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SB 591: Labor and Employment – Noncompete and Conflict of Interest Provisions – Application of Prohibition

Hearing of the Senate Finance Committee, March 2, 2023

Position: Favorable

The Public Justice Center (PJC) is a not-for-profit civil rights and anti-poverty legal services organization which seeks to advance social justice, economic and racial equity, and fundamental human rights in Maryland. Our Workplace Justice Project works to expand and enforce the right of low-wage workers to receive an honest day's pay for an honest day's work. The PJC **supports SB 591**, which would provide a technical fix to Maryland's limitation on noncompete provisions in employment contracts and restore the law's original intent to protect workers earning less than 150% of the minimum wage.

Problem: Noncompetes hurt Maryland workers, but our law limiting their use will become a nullity unless it is amended to reflect its original effect of protecting workers earning less than 150% of the minimum wage.

- **Use of noncompetes is growing.** A "noncompete clause" is a contractual term between an employer and a worker that blocks the worker from working for a competing employer, or starting a competing business, typically within a certain geographic area and period of time after the worker's employment ends.[1] In the past, noncompetes were used for high-level executives. Now, employers are putting them in employment contracts for many low-wage jobs in fields like retail, janitorial work, and home care.
- **Noncompetes hurt workers and the economy.** Noncompetes (i) decrease job mobility, (ii) lower wages, and (iii) hinder entrepreneurship. One recent study found that noncompetes lowered workers' wages by as much as 14% to 21%.[2] This study further found that banning noncompetes led to increased hourly wages for workers, and "while the wage effects are positive for men, they are approximately twice as large for women, suggesting that vulnerable workers who may be less likely to negotiate may be most affected." But noncompetes lower wages for *all* workers, even those not subject to them, because they inhibit free-market competition between businesses for potential employees.
- **The FTC recently proposed to ban noncompetes.** In January 2023, the Federal Trade Commission proposed a new rule to ban employers from imposing noncompetes on their workers.[3] The FTC noted that about one in five American workers are bound by a noncompete, and ending them would increase earnings of American workers by nearly $300 billion per year.
- **The General Assembly took action in 2019, but that law will soon lose its effect.** In 2019 the General Assembly passed SB 328, which provided that noncompetes are generally void for workers earning less than $15/hour. The Senate passed the bill unanimously, 45-0. At that time the minimum wage was $10.10/hour, so the law protected workers earning less than 150% of minimum wage. But the law will be a nullity when minimum wage reaches $15/hour.

[1] https://www.ftc.gov/legal-library/browse/federal-register-notices/non-compete-clause-rulemaking.
[2] Michael Lipsitz and Evan Starr, *Low-Wage Workers and the Enforceability of Non-Compete Agreements*, Management Science, 2019, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3452240.
[3] https://www.ftc.gov/legal-library/browse/federal-register-notices/non-compete-clause-rulemaking.

Solution: Pass SB 591's technical fix to restore the law's original intent to protect workers earning less than 150% of the minimum wage.

- **SB 591 provides a technical fix to Maryland's existing limitation on noncompetes.** The bill would simply change the income threshold in Maryland's current limitation on noncompetes – codified at Labor & Employment § 3-716 – such that the law would protect workers earning less than 150% of the minimum wage. This is a modest and common-sense technical fix that restores the law's original intent.
- **The bill's scope is still limited to low-wage workers.** When minimum wage reaches $15/hour, the law will protect workers earning less than $22.50/hour.
- **SB 591 will ensure that Maryland's existing public policy continues to have effect.** Existing law provides that "*[a] noncompete or conflict of interest provision* in an employment contract or a similar document or agreement that restricts the ability of an employee to enter into employment with a new employer or to become self-employed in the same or similar business or trade *shall be null and void as being against the public policy of the State*." Md. Code Ann., Lab. & Empl. § 3-716(b). SB 591 will ensure the vitality of Maryland's public policy of protecting low-wage workers from noncompete agreements – a policy that other states are increasingly adopting as their own.[4]

For the foregoing reasons, the PJC **SUPPORTS SB 591** and urges a **FAVORABLE** report. Should you have any questions, please contact David Rodwin at rodwind@publicjustice.org or 410-625-9409 ext. 249.

[4] Many other states and jurisdictions limit the effect of noncompetes, including:

1. Colorado, Colo Rev. Stat. Ann. sec. 8-2-113(2)(a)–(b), as amended by H.B. 22-1317 (effective Aug. 10, 2022) (non-compete clauses are void except where they apply to a "highly compensated worker," currently defined as a worker earning at least $101,250 annually, see Colo. Code Regs. sec. 1103-14:1.2)
2. District of Columbia, D.C. Code sec. 32-581.02(a)(1) (effective Oct. 1, 2022) (where the employee's compensation is less than $150,000, or less than $250,000 if the employee is a medical specialist, employers may not require or request that the employee sign an agreement or comply with a workplace policy that includes a non-compete clause)
3. Illinois, 820 Ill. Comp. Stat. 90/10(a) (effective Jan. 1, 2017) (no employer shall enter into a non-compete clause unless the worker's actual or expected earnings exceed $75,000/year)
4. Maine, Me. Rev. Stat. Ann. tit. 26, sec. 599-A(3) (effective Sep. 19, 2019) (an employer may not require or permit an employee earning wages at or below 400% of the federal poverty level to enter into a non-compete clause with the employer)
5. Massachusetts, Mass. Gen. Laws Ann. ch. 149, sec. 24L(c) (effective Jan. 14, 2021) (non-compete clauses shall not be enforceable against workers classified as nonexempt under the Fair Labor Standards Act ("FLSA"))
6. Nevada, Nev. Rev. Stat. sec. 613.195(3) (effective Oct. 1, 2021) (noncompete clauses may not apply to hourly workers)
7. New Hampshire, N.H. Rev. Stat. Ann. sec. 275:70-a(II) (effective Sept. 8, 2019) (employers shall not require a worker who earns an hourly rate less than or equal to 200% of the federal minimum wage to enter into a non-compete clause, and non-compete clauses with such workers are void and unenforceable)
8. Oregon, Or. Rev. Stat. sec. 653.295(1)(e) (effective Jan. 1, 2022) (non-compete clauses are void and unenforceable except where the worker's annualized gross salary and commissions at the time of the worker's termination exceed $100,533)
9. Rhode Island, R.I. Gen Laws sec. 28-59-3(a)(1) (effective Jan. 15, 2020) (non-compete clauses shall not be enforceable against workers classified as nonexempt under the FLSA)
10. Virginia, Va. Code Ann. sec. 40.1-28.7:8(B) (effective July 1, 2020) (no employer shall enter into, enforce, or threaten to enforce a non-compete clause with an employee whose average weekly earnings are less than the Commonwealth's average weekly wage)
11. Washington, Wash. Rev. Code Ann. sec. 49.62.020(1)(b) and 49.62.030(1) (effective Jan. 1, 2020) (non-compete clause is void and unenforceable unless worker's annualized earnings exceed $100,000 for employees and $250,000 for independent contractors, to be adjusted for inflation)

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SB 591 - Labor and Employment - Noncompete and Conflict of Interest Provisions - Application of Prohibition
Senate Finance Committee
March 2, 2023

SUPPORT

Donna S. Edwards
President
Maryland State and DC AFL-CIO

Madame Chair and members of the Committee, thank you for the opportunity to submit testimony in support of SB 591. My name is Donna S. Edwards, and I am the President of the Maryland State and District of Columbia AFL-CIO. On behalf of Maryland's 300,000 union members, I offer the following comments.

Noncompete clauses and conflict of interest provisions restrict the ability of workers to find new employment. These agreements used to be reserved for executive level professionals in white collar professions, typically involving work with intellectual property. Increasingly, noncompete and conflict of interest clauses are being used to restrict all types of workers including food servers, hairdressers, tutors and camp counselors. These bans can even last for a year or two after employment, resulting in newly unemployed workers not being able to get a job in their field without moving or traveling long distances to work. Overuse of noncompete clauses has become such a problem that the Federal Trade Commission is considering a rule to ban them entirely, arguing that they rob workers of $300 billion in earnings each year.[1]

In a 1972 ruling in Becker v. Bailey, the Maryland Court of Appeals took up the issue of enforceable noncompetition agreements in employment contracts. The Court found noncompetition agreements in employment contracts to be enforceable provided they met several factors. Included among those factors is the requirement to not impose an undue hardship on the employee or disregard the interests of the public. We believe that many of these agreements do both. The current use of these agreements are a method to restrict a worker's ability to work, harming the dynamic nature of our economy, which operates on the principle that employers compete against each other to attract workers. By raising the minimum salary threshold to 150% of the minimum wage we can help workers escape these abusive practices.

[1] Federal Trade Commission, "FTC Proposes Rule to Ban Noncompete Clauses, Which Hurt Workers and Harm Competition." January 5, 2023.

For well-compensated company leadership, who are privy to company secrets and strategies, noncompete agreements may make sense. However, applying them to a business's rank and file workforce is a violation of labor rights. These agreements negatively impact the rights and freedoms of workers and stifle free market competition.

SB 591 helps level the playing field for both workers and employers. We ask for a favorable report.

Lynne Bernabei - Maryland Assembly (March 2 2023)

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Chair Griffith and Members of the Senate Finance Committee:

I am Lynne Bernabei from the law firm of Bernabei & Kabat and am testifying on behalf of the Metropolitan Washington Employment Lawyers Association, the bar association whose members are attorneys representing workers in Maryland, Washington D.C., and Virginia. I previously testified before the Federal Trade Commission, on behalf of the National Employment Lawyers Association, in support of the FTC's proposed ban on most non-competes. Since its rule banning non-competes is not yet law, it is very important that the Maryland legislature amend its legislation to protect workers who earn less than 150 percent of the minimum wage.

Non-competes have an especially harsh effect on low-wage workers.

Statistics show about 40 percent of employees in Maryland earn the minimum wage or up to 150 percent of the soon-to-be $15 per hour minimum wage. Non-competes are widespread for low-wage workers, including those who work at fast food restaurants and as security guards. These are the essential workers whom we

so lauded during the pandemic. Making sure that they are not subject to non-competes is the best way to thank them for serving us throughout the pandemic.

There are three major problems with non-competes as to low-wage workers that I want to highlight:

First, non-competes can keep low-wage workers locked into bad jobs, because geographical restrictions force them to look for employment alternatives far from their current employer. This means that these workers have to spend more time and money in commuting to a new job if they are bound by a non-compete.

Second, low wage workers do not have the funds to challenge non-competes, even if these bans are clearly overbroad or illegal. Even middle class and upper middle-class employees often find it difficult to challenge overbroad non-competes.

Third, non-competes force low-wage workers to put up with and not report on-the-job discrimination and harassment, or dangerous working conditions and other illegalities in their workplace. In this way, non-competes impair the effective enforcement of the anti-discrimination and whistleblower statutes on the books.

Ensuring that non-competes do not apply to essential workers will ensure a fair and more just workplace.

For these reasons I urge a favorable report on SB 591. Thank you.