her services to a competitor. The drafters of the Restatement of Employment Law – which included both employee-side and management-side lawyers, in conjunction with the American Law Institute – encapsulated this reasoning as follows:

> [R]estrictive covenants . . . are generally unenforceable against employees who are terminated without cause or who quit employment for cause attributable to the employer. . . . An opposite rule would have the perverse consequence for employees of providing an incentive to an employer to advance its business interests by choosing to terminate rather than retain an employee who is performing satisfactorily and then restrict the discharged employee's ability to secure new employment.

Rest. (3d) Employment Law § 8.06 cmt. f.[2] An employee who is facing a layoff through no fault of her own should be able to accept any job offer she can get.

The Connecticut Business & Industry Association responds in its testimony to this Committee that invalidating terminated employees' non-competes would permit those employees to "steal[] a former employer's clients or reveal[] trade secrets." The CBIA is wrong. Nothing in HB 6379 bans covenants that prohibit the use or dissemination of employers' confidential information – which are virtually ubiquitous – and in any event both federal and Connecticut law provide express protections for trade secrets. *See* 18 U.S.C. § 1831 *et seq.* (Protection of Trade Secrets); Conn. Gen. Stat. § 35-50 *et seq.* (Uniform Trade Secrets Act). Likewise, nothing in HB 6379 prohibits covenants not to solicit clients or employees or other tailored restrictive covenants, such as non-service agreements.

In our view as lawyers for Connecticut's employees, HB 6379 is a step in the right direction, and we urge its enactment. Our hope, though, is that the General Assembly will revisit the topic of non-competes, as there are many additional ways that the Legislature can improve the law in this area to provide additional support for Connecticut's workers. Here are four improvements that we recommend based on our experience:

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[1] *See, e.g.*, A. Colvin & H. Shierholz, "Noncompete agreements" (Dec. 10, 2019), available at https://www.epi.org/publication/noncompete-agreements/.

[2] Restatements of the Law are treatises that articulate the principles or rules for a specific area of law. They are written and published by the American Law Institute and generally represent a consensus about the law. Connecticut's courts routinely adopt the positions advocated by Restatements. *See, e.g.*, *Advanced Arm Dynamics of New England LLC v. Comprehensive Prosthetic Servs. LLC*, 2011 WL 677475, at *6 (Conn. Super. Feb. 23, 2011) (Corradino, J.) (describing appellate courts' extensive reliance on Restatements).

Improvement No. 1:
Prohibit "Blue Penciling"

The "blue pencil" doctrine permits courts to revise or rewrite contractual clauses that are unenforceable in order to narrow them to the point that they are enforceable. Since non-competes are almost always drafted by employers and presented to employees without any leverage to negotiate, "blue pencil" clauses are prevalent, if not universal. The clause usually says something like, "If any provision of this Agreement is determined by a court to be excessively broad as to duration, geographical scope, activity, or subject, it shall be construed by limiting or reducing it, so as to be enforceable to the extent compatible with applicable law." (This example comes from an actual non-compete we reviewed for a client this week.) These clauses mean that employers can promulgate overly broad and unreasonable non-competes without consequence or risk. The unknowing employee will comply to his detriment (thus granting the employer a non-compete it otherwise could not enforce); and the knowing employee will be told that the non-compete is enforceable to its maximum reasonableness. "Blue penciling" should be prohibited in order to encourage employers to draft non-competes narrowly and carefully to cover only those areas they need for their businesses and only on terms that they are confident pass legal muster.

Improvement No. 2:
Prohibit "Choice of Law" and "Forum Selection" Clauses

Employees who work in Connecticut should be subject to the Connecticut law of non-competes (not the law of any other state) and should be able to litigate their non-competes in courts of Connecticut (not any other forum). A few years ago, we represented a blue-collar worker employed by a large national company. His 13-page single-spaced non-compete agreement – which he had no opportunity to negotiate – included clauses stating that the contract would be "governed for all purposes by the law of the State of Missouri" (where the company was headquartered) and that, if there was any litigation, the employee "submit[ted] to the exclusive jurisdiction [of] the Courts of the State of Missouri" and waived any argument that litigating in Missouri "would be inconvenient to him." This client, however, had lived and worked in Connecticut all his life; he had never even been to Missouri. This abuse of "choice of law" and "forum selection" clauses – as they are called – is unfair. Connecticut employees should have the benefit of Connecticut's non-compete law, and they should be able to challenge their non-competes, if necessary, in courts or arbitrations in Connecticut.

Improvement No. 3:
Prohibit One-Way Fee Shifts

The following is a clause that a client showed us this past week: "In the event legal action is necessary to enforce Employee's obligations hereunder, the Company shall be entitled to a recovery of its costs and attorney's fees expended in such action." (This clause departs from the so-called "American Rule," by which litigants generally bear their own costs.) Initially, this clause may seem fair enough. After all, if the employee breaches, he should have to cover the employer's costs. But what if the employee gets sued and prevails? He will have borne his own costs and fees, and the employer will owe him nothing. Simply put, one-way fee shifts are

unfair. The fair approach is either for both parties to recover their fees if they "prevail" or for neither to do so.

Improvement No. 4:
Make Developments in Non-Compete Law Retrospective

As with the 2016 physician non-compete law, which only applied to covenants "entered into, amended, extended or renewed on or after July 1, 2016," Conn. Gen. Stat. § 20-14p(b)(2), HB 6379 only applies to covenants formed after July 1, 2021. This is a lost opportunity. We regularly advise employees whose non-competes were signed years or even decades ago. Those employees should not be relegated to an outmoded statutory regime. Rather, they should be able to benefit from developments in the law, and they are no less deserving of those benefits than newly hired workers. Parties have vested interests in their contractual relationships, to be sure, but the General Assembly avoids the unfair invalidation of existing contracts by providing ample notice of the effectiveness of new statutes, as it has done here. That way, employers have sufficient time to promulgate new non-competes that comply with the law.

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We appreciate the opportunity to provide our perspective to the Committee and welcome questions from any Members who wish to discuss this important issue.