ELP EMPLOYMENT LAW PARTNERS, LLC

Partnering with Individuals and Companies in Employment and Business Disputes

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The Ohio Senate
Senate Judiciary Committee
136th General Assembly
1 Capitol Square
Columbus, Ohio 43215

Re: Proponent Testimony for SB 11 to Prohibit Non-compete Agreements

Dear Committee Members:

Thank you for the opportunity to testify in support of Senate Bill 11. I am an employment lawyer who has represented workers and businesses in non-compete cases for almost 40 years. I am a current Board Member of the Ohio Employment Lawyer's Association, past Chair of the Ohio State Bar Association's Employment Law Section and was one of the first Employment Law Specialist certified in Ohio. I urge Ohio's Senate to adopt SB 11 to end the abuse of agreements that prevent workers from taking jobs within their industry.

Non-competition Agreements Stifle Mobility, Innovation and Growth

Non-competition agreements prohibit employees from leaving jobs to work for others in capacities like the job they leave. They shackle workers to jobs that may go nowhere, stifle their careers and deprive other employers and their customers of their skills and services.

Some defend non-competes as necessary to prevent unfair competition. Workers compete unfairly when they use their employer's trade secrets or customer relationships for their own benefit.

While non-competes may battle unfair competition, it's like using a lawnmower to weed a garden. When you're done, you don't have weeds, but you don't have much of a garden, either.

The garden in this analogy is fair competition. Fair competition frees workers to start new jobs and businesses. Fair competition gives employers access to the best talent, and it creates the best selection of the best goods and services for the public.

While non-competes harm fair competition, better tools, like non-solicitation agreements, non-disclosure agreements and trade secret laws, root out unfair competition while leaving healthy competition to grow.

History

Non-competition agreements date back to English common law. In 1414, a judge in the *Dyer's Case* refused to enforce an agreement prohibiting a dyer from practicing his trade for six months in the town where he received his training. The *Dyer's Case* emphasized the importance of workers' freedom to pursue their chosen professions, and the harm to townspeople who needed his services.

In 1711, the English case of *Mitchel v. Reynolds* established the modern non-compete framework. It allows courts to enforce non-compete agreements, but only to the extent necessary to protect an employer's legitimate business interest.

Non-competes took root in the United States following the Civil War, when former slave owners utilized them to limit former slaves from seeking better opportunities. This abuse of non-competes to oppress vulnerable workers persists today. In 2016, for example, Jimmy Johns Sandwiches sparked national outrage by requiring their sandwich makers and delivery drivers to sign non-compete agreements that barred them from working for any competitor within a two-mile radius.

In response to Jimmy Johns' abuse and research showing non-competes stifle mobility and wages, most state governments now ban or restrict non-competition agreements. Only eight states do not regulate non-competition agreements by statute. Ohio is one of them. SB 11 is a great step forward for Ohio.

Better Tools

A. Ohio's Trade Secrets Law

Ohio law protects confidential business information that gives a company a competitive advantage. Trade Secrets include information that is not generally known or readily ascertainable by others, is the subject of efforts to keep it secret, and derives value from such efforts.

Trade secrets cover customer lists, business plans and other proprietary information. Unlike non-compete agreements that interfere with employment, trade secrets focus on information employees could use to compete unfairly.

B. Non-Solicitation Agreements

Non-solicitation agreements prohibit employees from soliciting the employer's clients to move their business. Non-solicitation agreements do not prevent former employees from working for a competitor altogether. Instead, they prevent former employees from using customer relationships built during their employment to divert or take away customers from the former employer.

Illustrating the Destructive Nature of Non-competes

Non-competes give the old employer an unfair litigation advantage and drive-up legal fees for all parties. Every non-compete case hurts a worker, their new employer, and the public, usually without changing the outcome. The following is a typical case I have handled that illustrates how this happens.

Reasonable Restrictions

Marie, a stylist, owns Salon de Marie. She hires Ricardo, another stylist, to work for her. He has an established book of clients. To protect her business, Marie and Ricardo agree he will:

1. Not to use or disclose Salon de Marie's Confidential Information, including customer lists; and
2. Not solicit, divert or take away Salon de Marie customers he develops while employed there.

Several years later, Ricardo accepts a better offer from Great Cuts, which is 12 miles from Salon de Marie. Ricardo does not take Salon de Marie confidential information or solicit customers he developed there. He only asks the customers he brought with him to follow him to Great Cuts.

Salon de Marie sees a drop in business after Ricardo leaves. Its attorney sends a cease-and-desist letter to Ricardo and Great Cuts, demanding that Ricardo and Great Cuts identify the customers who followed Ricardo there. They do so. As it turns out, all but two were Ricardo's customers when he joined Salon de Marie. Ricardo and Great Cuts agree not to provide further services to these or other Salon de Marie customers.

Harmful Non-Competes

Now suppose that Ricardo agreed to a non-compete when he started at Salon de Marie in addition to a non-solicitation clause. It prevents him from accepting employment with or starting a competing salon within 25 miles of Salon de Marie for two years.

When Ricardo finds a better opportunity at Great Cuts several years later, he now has two bad choices. He can stay at Salon de Marie and lose an opportunity to advance his career, or he can join Great Cuts and risk a lawsuit.

Most employees would stay in the old job, but Ricardo decides to join Great Cuts. Salon de Marie discovers this and sends a cease-and-desist letter, only this time demanding Ricardo's termination.

Most often, Great Cuts would terminate Ricardo, and Salon de Marie will not take him back. Everyone loses. But if Great Cuts is willing to defend the lawsuit, everyone incurs legal fees. They argue whether a 25 mile restriction is unreasonable and, if so, whether a 12-mile restriction is.

Same Outcome, Higher Costs and Greater Harm

In every case, the Court will encourage the parties to negotiate a lesser set of restrictions. Most of the time they do. If they don't, the Court will eventually make that decision for them. However they get there, the result is almost always the same. The parties will agree, or the court will order, that:

1. Salon de Marie cannot unreasonably stop Ricardo from working as a stylist for a competitor;
2. Ricardo can keep the customers he brought to Salon de Marie; and
3. Ricardo cannot solicit, divert, accept or take away customers he met at Salon de Marie.

This is the same result achieved without the non-compete, with several unfair side effects -- the non-compete might have forced Ricardo never to leave, Great Cuts might have terminated his employment to avoid litigation, and everyone incurred significant legal fees.

Conclusion

Non-competition agreements hurt workers, employers and the public without doing anything more to prevent unfair competition than existing tools. I urge adoption of S.B. 11.

Sincerely,

Neil Klingshirn

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