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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
March 4, 2021

Testifying in support of
SB 906: An Act concerning Non-Compete Agreements

Garrison, Levin-Epstein, Fitzgerald & Pirrotti, P.C. has been recognized for over 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 about restrictive covenants. It is based on that experience that we respectfully testify in support of SB 906.

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 may 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 cannot 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]

SB 906 would go a long way toward righting this widespread inequity. Its beneficial provisions include:

- Restricting non-competes to higher-income workers: Non-competes often mean that, to leave their jobs, employees will need to forego work for a period of months or even longer. A higher-income worker may be able to afford this trade-off, but lower-income workers often cannot.

- Providing employees with notice: Too often, employees are forced to sign non-competes on their first day of work, with no meaningful opportunity to review the covenants, let alone negotiate about their scope.

- Clarifying that Connecticut employees can litigate their non-competes in Connecticut courts under Connecticut law: 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 was presented to him on a "take it or leave it" basis – 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 about his employment, 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. SB 906 rightly would stop employers' abuse of these "choice of law" and "forum selection" clauses – at least in the context of non-competes.

- Limiting "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 with no leverage to negotiate, "blue pencil" clauses are nearly universal. These clauses allow employers to impose 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. SB 906 discourages employers from drafting unreasonable non-competes by providing that certain overbroad clauses are "presumed entirely unenforceable." (The Committee should take the additional step of prohibiting the practice of "blue penciling" entirely, in order to incentivize employers to impose only those non-competes that they can actually justify.)

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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/.

SB 906 would be good for Connecticut's workers, and we therefore urge its enactment. As between this bill and HB 6379 – which also addresses non-competes – both are good, but SB 906 is better. SB 906 could be even better still, though, if it incorporated two additional protections.

First, we urge the Committee to consider amending SB 906 to incorporate subsection (c) of HB 6379, 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:

> [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.[2]

An employee facing a layoff through no fault of her own should be able to accept any job offer she can get.

Second, we urge the Committee to make SB 906 retroactive. 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), SB 906 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 arbitrarily bound 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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[2] Rest. (3d) Employment Law § 8.06 cmt. f. 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).

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