New York State Office of the Attorney General
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Testimony Before the

New York State Senate

Standing Committee on Commerce, Economic Development and Small Business,
Chair: Senator Sean M. Ryan
Standing Committee on Labor, Chair: Senator Jessica Ramos

Impacts of non-compete agreements on the labor market and economic development, and possible legislative solutions, such as S3100/Ryan

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Good morning committee chairs and members. My name is Karen Cacace, and I am the Bureau Chief for the New York State Attorney General's Labor Bureau. I have been in this position for over three years. Prior to joining the Attorney General's Office, I was the Director of the Employment Law Unit at The Legal Aid Society in New York City for over nine years.

At the outset, I want to note that Attorney General James, and the rest of our office, continues to appreciate the strong and constructive relationship between our office and the legislature. We offer our time and any relevant expertise we may have to assist with other legislative proposals.

I also want to thank you for convening this important hearing and for giving our office an opportunity to share our thoughts on the impact of non-compete provisions on the labor market and economic development, and possible solutions, including Senator Ryan's bill.

While New York's common law provides some protection for workers, it is insufficient to address the problems created by non-compete provisions. Our office routinely receives complaints from workers subject to non-compete provisions who have serious concerns, including: from workers who are being sued by a former employer; from workers whose prior employer are threatening to sue; from workers who find out after they have begun working that they unknowingly signed an agreement that includes a non-compete provision; and from workers who are about to start a job and believe the non-compete provision that their employer is requiring them to agree to is overbroad.

For most of these workers, the non-compete provision was not presented as a negotiable contract—it was presented as a requirement to keep or continue their employment or as part of the first-day pile of paperwork. And even if those workers were able to ascertain that they are being required to agree to a non-compete provision, most of them could not afford an attorney to represent them and attempt to negotiate the terms of the provision.

The businesses about which workers complain about imposing onerous non-compete provisions are of varying types and sizes, including temp agencies, janitorial services, banks, media companies, fitness companies, telecommunications companies, home health aide agencies, retailers, data analytics companies, pest control companies, legal translation services, chiropractors, and hotel operators.

Our office has investigated and settled non-compete issues at various companies, including the legal news website Law360, Jimmy John's Gourmet Sandwiches, Examination Management Services, a nationwide medical-information-services provider, and WeWork, the shared office space provider. We have also investigated and settled non-compete issues with smaller companies, such as a payment processing firm and a healthcare staffing agency that prevented its temporary and travel medical professionals from working at any competitor of its client facilities, including hospitals and nursing homes.

Historically, non-compete provisions were used sparingly for executives with trade secrets or confidential business information, and these executives were typically represented by lawyers who negotiated the terms of the agreement with the employer. However, it has become increasingly common for employees even in low-wage jobs to be subject to non-compete provisions often with little or no negotiation allowed. An ever-growing number of these agreements bear no relation to their historic purpose. And companies often impose the same, overly broad non-compete provisions on their workforces without the necessary tailoring required, leading to lower-level and higher-level, specialized and nonspecialized employees being subject to the same onerous requirements. The provisions are not necessary to protect trade secrets or proprietary information – confidentiality and non-solicitation agreements can address these issues.

New York is behind other states in enacting legislation restricting non-compete provisions. This year, Minnesota will join California, Oklahoma, and North Dakota in completely banning non-compete provisions. Maryland and Kentucky have both enacted legislation this year awaiting their governors' signatures, which will add restrictions on employers imposing non-competes. And many other states, recognizing the effects of non-competes on workers, especially lower-wage workers, have enacted legislation restricting non-competes in recent years.[1]

The Federal Trade Commission's proposed rule banning non-competes is a welcome development. Our office recently joined with the Attorney Generals of 16 states and the District

[1] These states include Washington State, Rhode Island, Maine, Massachusetts, Maryland, Oregon, Virginia, Indiana, Washington, D.C., Nevada, Colorado, Iowa, Kentucky, and Illinois.

of Columbia to file support for the Commission's proposed rule.[2] However, because it is not possible to determine when the FTC's proposed rule will take effect, it is important that the state legislature enact legislation prohibiting non-compete provisions. We, therefore, urge the New York State Legislature to enact non-compete legislation and finally end the proliferation of these abusive provisions in New York.

Senator Ryan's proposed non-compete legislation creates a uniform standard for all New York workers and businesses and reflects New York's priorities in protecting workers, wage growth, and economic development. The legislation also addresses companies' concerns regarding the protection of trade secrets and the solicitation of clients. We do, however, support proposed amendments to Senator Ryan's bill, which we believe strengthen the protections and provide important clarifications to workers and businesses.

First, the amendments would clarify that non-compete provisions currently in effect are null and void and require that employers notify their workers that any current non-compete then in effect is void. We believe that voiding non-competes currently in place is necessary to alleviate the problems this legislation is meant to address and provide all workers in New York certainty and the uniform protection of the law.

Second, the amendments require that employers notify all workers in writing or by posting in a place customarily frequented by employees that non-compete provisions are prohibited by law. It is important to inform workers of their rights and is consistent with other laws that require employers to provide workers notice of employment protections.

Third, the amendments clarify the definitions of "individual," "employer," and "employment" to ensure that the ban on non-competes applies to all workers in NY.

Fourth, the amendments prohibit workers from waiving application of the law and prohibit employment contracts from containing a choice of law or choice of venue provision that would have the effect of avoiding the ban on non-competes.

Fifth, the amendments add a prohibition against the use of TRAPs (training repayment agreement provisions) in most circumstances. TRAPs are increasingly used by employers to restrict employee mobility.[3] TRAPs are provisions that state that a worker must stay at a job for a certain amount of time, and if the worker leaves before that time, then that worker is liable to pay

[2] In addition to NY, the AGs for the District of Columbia, New Jersey, California, Colorado, Delaware, Illinois, Maine, Maryland, Massachusetts, Michigan, Minnesota, Nevada, New Mexico, Oregon, Pennsylvania, Rhode Island, and Washington signed onto the letter.

[3] Nearly 10% of American workers surveyed in 2020 were covered by a training repayment agreement, according to the Cornell Survey Research Institute. https://www.reuters.com/world/us/more-us-companies-charging-employees-job-training-if-they-quit-2022-10-17/.

the employer for the training the employee received. TRAPS have the same chilling effect as non-compete provisions. For this reason, the FTC's proposed rule prohibits TRAPs.[4]

Our office has received several complaints of TRAPS. In one egregious example, an employer had a contract requiring a tattoo apprentice to pay back training costs if the apprentice left before the end of a 2-year term expired. When that worker left four months before the contract term expired, the employer sent a bill for $15,000.

Finally, the amendments address enforcement of the legislation. In addition to the private right of action that the current legislation provides, the amendments give express enforcement authority to the Attorney General and the Department of Labor. The amendments also add mandatory fee-shifting for workers who successfully litigate a claim and a provision that allows the plaintiff to designate the venue for any actions. Banning non-competes must be paired with robust enforcement and the amendments ensure that will be the case by empowering government and encouraging private enforcement.

We very much appreciate the opportunity to share our input with you here today and welcome the chance to continue this conversation moving forward.

Thank you.

[4] Under Michigan's Payment of Wages and Fringe Benefits Act (WFBA), employees cannot be required, as a condition of employment, to reimburse an employer for employer-mandated training after he or she resigns. The Michigan Supreme Court has found that this law is designed to "prevent kickbacks or payments of any kind to an employer in return for employment or its continuation." *Sands Appliance Servs., Inc. v. Wilson*, 463 Mich. 231, 241 (2000).