**DRAFT June 15, 2022**

**TO**: All Councilmembers­

**FROM**: Councilmember Elissa Silverman,

 Chairperson, Committee on Labor and Workforce Development

**DATE**: June 16, 2022

**SUBJECT**: Report on B24-256, the “Non-Compete Clarification Amendment Act of 2022”

 The Committee on Labor and Workforce Development, to which B24-256, the “Non-Compete Clarification Amendment Act of 2021” was referred, reports **favorably** thereon with amendments, and recommends its approval by the Council.

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# **I. BACKGROUND AND NEED**

*Executive Summary*

Councilmember Silverman introduced B24-256, originally titled the “Non-Compete Conflict of Interest Clarification Amendment Act of 2021,” May 21, 2021, to amend the Ban on Non-Compete Agreements Amendment Act of 2020 (D.C. Law 23‑209) (hereinafter called the “Total Ban”).

The Total Ban barred the use of non-compete agreements in the District, with only a narrow exception for medical specialists.[[1]](#footnote-2) The law stated that District employers could not restrict their employees from simultaneously holding a second job or from leaving their job to work for a competing business.

After the Total Ban was passed, affected employers raised further policy and practical questions about it. Councilmember Silverman then introduced Bill 24-256 to clarify any perceived ambiguity regarding simultaneous employment. Businesses interested in the legislation asked the Committee to further amend the law to allow non-compete agreements for certain workers. In addition, Councilmember Brooke Pinto drafted a proposal, which was not formally introduced as a bill, to substantially revise the Total Ban (see “Councilmember Pinto’s Proposal” below).

In the spirit of comity, Councilmember Silverman instructed the Committee staff to come to a reasonable compromise, working with the concerned interests who approached the committee. Upon thorough review of the submitted testimony, conversations with business and community members, consultation with subject matter experts, and a review of non-compete restrictions across the country, the Committee recommends a narrow allowance for non-compete agreements with only those employees who have annual total compensation of at least $250,000, provided that the agreements last no more than one year and adhere to certain drafting requirements including clear disclosure to employees.

***Procedural Background***

Although the Total Ban became DC law on March 16, 2021, its initial applicability date was set to October 1, 2021, the date when its implementation costs were expected to be fully funded in the District’s budget. After its enactment but before the law applied, business community members (the “Working Group”) reached out to Councilmember Silverman seeking legislation clarifications to the law.[[2]](#footnote-3) Chairperson Silverman introduced B24-256 on May 21, 2021 to make permanent changes to the Total Ban. A public hearing was held on July 14, 2021, and discussions with the business community continued through 2021 and into 2022. The demands of the pandemic, given the Committee also oversees the Department of Employment Services and the city’s unemployment compensation program, contributed to a slower than ideal timeline. The applicability date of the Total Ban was postponed in emergency and temporary legislation while the present bill was considered.[[3]](#footnote-4)

***The Bill As Introduced***

As introduced, B24-256 focused only on clarifying the Total Ban’s restrictions around simultaneous employment. The Total Ban had stated, “No employer may have a workplace policy that prohibits an employee from: (1) Being employed by another person; (2) Performing work or providing services for pay for another person; or (3) Operating the employee’s own business.”

Employers informed the Committee that this meant their individual conflict-of-interest policies would violate the law. Representatives from associations such as the Consortium of Universities of the Metropolitan Washington Area (the “Consortium”) and the Maryland DC Delaware Broadcasters Association (the “Broadcasters Association”) said that they could not comply with the Total Ban due to certain federal regulations that applied to their industries. The Broadcasters Association said that restrictions on their conflict-of-interest requirements could run afoul of Federal Communications Commission (“FCC”) regulations on paid advertising. Their conflict-of-interest policies were necessary, they said, so they could proactively identify and manage the risks that could come from an employee receiving payment for promotional reasons. The Consortium said that federal research grant agreements, some with underlying regulations, required member institutions to identify and manage any conflicts that could interfere with proper administration of federally-funded research studies. Colleges and universities also sought to prevent their admissions officers from capitalizing on access to internal institutional information by working for prospective applicants on the side. This could result in more favorable admissions for wealthy applicants. Committee staff noted to these groups that, in many of the examples provided, federal laws would supersede District law, allowing these employers to meet federal requirements. Nevertheless, the businesses sought further changes to make it easier to comply with both laws and to avoid the scrutiny that could come if a misinformed employee reported them to the government for investigation.

B24‑256, as introduced, allowed employers to maintain “bona fide conflict of interest policies” that could bar employees from performing certain outside work. Specifically, it would allow an employer to impose this restriction where the employee was accepting money if “the employer reasonably believes that the employee’s acceptance” of it “will cause the employer to conduct its business in an unethical manner; or violate applicable local, state, or federal laws or rules.” (internal formatting removed). As detailed below, the Working Group and others who submitted testimony fretted that these two exceptions did not address all of the potential scenarios they faced, and the legislation was expanded to include those additional situations.

**POLICY CONSIDERATIONS**

Witnesses testified from a range of perspectives on two main issues: (A) restrictions on simultaneous employment and (B) post-employment restrictions. This section summarizes the main viewpoints and the Committee’s policy choices. A more detailed summary of all testimony is included in Section IV of this report.

**A. Simultaneous Employment**

The Total Ban prohibited all restrictions against simultaneous employment. But the clear majority of witnesses to address this issue favored revisions that would clarify this prohibition, so that employers could restrict an employee’s ability to hold other employment simultaneously. Witnesses persuasively explained how the Total Ban could unduly interfere with the employer’s expectation of undivided loyalty from employees in the context of various industries including higher education and professional sports.

Andrew Flagel of the Consortium explained that a college or university needs to prevent its faculty from outside work that would interfere with employees’ duty to the primary institution. He provided the example of a tenured faculty member who received tenure at second institution, failing to fulfill the duties of their job. But Marcy Karin, a tenured law professor specializing in employment law, said that the Total Ban’s language should not be altered. If a faculty exception were added to the law, she said, it a could result in faculty members no longer being able to perform service in government, non-profits, or think tanks because their home institution did not approve it. However, the Consortium explained that it was also concerned about executive employees of its institutions taking outside consulting jobs in their field not fulfilling their obligations to the primary employer. The Consortium insisted that its members only used these policies to identify and proactively manage potential conflicts rather than bar faculty from external opportunities that could enhance their value to the institution.

 The Consortium distinguished “conflict of commitment” provisions in university handbooks from other employers’ “conflict of interest” policies. A “conflict of commitment” provision or policy is a limitation usually imposed by a college or university employer on a faculty (or full-time staff) member that is intended to ensure that the employer and its objectives are not undermined by an external obligation or activity engaged in by the faculty member.[[4]](#footnote-5) The American Association of University Professors says, “A 'conflict of commitment' arises whenever a faculty member’s or administrator’s outside consulting and other activities have the potential to interfere with their primary duties, including teaching, research, time with students, or other service and administrative obligations to the university.” The Consortium said that its conflict of commitment restrictions generally resulted in conversations between the employee and the employer about how the employee would structure their work in order to accomplish everything. While universities use conflict-of-commitment policies to prevent paid and unpaid interferences with the faculty member’s commitment to their employer, the non-compete ban only implicates paid work such as employment or starting one’s own business.

Other business representatives, such as the Broadcasters’ Association, were closely aligned with the Consortium and the Working Group’s recommendations regarding conflicts of interest.[[5]](#footnote-6) The Broadcasters wanted to restrict employees with access to confidential and proprietary information from holding second jobs where they might reveal that information to a competitor. In addition, they wanted to limit their employees from outside work that could run afoul of FCC regulations requiring transparency around endorsements and advertising. They also sought to prevent “brand-identifiable” employees from having a second job that would “dilute” the value the employer derived from having exclusive use of the employee’s talents. In written testimony, Comcast also supported a conflict-of-interest exception to prevent their employees from holding second jobs. Comcast emphasized their desire to prevent “uniquely talented, highly-educated and highly-compensated, talent who gain access to contacts and resources due to being an NBC News producer, reporter, correspondent, and/or on-air host[]” from simultaneous employment. By way of example, they said that the legislation “would allow Chuck Todd (on-air host of Meet the Press) to simultaneously work as an on-air host of a CBS News program; causing confusion for the audience and conflict of duty issues by his work with a competitor.”

 Betsy Philpott, Vice President and General Counsel for the Washington Nationals Baseball Club, testified in favor of permitting non-compete provisions that have been collectively bargained. The collective bargaining agreement between the Major League Baseball clubs and the Major League Baseball Players Association requires those parties to use a uniform player contract that prohibits the employee from working for more than one team at a time. This term directly conflicted with the limitation in the original bill that employers could not prevent employees from holding a second job. The members of a collective bargaining unit have more leverage to negotiate fair employment terms than employees without such representation; therefore, it is reasonable to permit those agreements to control the terms of the parties’ relationship.[[6]](#footnote-7)

 Following the hearing, Sandeep Vaheesan from the Open Markets Institute provided additional background for the Committee on District law surrounding an employee’s “duty of loyalty.”[[7]](#footnote-8) In summary, the DC Court of Appeals recognizes that an employee owes a duty of loyalty to their employer. Courts engage in a fact-specific analysis to resolve a dispute about whether an employee breached this duty. In summary, an employee is expected to exercise good faith, perform their job within the scope of their employment, and behave honestly.

Several particular revisions were made to the bill’s texted to ensure that businesses’ conflict of interest scenarios were included. The terms “confidential” and “proprietary” information have been standardized in the committee print so employers who want to protect these business secrets are assured that they are within the law to do so. The reference to “ethics” in the bill as introduced was replaced with the allowance for a conflict of interest that would violate “established rules” regarding such conflicts within that particular industry or profession. Instead of protecting against a conflict that would cause the employer to violate the law, the language is broadened to include a conflict that would cause the employer to violate a law, contract or grant agreement.

 In most of the cases detailed by the businesses, amendments allowing conflict of interest restrictions on employees would simply maintain the status quo that existed in those workplaces. However, with the complexity of these additional exceptions, it could become difficult for an employee to understand whether their employer had such a policy. Therefore, the Committee print now requires employers who rely on any of these exceptions to provide it in writing to the employee.

**B. Post-Employment Restrictions**

The Total Ban prohibited all non-compete restrictions on the employee’s work after the employment relationship ends. Although this issue was not addressed in the introduced version of B24-256, a considerable number of employer representatives expressed concerns with or opposition to the ban on post-employment non-compete agreements. Yet there was a diversity of views among employers and no consensus about the circumstances when non-compete agreements should be allowed.

On the other side, labor economists reiterated the role of non-compete agreements in suppressing wages and stifling competition among businesses, which had prompted the Council to unanimously enact the Total Ban in the first place. Further, individual employees testified from personal experience about non-compete agreements that limited the growth of their careers or trapped them in toxic workplaces. The Committee remains convinced that post-employment non-compete agreements generally cannot be justified in light of the harms inflicted upon employees and the broader economy.

The Committee print attempts to balance these views to advance a beneficial policy that will satisfy some but not all employers. As a compromise, the Committee print generally bans non-compete agreements but makes an exception for highly compensated employees, as further explained in the section immediately below. The remaining sections outline the Committee’s reasoning on other issues.

***Highly Compensated Employees***

Again, in the spirit of comity, the Committee crafted a reasonable compromise to address business community concerns about retention of talent. In recognition of the District’s strong interest in keeping talented and high-paid workers within its jurisdiction together with the testimony about the potential harms to workers and the assets that non-compete agreements help businesses protect, the Committee print of the bill allows the use of non-compete agreements with only those whose total compensation is at least $250,000 per year.[[8]](#footnote-9)

In the November 19, 2020 committee report on the Ban on Non-Compete Agreements Amendment Act of 2019, the Committee wrote that limiting the ban to only protect lower-income workers would overlook the fact that even those at higher incomes were harmed by the use of non-competes:[[9]](#footnote-10)

Employers that use non-compete agreements with their more highly-paid workers harm their local economies by driving away highly-skilled workers and depressing wages. Hawaii, for example, implemented a ban on non-competes for the technology industry in order to protect and grow that sector. The legislature said that “restrictive employment covenants impede the development of technology businesses within the State by driving skilled workers to other jurisdictions.” The state also wanted to protect Hawaiians’ pathway into those local jobs.

Higher salary alone does not mean an individual is better equipped to negotiate a non-compete or other terms of employment. In certain fields, such as medicine and information technology, workers just entering the job market can command salaries above $100,000. In one study, only one out of six tech workers – whose average salary in DC is $139,000- tried to bargain with their employer over non-compete terms.[[10]](#footnote-11)

Many businesses that testified at the July 14, 2021 hearing said that only non-compete agreements could provide them with the level of protection they needed with high-level employees with access to business strategy and other highly valuable information. This committee has pointed out that non-solicitation and non-disclosure agreements are better suited and narrowly tailored to protecting trade secrets and other confidential information than non-compete agreements.[[11]](#footnote-12) However, employers expressed concern that it could be difficult to prove that a competitor obtained specific information from a departed employee. Their preferred approach was to simply prevent the employee from working in the same geographic region or with a competitor.

The Committee considered limiting the duration of the non-compete period and requiring employers to pay employees who had signed non-competes for as long as they were out of the workforce. The higher an employee’s income, the better they can weather the challenge of being out of work, either because they have greater personal savings or can travel outside the geographic parameters of a non-compete to work. These workers are also more likely to have the skills to negotiate employment terms that are fair to them, to be able to afford to hire someone qualified to advise them, or to be capable of temporarily relocating for work without having to fully uproot their life in DC.

In her proposal, Councilmember Brooke Pinto suggested allowing non-compete agreements only if their employers paid “garden leave,” which is akin to severance or compensation for the covered employee while they are taken out of the labor market. In the end, Councilmember Silverman decided against an additional requirement of “garden leave,” which would add an expense for employers.

Massachusetts and Oregon non-compete laws require the employer must pay their former employee at least 50 percent of their final salary for the entire period of competition.[[12]](#footnote-13) Several witnesses rejected the idea that paying for the duration of a non-compete would address the negative consequences of that employee being unable to work. Najah Farley from the National Employment Law Project (NELP) pointed out that employees can lose skills while unemployed, making them less attractive hires. She also explained that most workers receive pay raises when changing jobs; however, an employee who had been subject to a non-compete agreement would have less leverage to negotiate fair compensation with their new employer if they were doing so after a period of not working.[[13]](#footnote-14) While a garden leave requirement would address the financial pressure that an unemployed person might experience, it would not address the broader depression of wages that can occur when non-compete agreements are used within a region or mitigate the stigma against hiring unemployed workers that can keep them out of the workforce. Moreover, if the revised DC law required garden leave to be paid, these cases would be more complex and expensive for the Department of Employment Services (DOES) to resolve. Employers are therefore not required to pay garden leave under the terms of their non-compete agreements, but the parties are free to negotiate over and include this term if desired.

In the hearing, witnesses like Ms. Geneva Kropper detailed how employers can use overbroad, technically unlawful terms in these agreements, exploiting the workers’ unfamiliarity with the law to intimidate them into complying with the non-compete. Dan Essrow and Daniel Perez from the Non-Profit Employees Union supported a total ban on non-compete agreements because this would be the clearest for workers to understand. In their experience working with union members, employees at all levels struggled to decipher legal requirements that applied to them. They also supported full freedom of employees to leave jobs where they felt stagnated or unsafe, pointing out that the harms of non-competes were exacerbated for women and minority groups. An outright ban would also be easier for worker advocates and the agency enforcing the law to apply, since it would require no review of annual wages.[[14]](#footnote-15) Dr. Evan Starr explained that non-competes bind employers, too, because they impede businesses that might want to recruit workers who have signed non-competes.[[15]](#footnote-16)

Therefore, to be valid and enforceable, non-compete agreements permitted under this law must adhere to certain procedural and drafting requirements. A valid non-compete agreement must specify the “functional scope of the competitive restriction,” meaning the services, roles, industry, or competitors being restricted; the geographical limitation of the work restriction; and period of non-competition no longer than twelve months.[[16]](#footnote-17) In addition, the employer must provide the non-compete provision to the employee in writing at least 14 days before the agreement is to be executed. A provision or agreement that does not satisfy these basic requirements will be void and unenforceable as a matter of law, without the employee needing to seek a remedy in court.[[17]](#footnote-18) The requirements in this legislation are the basic requirements for non-compete agreements to be valid. Parties are free to negotiate additional lawful terms in the agreement, such as garden leave provisions; however, the agreements must otherwise comply with existing statutory and common law governing such contracts.

Non-compete agreement are not always executed at the start of an employee’s tenure; they may be requested by an employer while the individual is an employee or when that employee leaves their job. The bill is drafted to allow an employer to look to the employee’s expected earnings to determine whether to execute a non-compete agreement with a new employee or someone with irregular earnings. An employer might be unable to use a non-compete with an employee when they are first hired, but if that individual then earns enough to put total compensation over the threshold, the employer could propose a non-compete agreement. Employers that want to use non-compete agreements with these employees during their tenure must reasonably anticipate that the employee signing the non-compete agreement will satisfy the minimum qualifying annual compensation amount in the law. If a departing employee’s total compensation for the last year does not meet the $250,000 total compensation threshold, any non-compete provision the employee agreed to is void and unenforceable against them.

***The DC Broadcast Industry Contracting Freedom Act***

The District has banned the use of non-compete agreements with broadcast industry employees, other than salespeople, since passing the Broadcast Industry Contracting Freedom Act of 2002.[[18]](#footnote-19) According to the Screen Actors’ Guild - Academy of Film Television and Radio Artists (SAG-AFTRA), which represents on-air and other broadcast talent, the DC bill was part of a sustained effort by unionized broadcast employees to eliminate the use of these agreements.[[19]](#footnote-20) The District’s law frees broadcast employees to move to higher-paying jobs in the DC market without having to uproot their families. Alongside the DC law, broadcast industry non-compete bans currently exist in Arizona, Connecticut, Illinois, Massachusetts, Maine, New York, and Washington. The union points out that these states have some of the largest, most competitive, and valuable media markets in the country.

In testimony at the July 14, 2021 hearing, the Broadcasters Association told the Committee that their members wanted to prevent salespeople who had access to client lists and specialized sales practices from leaving to work for a competing business. Together with the Working Group, they also sought to prevent high-level executives and managerial employees from engaging in competition.[[20]](#footnote-21) This would reverse two decades of District law. The Broadcasters Association objected to being treated differently under the revised legislation than executives in other industries; however, this differential treatment is not a function of the current bill but rather has been the status quo since 2003.

The Broadcasters Association noted in a post-hearing submission to the Committee that broadcast companies had left DC because of the burden of taxes and regulation.[[21]](#footnote-22) First, they noted that Fox 5 moved from DC to Maryland. However, the Committee learned that in that case, the state of Maryland incentivized the move with benefits valued at more than $1.5 million.[[22]](#footnote-23) WTOP relocated in 2020 but said in 2018 that “property taxes were not a significant factor in WTOP’s decision, as they were fairly comparable in DC and Chevy Chase.”[[23]](#footnote-24) Recently, television and media company Nexstar announced plans to expand their local television news offerings in the DC area, including with an office on Wisconsin Avenue.[[24]](#footnote-25)

***Medical Specialists***

Medical Specialists were a last-minute exception to the Total Ban in response to concerns raised by Committee members at the mark-up. As detailed in the Committee Report, the DC Hospital Association (the “Hospital Association”) objected to the Total Ban and Committee members entertained those concerns. Councilmember Grosso also said he planned to introduce a broad exception to the bill during the mark-up. However, he declined to do so after Chair Silverman indicated that she was willing to continue discussions with the Hospital Association and potentially address their concerns. Following the Committee’s approval of the Committee print, Councilmember Silverman did just that. As a result, at the December 1, 2020 Legislative Meeting, Councilmember Silverman introduced an Amendment in the Nature of a Substitute carving out “medical specialists” from the ban on non-compete agreements.[[25]](#footnote-26) No other amendments were circulated or introduced.

Justin Palmer from the Hospital Association testified in support of retaining the Total Ban’s exception as drafted. The Committee’s present proposed changes will simplify hospitals’ application of the law. Previously, hospital employers would have to consider whether an employee met licensing, work experience, and income requirements before they could use a non-compete agreement with them. Government investigations would also have to engage in this inquiry. Under the revised legislation, these entities will only have to look to the total compensation for a given employee to determine whether they are eligible for a non-compete agreement.

***Long-Term Incentives***

Businesses also asked the Council to allow non-competition requirements when used in long-term incentive plans, irrespective of the employee’s underlying salary or position in the company.[[26]](#footnote-27) Long-term incentive plans (LTIPs) pay employees a combination of cash and equity compensation when they achieve a certain number of years of tenure or other benchmarks. However, some of these perks are only paid out if that employee does not engage in “competitive activity."

The character of equity compensation varies according to the position, company, or industry offering it. It could mean the option to purchase stocks, either at full price or at a discounted rate, phantom shares issued before a company goes public, or an entitlement to stock upon achieving certain benchmarks (for ex., years of tenure). However, an exception from the definition of non-compete provision would create a dangerous loophole to the legislation’s otherwise broad protections. Employers could exploit this exception in employment agreements to intimidate employees into not working for a competitor, even if the contract in question was not valid. Employers that want to use non-competition terms in long-term incentive plans will be required to limit the use of those provisions to just those circumstances permitted by the legislation. In other scenarios, the employer can still provide those incentive awards to employees but must do so without restrictions on the employee’s ability to work for a competitor.

***Councilmember Pinto’s Proposal***

At the hearing, several witnesses mentioned alternative legislative language proposed by Councilmember Brooke Pinto, saying it better addressed their concerns than the bill as introduced. The alternative legislation was not introduced at the Council, but was circulated amongst business groups and shared with the Committee. It contained exceptions for conflicts of interest that were substantially similar to the draft language in the committee print of the legislation.[[27]](#footnote-28) The proposal would allow non-compete agreements with any employee with access to certain valuable employer information earning $80,000 a year or more, provided that no non-competes lasted more than 6 months.[[28]](#footnote-29) It also retained the exception for medical specialists that appeared in the Total Ban. The draft bill also stipulated that employers pay employees “garden leave” for the entire post-employment period when the non-compete prevented them from working.[[29]](#footnote-30) Employers using such agreements would be allowed to subtract from the post-employment payments any signing bonus that had been made to the employee. The proposal also included a narrowed definition of “employee” that aligned with the Working Group’s preferred definition. The Chairperson and Committee staff met with Councilmember Pinto and her staff on numerous occasions in 2021 and 2022 to consider the many complex and interrelated issues raised by witnesses and the Working Group.

***Tech Workers***

Testimony at the hearing was mixed on whether technology companies had unique needs for non-compete agreements. Some witnesses said that non-compete agreements were necessary to protect confidential or proprietary information from improper disclosure and to assure investors that new companies could succeed.[[30]](#footnote-31) However, California has banned non-compete agreements since before the rise of Silicon Valley and, in 2015, Hawaii outlawed the use of non-competes specifically with tech workers. Dr. Starr’s own study showed that quarterly earnings and job mobility increased following Hawaii’s enactment of their ban. Ms. Kropper testified about her experience as an entry-level worker at a digital fundraising company where a non-compete agreement threatened her livelihood.

At the hearing, Councilmember Silverman commented that with the high cost of living in Bay Area, jurisdictions such as DC were becoming more appealing to tech workers who might otherwise flock to Silicon Valley. She explained that, for example, ice cream vendors locate in the middle of a beach in order to maximize access to customers. They do not locate on either end of the beach to distance from each other- they centrally locate to mutually thrive. She proposed that the District will have a more entrepreneurial environment, attracting small 1 to 5 person companies rather than appealing to corporate giants such as Amazon. She concluded by pointing out that the high risk at start-ups was not only felt by those working to recruit funders, but also workers who should not be restrained from pursuing their livelihood.

**COMMITTEE PRINT:**

The Committee print makes two major substantive changes to the Total Ban. First, it allows employers to prohibit simultaneous employment that would create a bona fide conflict of interest. Second, it broadens the exception in which an employer and employee may agree to a non-compete provision, by permitting non-compete provisions for employees with annual compensation of at least $250,000 with a maximum duration of one year. In addition, the Committee print adds new statutory definitions and other clarifying changes. B24-256 has been drafted to overwrite Title I of B23‑494, leaving Titles II and III of the underlying law intact.

As described in detail below, the Committee print substantially changes the definitions section of the Total Ban by adding new defined terms and refining existing definitions. Again, the Committee sees this as an effort at compromise with impacted industry groups.

The definition of “broadcast employee” is adopted from the Broadcast Industry Contracting Freedom Act of 2002 which excludes salespeople from its definition. Broadcast industry employers of salespeople can ask those earning the minimum qualifying annual compensation to sign non-compete agreements without running afoul of the law.

The definition of “covered employee” has been updated to conform with other District laws such as the Universal Paid Leave Act. It considers anyone who spends more than 50 percent of their work time for their employer working in the District or not more than 50 percent of their working time in another jurisdiction.

“Compensation” is defined to encompass all of the cash or cash equivalent payments made directly to employee. In crafting this definition, the Committee considered input from the Broadcasters Association who explained that highly compensated employees often receive a mix of base salary, cash bonuses, equity & other long-term incentive grants, and commissions*.* Additionally, the definition calls out “cash incentives” and “restricted stock units” as being one of the types of monetary remuneration that will make up “compensation” for an employee, in recognition of employers using long-term incentives with their employees. The only value excluded from the definition are those employer costs incurred on behalf of employee, such as life insurance premiums, conference travel, meals, the value of which parties may not both know or which can be subjective.

The phrases “confidential employer information” and “proprietary employer information” are defined in order to distinguish information protected because it may otherwise violate individuals’ privacy (“confidential”) from information the employer has made their own by creating or modifying it (“proprietary”). The examples of “proprietary employer information” are taken directly from requests by members of the business community that they be able to keep their customer lists, price lists, trade secrets, and more from being disclosed by their employees.

As described earlier, the definition of a “conflict of commitment” was drafted in consultation with the Consortium and is limited to employment by postsecondary institutions. While the District of Columbia does license postsecondary institutions to operated within its jurisdiction, many of them are exempt from the requirement because they were federally chartered predating Home Rule in DC. Therefore, to capture them all, the law says that a “higher education institution” is any postsecondary educational institution accredited by the United States Department of Education.

An “employee” is defined to include individuals hired but who have not yet begun work; it excludes partners, who are employers, and also incorporates the existing statutory exclusion for a “casual babysitter.” The clarification was suggested by Greater Washington Society of CPAs. It does not include anyone engaged as a volunteer, contractor, or board member.

The Working Group pointed out that the Total Ban did not specify the responsibilities of partners; this legislation clarifies that partners are “employers.”

Highly compensated employees will now include “medical specialists” who, under the Total Ban, were the only District employees with whom employers could use non-compete agreements. Expanding this exception will streamline enforcement since the investigating entities will have to consider whether an employee qualifies as a “medical specialist,” but only has to reference the individual’s “minimum qualifying annual compensation.” The “minimum qualifying annual compensation” upon the law’s enactment is $250,000 and beginning in January 2024, will be adjusted upward according to the Consumer Price Index.

The Total Ban adopted the current administrative complaint process and Executive and Attorney General enforcement powers authorized by District labor laws. Revisions in this bill include the same range of applicable penalties and relief ($350-$2,000) that, in the original bill, applied for violations against covered employees and medical specialists. This legislation adds similar protections for highly compensated employees. However, employers of highly compensated employees will not be penalized if they rescind a job offer or negotiate non-compete terms a highly-compensated employee. Highly compensated employees are protected from adverse action by their employer only after they have already executed a non-compete agreement with their employer.

The Total Ban previously required the agency to issue rules to implement the law, including rules related to the preservation of employer records. This amendment clarifies that the agency rulemaking must also specifically address annual changes to the minimum qualifying compensation amount.

The introduced version of the legislation required the implementing agency to revise the mandatory “Notice of Hire” form that employers provide to their employees with language referencing the ban on non-compete agreements. This requirement was eliminated in the final draft.

# **II. LEGISLATIVE CHRONOLOGY**

May 21, 2021 Introduced by Councilmember Silverman

June 1, 2021 Referred to Committee on Labor and Workforce Development

May 28, 2021 Notice of Intent to Act published in the District of Columbia Register

June 25, 2021 Notice of Public Hearing published in the District of Columbia Register

July 14, 2021 Public Hearing on B24-256

June 16, 2022 Consideration and vote on B24-256 by the Committee on Labor and Workforce Development

# **III. POSITION OF THE EXECUTIVE**

In written testimony submitted to the Committee for the record, upon reviewing the bill as introduced, Department of Employment Services (DOES) Director Unique Morris-Hughes said changes to the Total Ban would require additional funding for her agency. For example, Director Morris-Hughes thought the agency would need to promote a current staff member to a Supervisory Program Analyst position and hire a new Program Analyst. The Director pointed out that the estimate might change if, during implementation, DOES determined that more than 200,000 District employees were impacted.

# **IV. HEARING RECORD AND SUMMARY OF TESTIMONY**

 The Committee on Labor and Workforce Development held a virtual public roundtable on July 14, 2021 at 1:00 pm. Councilmembers Silverman, Henderson, and Pinto attended the hearing. Testimony was received from 27 individuals and entities and is summarized below.

**A. Hearing Testimony**

***Evan Starr, PhD, Associate Professor, University of Michigan School of Management and Organization***

Dr. Starr said he has been researching non-competes for more than six years and also testified at the hearing on the initial bill. He addressed the concerns that employers could suffer a disadvantage if their employees can take valuable knowledge from one employer to a competitor and that workers at higher levels might benefit from signing non-competes when properly represented in the negotiations.

On the issue of worker impacts, he first said Hawaii banned non-competes in 2015 for their technology sector workers and as a result, job mobility rose among high tech workers by 11% and wages rose by 4%, demonstrating that those workers were being hurt by the use of non-competes. Second, he said that, even though non-compete agreements are signed between two parties, they implicate third parties. Specifically, other firms that might want to hire workers who have signed non-competes, and the startups those employees might open are frustrated because workers who are otherwise qualified are bound by non-competes. He described a study by Liyan Shi which concluded that a ban is optimal for every employee, including executives, because it allows them to be more productive for society versus being inhibited by a non-compete agreement. Dr. Starr’s own study considered what happened in labor markets with a lot of non-compete agreements and found slower moving labor market wages, fewer job offers, and lower job satisfaction, including effects on those who did not sign non-competes.

On employer impacts, Dr. Starr said the benefit of employees’ moving (such as in California) attributed to rise of Silicon Valley and increased innovation with ideas free to be shared and developed. The availability of other legal protections like nondisclosure agreements or trade secrets call into question the need for non-compete agreements as well. He also mentioned the challenge of putting a threshold wage level for non-competes since it would need to change over time and for commissioned employees with fluctuating wages. Dr. Starr concluded by observing that employees already have a fiduciary duty to their employer and that many employers already utilize conflict of interest provisions, so the simultaneous employment issue can be addressed with existing tools.

Councilmember Pinto asked Dr. Starr about the fiduciary obligation employees have and how it applied to the existing law. He stated that, as a non-lawyer, he was only familiar with the general principle of the “duty of loyalty” that the employee could not work against their employer but that the existing non-compete law didn’t interfere with it. She wanted to know if the duty of loyalty would apply where an employee went to work for an employer’s direct competitor, such as in the testimony the Broadcasters provided. Dr. Starr indicated his understanding of the “duty of loyalty” restricts sabotage, not simultaneous employment. Councilmember Pinto contrasted the case of a driver working for both Uber and Lyft, where the employee likely isn’t highly identifiable or privy to their employer’s valuable sensitive information, with an employee working in the broadcast industry. Councilmember Henderson asked Dr. Starr at what income level non-competes would harm workers less. He said that research shows non-competes are used at all levels. Even though employers often want to use non-competes, he pointed out, they are also harmed by not being able to recruit workers and sometimes even go to court to argue that another business’s non-compete is not enforceable.

***Sandeep Vaheesan, Legal Director, Open Markets Institute***

Mr. Vaheesan began by noting that his organization, OMI, was part of a coalition of labor and public interest groups that petitioned the Federal Trade Commission to ban non-compete agreements nationwide. Mr. Vaheesan’s testimony focused on two specific issues: workers’ general inability to bargain over non-compete clauses and the common justifications for these contracts, which he characterized as “specious.”

He said that non-compete clauses are adhesive contracts presented to workers on a take it-or-leave it basis. Mr. Vaheesan said that only a small fraction of workers can, or believe they can, resist or try to negotiate these contractual provisions (only ten percent tried to negotiate in one study, and only one in six tech workers in another study). In his view, workers also believe that questioning or objecting to a non-compete clause could lead to the revocation of a job offer or termination. Also, large chain companies may dominate an industry to disempower employees relative to their employers.

Mr. Vaheesan said that employers and their representatives assert that non-competes are necessary for protecting trade secrets, customer lists, and other valuable information, even though less restrictive alternatives exist to prevent unauthorized disclosures. Alternatives include copyright and trade-secret laws, in addition to targeted non-solicitation agreements to ensure that information is protected. If non-compete agreements are used with the sole purpose of retaining employees, Mr. Vaheesan believes there are other measures to ensure a loyal workforce, including regular raises, promotions, bonuses, and fair working conditions. Employers could also utilize fixed-term employment contracts, such as those commonly used in professional sports. He said that non-competes are overbroad because they restrain worker mobility with the aim of protecting employer information regardless of whether that information is outdated or trivial; yet non-competes are also too narrow or poorly targeted because they do not prevent unauthorized disclosures to competitors, one of the reasons employers use them.

Given these considerations, Mr. Vaheesan believes that the Council should not amend the current law on non-compete clauses to carve out additional workers. If amendments are made, any existing exemptions should be eliminated and the ban extended to all workers.

Councilmember Pinto asked for examples of employers that had utilized alternatives to non-compete agreements. He said that targeted bans based on income or occupation resulted in greater compensation for workers. When asked about whether his research showed how non-competes impacted workers at different levels of compensation, Mr. Vaheesan said that he had observed in others’ research that non-competes reduce the wages of all workers, even CEOs.

***Andrew Flagel, President and CEO, Consortium of Universities of the Washington Metropolitan Area***

Dr. Flagel presented on behalf of nine DC colleges and universities, having over 10,000 employees serving over 300,000 students each year. He thanked the Committee Chairperson for introducing the measure and for postponing the law’s applicability date, and commended Councilmember Pinto’s input regarding potential revisions to the law.

Dr. Flagel stated that the Consortium’s members strongly support outside employment opportunities for their employees. He referred to the proposed DC law as “the country’s most extensive ban on both simultaneous and subsequent employment.” He said that the law’s text would bar the Consortium’s member institutions from preventing and managing potential conflicts and, as a result, put at risk millions of dollars in federal and private research grants to those institutions.

Dr. Flagel urged the Committee to ensure that the law addressed conflict of interest and conflict of commitment concerns. He argued that universities must be able to preclude administrators, such as coaches, admissions officers, and financial aid officers, from taking outside employment that creates ethical and equity concerns. For example, universities should be able to prohibit admissions officers from working as a consultant with wealthy students, which would disadvantage lower-income students.

Dr. Flagel highlighted the Consortium’s concerns regarding tenured faculty. Under the existing law, he said DC would be the only place in the country where universities could not preclude faculty from being tenured at more than one university simultaneously. Tenured faculty have job security, competitive compensation, and limited oversight, he said, in exchange for the expectation of a full-time commitment to their institutions and their students. Dr. Flagel said that this was why the Consortium supported Councilmember Pinto’s recommendation to fully exempt full-time faculty from the ban.

***Betsy Philpott, Vice President & General Counsel, Washington Nationals***

Ms. Philpott characterized her testimony as addressing unintended effects of the legislation for the sports industry.

She said it is “critically important that teams have the ability to limit some employees who have access to confidential, sensitive or proprietary business information from using such information while working simultaneously for a competing team.” Ms. Philpott noted that the concern about simultaneous employment clauses was limited to a very small portion of the Nationals’ employees. Ms. Philpott gave the example of a baseball scout employee who was hired to analyze the promise of various baseball players and worked within the team to make sure they had a roster of the best talent. If they can’t restrain that employee, she said, then their business would be harmed and it would harm fans’ perception of the industry. In addition, Major League Baseball teams are bound by collective bargaining agreements and must use model contracts from Major League Baseball that have been agreed to in those negotiations. In closing, Ms. Philpott requested that the Committee use the language Councilmember Pinto proposed.

Councilmember Pinto asked Ms. Philpott about the “duty of loyalty,” and Ms. Philpott spoke about the harm that can result if someone with a second job unwittingly discloses or uses confidential or proprietary information. She also said that a cheating scandal can harm the entire sports industry. In response to Councilmember Henderson’s question about whether industry or employee type exemptions were preferred, Ms. Philpott said later that the Nationals preferred a key employee exception.

***Tim Nelson, Counsel, Maryland-DC-Delaware Broadcasters Association***

According to Mr. Nelson, the MDCD Broadcasters Association’s 35 local television and 175 radio station members, 14 physically located in DC, support what they believe was the policy rationale of the underlying bill: “to ensure that District employees are not overly limited in their ability to find work, to permit people to make a good living, including to work multiple jobs if desired and/or start their own business.”

However, Mr. Nelson said that the Total Ban is broad and could have harmful impacts on his members’ ability to deliver local news, journalism, emergency information, and other programming. Mr. Nelson explained that his organization and its members preferred the proposed legislative revisions drafted by Councilmember Pinto.

He maintained that businesses need the ability to enter into contractual arrangements with “key employees” to prevent them from simultaneously working for a competitor and/or from working for a direct competitor post-employment, provided that any such post-employment restriction is reasonable. Mr. Nelson gave the example of a television station’s chief meteorologist in whom a station invests significant resources as a way to build their trusted brand and gain the loyalty of viewers, as well as advertisers. If that station can’t ensure that its chief meteorologist won’t simultaneously be working for one of its direct competitors, then the customer loyalty, and the revenues that flow from it, would be at risk. In addition, the station’s incentive to invest in that on-air talent is dramatically decreased. Similarly, he said, top salespeople working for broadcasters are trained and provided with sales strategies and techniques that need to be protected as the employer’s investment, not be susceptible of benefitting a competitor. In his testimony, Mr. Nelson recommended adopting Councilmember Pinto’s language exempting any employee who “holds a position such that the employee is reasonably and readily publicly identifiable with the employer or the employer’s branded products or services.” Even with these changes, he said, the District’s law would still be one of the most stringent in the country.

Councilmember Pinto asked him to speak about the harm to their business if a brand-recognizable radio or TV personality competes. Broadcasters invest a lot of resources in on-air employees to bring in viewers and listeners and generate advertising revenue. It dilutes the reason people are watching or listening if the employee isn’t exclusive to their employer. He also said that the station invests in those employees in a community to build up the news brand, but they won’t do it if they can’t protect the person from going to a competitor on the weekend.

Councilmember Henderson asked whether there should be a general exception to the law or an industry-specific exception. Mr. Nelson said that he favors the Councilmember Pinto approach that would carve out as “key employees” those who have access to sensitive information in their roles.

***Najah Farley, Senior Staff Attorney, National Employment Law Project***

Ms. Farley supports limiting the proposed amendments to the original ban in order to “ensure that the amendments do not reduce the effectiveness of the non-compete law.” She indicates that non-compete agreements have increased significantly in recent years, with research suggesting that nearly 1 in 5 workers in the United States are currently bound by a non-compete. Ms. Farley said that the rationales that employers use for non-competes do not apply to most workers. For example, most workers do not have access to trade secrets so this reason does not apply to them. Narrower types of agreements can be used with the workers who do have access to that protected information.

Ms. Farley noted the momentum across state legislatures to ban non-competes as well as by President Biden’s recent Executive Order instructing the Federal Trade Commission to put regulatory restrictions on non-competes.

Ms. Farley said that the DC ban on non-competes is model legislation and one of the strongest in the country, containing protections for workers including notice provisions, damages to workers, private right of action, and civil penalties to deter violations. She said the current exceptions are broad enough that employers can restrict employees from using proprietary information as it “lists the various types of proprietary information and acknowledges that agreements that bar the usage of sensitive information and agreements that prelude competition when buying or selling a business is still lawful.”

To the extent that the D.C. Council is persuaded to amend the law, Ms. Farley suggested the Council only clarify that a conflict-of-interest provision does not violate the non-compete law, rather than changing the applicability of the law. This would preserve the integrity of the law and ensure employers can protect proprietary information. She concluded that curbing the use of non-compete clauses is integral to the country’s economic recovery.

Councilmember Silverman began her questions by asking Ms. Farley about employers’ desire to use non-competes with “key employees” who have access to confidential or proprietary information, referring back to the Broadcasters Association or the Washington Nationals’ testimony. Ms. Farley said that there may be situations where employers can apply reasonable limits on simultaneous employment, but not post-employment. Highly skilled employees should not be restricted from continuing to work in their field and continuing to use their expertise to enrich themselves and their families. Regarding the issue of garden leave, Ms. Farley said it could be complicated for employees to actually make sure they receive the garden leave payments. She also mentioned that prospective employers may be less likely to hire someone who has not used their relevant skills during the non-compete time frame than someone who has been able to use those skills more recently. She later said that this rationale applies to CEOs as well as lower-paid workers.

Councilmember Silverman asked her whether the garden leave idea was unfair. Ms. Farley said that asking people to stay out of the workplace restricts their ability to continue building skills in their field. Most workers increase their wages when they move to a new job; if the person is not in the workforce, they have less leverage to negotiate better wages in their next job. She referred back to the greater impact such practices would have on the regional economy.

***Marcy Karin, public witness***

Ms. Karin is an employment lawyer and professor employed by the University of the District of Columbia who has previously worked at multiple universities in faculty and staff positions. She believes that the Ban on Non-Compete Agreements Amendment Act of 2020 is critically important and should take effect *as enacted* as it would “significantly reduce the impact of non-compete provisions on the upward mobility, safety, and economic security of local workers.” In response to suggestions that the law be amended again, she said she feels it is premature to amend the law to create additional carve-outs from the general requirement banning non-compete provisions.

Ms. Karin believes a specific carve-out for faculty at postsecondary institutions would be a mistake with negative impacts on the academic market. In her experience, it is common for a faculty member to move across institutions, affiliate with multiple institutions, or take leave from one’s home institution to participate in another valuable opportunity. She indicated that some colleagues “have visited at other universities, taken unpaid leaves to go into the government, worked at think tanks, non-profits, or other organizations while on sabbatical, been simultaneously affiliated with other (often) higher-ranked institutions, or participated in Fulbright and other prestigious fellowships.” Ms. Karin said the Committee should “tread carefully in creating changes to the general ban” as “the law may end up suppressing the ability of academics and other staff to grow in their fields.” Ms. Karin proposes that any new limitations to the law should be accompanied by additional protections “to accomplish the law’s original goals.” She referred to her written testimony, including limiting bona fide conflict-of-interest provisions to written policies; requiring such provisions to be reasonable in time, geography, and scope; and mandating their disclosure in job postings. She also suggested that employers and employees engage with each other to determine how to best manage conflicts, rather than employers unilaterally barring outside work. In conclusion, she noted that, as a tenured professor at UDC, she did not have the same risk of retaliation by her employer that non-tenured colleagues at non-public institutions might.

Councilmember Silverman asked about the potential harm that the Consortium witness, Dr. Flagel, said could result if a tenured professor were allowed to hold tenure at a second institution. Ms. Karin said that she was encouraged to hear that the conflict-of-interest situation described by Mr. Flagel is very limited. Faculty are careful to adhere to the grant requirements or their professional rules of conduct.

***David Stephen, Political Director, Metropolitan Washington Council AFL-CIO***

Mr. Stephen said the union is comprised of 150,000 union members affiliated with the D.C. Labor Council, including about 40,000 labor union members in Washington, DC, including food, commercial, healthcare, and office professionals everywhere on the income spectrum. The D.C. Labor Council supported the Ban on Non-Compete Agreements Amendment Act in 2020 because of its potential impact on economic opportunity, and they now also support “the equal application of this law and want to see it remain strong and simple for workers to understand.” The simplest way to protect all workers is to ensure there is a broad ban, rather than carving out certain workers. He characterized the current amendment as a middle ground that balances business interest and the protection of their confidential or sensitive information while also protecting undue restraints and limitations on working people.

Councilmember Pinto asked whether paying an employee for six months while a non-compete was in place would help address concerns about unemployment. He said that for low-income people, they would be disadvantaged at getting a new job after spending six months out of the workforce. He said even earning $80,000 in this job market it is still hard to secure employment. This is an undue burden on workers, and we should not create barriers to them get into a new job.

Councilmember Pinto also asked about conflicts of interest while someone is employed. Mr. Stephen supports the existing legislative language.

***Kari Bedell, Executive Director, Greater Washington Society of CPAs***

Ms. Bedell said the GWSCPAs represents 3,500 financial professionals based in the metropolitan area. Their members are independent auditors, advisors, and accountants for non-profits, government, small businesses, and individuals. She said that the Non-Compete Conflict of Interest Clarification Amendment Act of 2021 makes important strides toward correcting many of the consequences of the 2020 Act and asked for additional changes.

Because many local accounting firms maintain offices and licenses in multiple jurisdictions, Ms. Bedell supports amending the definition of employee to mean “an individual whose employment or prospective employment is or will be based in the District and who regularly spends or will spend a substantial amount of their working time in the District and not more than 50 percent of their working time in any particular state.” Ms. Bedell believes that the “bona fide conflict of interest” exception would not fully capture all potential conflicts or perceived conflicts, and therefore does not protect CPA independence. She supports amending exceptions to include “compliance with applicable statutory or common law, state or federal sponsored grants or contracts, conditions of a sponsored grant or award, applicable professional rules of conduct, ethical and regulatory obligations.”

She estimated that one-third of her association’s members used non-compete agreements.

***Geneva Kropper, public witness***

Ms. Kropper testified about her experience as a low-wage worker with a broad non-compete agreement. She does not support any changes to the existing law.

Councilmember Pinto asked Ms. Kropper what she thought about the garden leave requirement during a post-employment period of up to six months.

Ms. Kropper was concerned that the employer would not actually pay the money during that time frame. She emphasized that there is information asymmetry between employers and employees, with employers using exceptions in the law to mislead their employees about how non-competes work. This leads to employees giving up and not challenging their employer, and instead complying with even an invalid non-compete agreement. She said, if the threshold was pushed up to $250,000, most workers with those disadvantages would be protected, but the threshold could not be as low as $80,000 since workers in DC area earning that salary do not have enough power to negotiate fair terms.

Councilmember Silverman asked her about her experience with a non-compete agreement in DC. Ms. Kropper said she was working at a Democratic digital fundraising company at age 22, newly graduated from college, and signed it in onboarding process without awareness of what the non-compete was for. She began considering leaving for a new job after witnessing abusive treatment and harassment in the workplace. She believed the non-compete was enforceable, so she sought work in non-digital marketing. Upon notifying her employer of the new position, she was told it would violate her non-compete agreement and believed the employer was wrong based on extensive research she conducted on her own. However, she believes the employer was trying to intimidate her to not leave for her new job.

She doesn’t think employees should have to have nuanced understanding of non-compete law in order to protect against those unfair practices. The importance of the clear ban on non-competes can be undermined with exceptions to the law.

***Kevin Wrege, DC Chamber of Commerce***

Mr. Wrege appeared on behalf of DC Chamber of Commerce CEO Angela Franco. He began by saying that when employers thrive then their employees will thrive as well. He noted that four out of five members of the DC Chamber are small businesses. He thanked Councilmember Silverman for revisiting the original bill and prioritizing holding the hearing.

Mr. Wrege said the bill began to address several issues triggered by the Total Ban, but did not go far enough. He believes that most employee conflicts of interest do not result in the types of conflicts described in the draft legislation such as unethical business behavior, violations of laws, or professional standards. Mr. Wrege favored the proposed legislative language drafted by Councilmember Pinto, saying it was narrowly tailored to preserve important protections in the law such as an employee’s ability to pursue simultaneous work in an unrelated field. For example, the non-competes that employers could use would be limited to six months and require payment to the employee.

Mr. Wrege said that non-competes “are the only truly effective way to prevent an employee from unwittingly considering, applying or disclosing confidential information obtained through work with a competing firm” as opposed to nondisclosure agreements. An employee who was working for two employers using non-disclosures agreements could not fulfill their obligations to either employer; therefore, a non-compete agreement could avoid this situation arising. He said the law would harm the region because DC employers would not be able to use non-competes to protect against having employees poached by employers in other states.

Responding to questions from Councilmember Pinto, Mr. Wrege said the Chamber did not want to restrict low-wage workers’ ability to have a second job. However, tech workers and salespeople might have access to proprietary information that those workers could unwittingly disclose. In response to Councilmember Silverman’s questions about non-disclosure agreements, Mr. Wrege said that Virginia and Maryland have limited restrictions on non-competes and so the DC businesses were at a disadvantage. He said his and other businesses’ recommendations to Councilmember Pinto were circumspect and did not go as far as some members of the group wanted.

***Bernie Brill, Executive Director, Sheet Metal and Air Conditioning Contractors’ National Association (SMACNA) Mid-Atlantic Chapter***

Mr. Brill said his organization represents 50 union signatory contractors. Mr. Brill encourages the Committee to reconsider the ban on non-compete agreements. He made the argument that non-compete contracts help protect proprietary information, databases, and customer lists. He stated that a complete ban would discourage businesses from choosing to locate or stay in the District. Non-competes are used with senior-level managers and executives because employers want to prevent those employees from leaving to work for a direct competitor. He maintained that allowing a ban on non-competes could threaten businesses by allowing an employee to transfer key information and company secrets without recourse.

Mr. Brill said the District government should not interfere with the use of non-compete agreements by certain businesses. He believes that employees who do not want to sign a non-compete agreement can refuse to sign them and seek employment elsewhere. Responding to questions from Councilmember Pinto, Mr. Brill said that building trade employers can spend $100,000 per apprentice to get them to the level of skill they need them. He said that these employers retain workers with higher wages and benefits to incentivize them staying with one employer for decades. He said that in his industry senior management are usually asked to sign non-compete agreements.

***Janene Jackson, Partner, Holland & Knight on behalf of Opportunity DC***

Ms. Jackson believes that as drafted, the bill “increases employer and employee confusion regarding an employer’s ability to safeguard its highly competitive and confidential information from disclosure and the restrictions employers can place on their employees” in situations where employees can work for competing companies. She said that the bill’s language was vague and failed to clarify under what circumstances simultaneous employment was allowed. She was also concerned that it was not clear how an employer can protect their confidential and proprietary information. She noted that the DC law approach differs from California’s ban, which only addresses post-employment competition.

She recommends that the Council amend the ban on non-competes by allowing reasonable limitations on simultaneous employment when the employee has access to confidential information and by allowing employers to use post-employment non-compete agreements for employees earning over a certain income threshold when the employer agrees to pay the employee for the period they are not working. Her written testimony included draft legislative text and she supported the amendments drafted by Councilmember Pinto.

Responding to questions from Councilmember Pinto, Ms. Jackson said that an employee could use an employer’s information in their second job without ever disclosing it. Therefore, she said a non-disclosure agreement would only protect against disclosing information in a detrimental manner.

Councilmember Pinto asked Ms. Jackson to address employer’s need for clarity and the time required to implement the changes. Ms. Jackson said HR polices are not developed overnight and that that after the law is enacted, employers will need time to draft policies, adapt their materials, and implement their practices accordingly.

***Daniel Essrow, Organizer, Nonprofit Professional Employees Union***

Mr. Essrow supports a clear and simple ban on non-compete agreements in DC. He said that a key part of his job is to educate workers, including highly educated and highly paid individuals, about their rights in the workplace. He expressed his concerned about attempts to “water down” DC’s ban on non-compete agreements before it goes into effect. Mr. Essrow believes the complicated thresholds proposed by others should be rejected in favor of clear and universal rules. Mr. Essrow pointed out that managers and supervisors cannot be in unions; in his experience, employers use that rule to exclude large categories of workers from the union undercutting worker leverage in that workplace. He said that employees should be encouraged to grow and improve in their field rather than being tied to a particular employer where they might not be growing. He said that even in a healthy economy, leaving a job is a fraught and difficult choice. For a worker bound by a non-compete agreement, quitting without the ability to apply their skills at another job in the same industry is nearly impossible. He said that until every workplace in the country has a union, employers will continue to hold most of the cards in setting the terms and conditions of employment. Workers need to be afforded simple and enforceable rules, without undue exceptions, so they aren’t forced to sign away their rights just to secure a job.

When Councilmember Pinto asked Mr. Essrow about post-employment non-competes, he said that too many exceptions to the law will make it too hard for employees to understand their rights. In his experience, employers use non-disclosure agreements. But other employers can just fire an employee if they are undercutting their employer.

***Daniel Perez, Vice President of Organizing, Nonprofit Professional Employees Union***

Mr. Perez testified the ban on non-competes should be preserved because these agreements negatively impact workers and the economy at large. Mr. Perez said that non-compete harm workers by making workers sign away their right to switch jobs and pursue better opportunities.

Mr. Perez outlined that non-compete agreements reduce wages and economic mobility, disproportionately harm already marginalized workers, and there are good alternatives available. He cited studies that showed workers were less satisfied in jobs where they had signed non-compete agreements; where they were banned, wages for minority groups and women increased. Binding workers is bad for wages but also bad for workers in hostile workplaces due to sexual harassment, bullying, or hazardous conditions. He rejected the idea that non-compete agreements were the only way employers could protect their confidential information; employers can offer better wages and working conditions to their employees. Mr. Perez said that preventing employees from leaving jobs is a short-sighted solution and one that erodes working standards.

***Keisha Davis, Human Resource Manager, Enlightened, Inc.***

Ms. Davis read the testimony of Antwayne Ford, President and CEO of Enlightened, Inc Ms. Davis testified that they did not support a complete ban on non-compete agreements.

She said that employees can willingly or unwillingly share proprietary, competitive, and/or confidential information with competitors and harm small businesses, such as in a situation where a larger business offers higher pay to obtain a competitive advantage. Ms. Davis supports clarifying the law further to prevent current and former employees from accessing, selling, or using employer information particularly pricing lists and other intellectual property.

Ms. Davis stated that a full ban on non-compete agreements would trigger unethical business practices and create chaotic legal issues. She believes that employees should not be able to work for competing employers at the same time. As an example, she shared that current employees could use their ongoing access to confidential information to benefit their second employers. Ms. Davis supports adding an exception to permit restrictions against employees performing work for or providing services to a competing employer simultaneously and explicitly excluding non-soliciting contracts. She supported reasonable restrictions on post-employment non-competes for employees earning under $80,000. She supported the parameters of Councilmember Pinto’s proposal.

***Linwood Jolly, Vice President, Business Development, Codice***

Mr. Jolly read the testimony of Dash Kirdena, CEO of Codice. He said that the Total Ban presented grave challenges for businesses in the District who are always competing with businesses operating in Virginia and Maryland. He believes that the amendment “is an important step to striking a balance for District employees and employers.”

Mr. Jolly said that a blanket prohibition on non-compete agreements poses serious challenges to small companies that rely on industry-specific expertise in upper management. He emphasized the point that allowing simultaneous employment for upper-level managerial employees could harm businesses, especially small businesses. In addition, he said that “the current Ban on Non-Competes would allow upper management employees to perform work for direct competitors immediately following the end of employment with a business. High level employees may find themselves in a situation where they subconsciously rely on intimate knowledge of a former employer’s technology to give their new current employer an unfair advantage in the marketplace.

He said the ban disadvantages subcontractors relative to larger enterprises because subcontractor agreements may contain prohibitions against competing with the prime contractor. He said the proposed amendment did not address his concerns.

When asked by Councilmember Silverman if he had signed a non-compete agreement, Mr. Jolly said “yes” but because of the high level of his position, he was not concerned about the impact of that agreement on him.

***Laura Miller Brooks, Senior Associate, Federal City Council***

Ms. Miller Brooks testified against the ban on non-compete agreements. She has a background in tech startups, including the Lime transit company. She stated that the ban could give companies a reason to not hire in the District. Tech startups provide unique opportunities to workers but the ban could result in these businesses not locating in Washington, DC. Ms. Miller Brooks said she signed a non-compete when she worked for Lime during a crowded market. She said how they competed was more important than the services they offered. In the early stages of her own startup, she had to assure investors that the idea could be brought to fruition without other businesses interfering; therefore, using a non-compete agreement could protect the startup against another company that was able to pay high salaries. DC should not have more onerous regulations than California, Austin, New York, Miami, Virginia, or Maryland.

***Justin Palmer, DC Hospital Association, Vice President for Public Policy and External Affairs***.

Mr. Palmer said his association represents employers of over 30,000 associates. He said DCHA supports the clarification in the present legislative proposal. He also mentioned the limited allowance for non-compete agreements with medical specialists that was already in the law and which he said should remain unchanged.

**B. Written Testimony**

***Stacy Burnette, Senior Director, Government & Regulatory Affairs, Comcast,***  wrote specifically about the need to use non-compete agreements with uniquely-qualified, highly-educated, and highly-compensated employees of Comcast, such as news producers, reporters, correspondents, and/or on-air hosts. For example, the bill would permit “Chuck Todd (on-air host of Meet the Press) to simultaneously work as an on-air host of a CBS News program.”

In a joint submission, ***Angela Franco, President and CEO of the DC Chamber of Commerce, and Glenn Spencer, Senior Vice President of the Employment Policy Division of the US Chamber of Commerce,*** wrote asking the Council to clarify the underlying law regarding long-term incentive awards. They said that the Committee’s Development report on Law 23-209 (dated Nov. 19, 2020 noted that non‐compete agreements are “usually… a contract between an employer and an employee stating that the employee will not work for a competitor for a period of time after that worker leaves their employment” but found the existing statutory language ambiguous and asked for changes to clarify that the law would not apply to long-term incentives that are forfeited if an employee joins a competitor.

***Marta Zaniewski, Vice President, State Regulatory and Legislative Affairs, American Institute of Certified Public Accountants***

Ms. Zaniewski asked that the Committee amend the current Act to “help protect all businesses in the District of Columbia and make it a competitive place to do commerce.” She wanted stronger protection of sensitive and private information, including client and customer lists, research grants, pricing lists, intellectual property, and trade secrets. She said non-competes are necessary to protect a business’s economic advantage and an employer’s investments.

She was concerned that the legislation, as drafted, “only addresses an employee’s disputes that cause the employer’s business to operate in either an ‘unethical manner,’ or infringe upon applicable laws or rules and it does not preserve a firm’s ability to protect itself against a well-placed employee accessing confidential, sensitive, or proprietary business information and seeking to work simultaneously, or subsequently for a competing firm.” She stated that AICPA supported the draft amendment circulated by Councilmember Pinto.

***Melissa Bradley, Founder and Managing Partner, 1863 Ventures***

Ms. Bradley testified in opposition to the noncompete ban. She believes that the ban is a barrier to minority entrepreneurship, it could increase inequities in venture capital, start-ups, and wealth, and it undermines the very goal that the Council and minority activists are trying to achieve. She also thinks that “investors will not take the chance on a DC-based startup knowing full well that the startup’s team could jump ship to a competitor spilling all of the startup’s valuable intelligence.”

***Rob Stewart, Former Managing Partner, JBG Smith***

Mr. Stewart opposed the ban. He said that the larger regional context of DC’s economy made the existing ban harmful to the city’s economic competitiveness and to the economic prospects of the people the DC Council is intending to help. Mr. Stewart worried that businesses would prefer to operate in Tysons Corner or Bethesda rather than the District. He said that “this ban means that a rival company in the suburbs could orchestrate a one-sided poach of their software programmers, mechanical engineers or paralegals.”

***Tim O’Shaughnessy, President and CEO, Graham Holdings***

Mr. O’Shaughnessy opposed the overall ban on non-compete agreements in the existing law. He said that an entrepreneur would be less likely to start a company in the District if a competitor in Arlington could “orchestrate a one-sided poach of their software programmers.” He reiterated similar points that Mr. Stewart had made.

***Greater Washington Board of Trade*** submitted comments supporting some of Councilmember Pinto’s proposed changes to the introduced bill. They said those changes would strike a balance between allowing DC employees to enjoy the benefits of a competitive job market and making sure employers can minimize the risk of competition. They sought an exception for the use of noncompete agreements with employees who earn more than $80,000 a year and noted the importance of protecting employee access to confidential, sensitive, or proprietary business information. They also suggested further post-employment restrictions for employees with access to sensitive data.

***Wayne McOwen, Executive Director, District of Columbia Insurance Federation***

Mr. McOwen’s written comments applauded the initiative of Councilmember Silverman to revise and improve the provisions of the total ban. He suggested a provision that would protect employers against employees with confidential sensitive or proprietary business information simultaneously or subsequently working for a competitor. He supported a salary threshold to identify employees who had more access to proprietary information. Mr. McOwen also asked the committee to consider setting a “window of protection,” which would be a time when the prohibition of the noncompete would apply after employment.

# **VI. IMPACT ON EXISTING LAW**

This bill limits the application of the Total Ban in two ways. First, it allows employers to use non-compete agreements with “highly compensated employees” (anyone earning $250,000 total compensation). Previously, only employers of “medical specialists” earning $250,000 or more were allowed to use non-compete agreements. Therefore, more employees in the District will be excepted than under the Total Ban as enacted in 2021. Second, the present legislation clarifies that. Additionally, this legislation specifies the types of policies employers may use to manage potential conflicts of interest. By specifying these, the law simplifies for employers, employees, and the enforcement agency which employer policies are permitted.

The administrative complaint investigation and enforcement provisions of the law remain unchanged.

# **VII. FISCAL IMPACT STATEMENT**

The attached fiscal impact statement issued by the District’s Chief Financial Officer states that funds are not sufficient in the FYxxxx budget and proposed FY xxxx through FY xxxx budget and financial plan to implement the bill. An additional $\_\_ in FY 2018 and $\_\_\_for the four-year plan are necessary to fund B24-256.

# **VIII. SECTION BY SECTION ANALYSIS**

 Section 2(a) of the legislation wholly rewrites Title I of Law 24-256, the “Non-Compete Clarification Amendment Act of 2022.” The law will apply as of October 1, 2022, which is specified within substantive sections below. Sections 101 through 104 within Title I specify as follows:

Section 101 defines terms used in the bill.

 Section 102 prohibits non-compete provisions for covered employees. It bars employers from requiring or requesting an employee to sign such agreement or abide by a workplace policy that includes a non-compete provision. It also bars employers from retaliating against covered employees.

Sec. 103 details requirements for non-compete provisions with highly compensated employees to be valid and enforceable, including that the geographic area, type of competitive work, and duration of twelve months or less must be stated in the agreement. This section bars retaliation against these employees. The employer is required to provide the non-compete provision to the employee in writing at least 14 days before the start of work or, for already-employed workers, at least 14 days before the employee must execute the agreement.

 Section 103a. Disclosures to employees. This section specifies that employers using conflict-of-interest policies which restrict employees’ ability to hold a second job must provide those policies to employees. In addition, a highly compensated employee’s employer must provide a notice to the employee stating that they are excepted from the non-compete ban.

Section 104. The section details what relief and penalties the District and employees are entitled to recover when an employer violates this law.

(b) Amends section 302 to apply as of October 1, 2022.

Sec. 3. Specifies the fiscal impact statement.

Sec. 4. Provides the effective date of the legislation.

# **IX. COMMITTEE ACTION**

The Committee on Labor and Workforce Development convened at \_\_\_ a.m. on June 16, 2022 to consider and vote on B24-256. Chairperson Silverman recognized the presence of a quorum, consisting of herself and Councilmembers Christina Henderson, Janeese Lewis-George, Robert C. White, and Trayon White, Sr.

Chairperson Silverman moved B24-256 and opened the floor for discussion.

Discussion having ended, Chairperson Silverman then moved the proposed committee print and report for B24-256 , with leave for the Committee staff to make technical and conforming amendments.

After opportunity for discussion, the members voted as follows:

 **Vote**

Chairperson Elissa Silverman

Councilmember Christina Henderson

Councilmember Janeese Lewis-George

Councilmember Robert C. White

Councilmember Trayon White, Sr.

Thus, the committee print and accompanying report were passed, with the Members present voting \_\_\_\_\_.

The committee meeting adjourned at ­­­\_\_\_ p.m.

**X. ATTACHMENTS**

1. B24-256 as introduced
2. Notice of Intent to Act
3. Public hearing notice for B24-256
4. Public hearing agenda and witness list for the July 14, 2021 hearing.
5. Public hearing witness testimony and additional statements and documents submitted for the record
6. Fiscal Impact Statement
7. Legal Sufficiency Determination
8. Comparative Print of B24-256
9. Committee Print of B24-256
1. Non-compete agreements vary in scope and content, but traditionally they are a contract between an employer and an employee stating that the employee will not work for competitors for a defined period of time and in a specific geographic region after that worker leaves their employer. The 2020 legislation barred employers’ use of these contracts to restrict where employees could “moonlight” or the jobs they took after leaving their employment. It also forbade the use of a non-compete term in an employer’s policy manual. Council of the District of Columbia, Committee on Labor and Workforce Development, “Committee Report on Bill 23-494, the Ban on Non-Compete Agreements Amendment Act of 2020,” November 19, 2020 (hereinafter, “2020 Non-Compete Ban Report”). [↑](#footnote-ref-2)
2. These businesses and associations formed the “Working Group”: Natalie Ludaway, Crowell & Moring, LLP; Andrew Flagel and Mondi Kumbula-Fraser, Consortium of Universities of the Metropolitan Washington Area; Tim Nelson, the Maryland DC Delaware Broadcasters Association; Janene Jackson, Holland & Knight, LLP; and Kevin Wrege, DC Chamber of Commerce. In October 2021, via email, Crowell & Moring, LLP, notified the Committee that it had withdrawn from participation. [↑](#footnote-ref-3)
3. B24-683, the Ban on Non-Compete Agreements Applicability Emergency Amendment Act of 2022; the Ban on Non-Compete Agreements Applicability Temporary Amendment Act of 2022; PR24-0603, the Ban on Non-Compete Agreements Applicability Emergency Declaration Resolution of 2022; PR24-786, the Ban on Non-Compete Agreements Applicability Congressional Review Emergency Declaration Resolution of 2022; and B24-844, the Ban on Non-Compete Agreements Applicability Congressional Review Emergency Amendment Act of 2022. [↑](#footnote-ref-4)
4. For example, Cornell University maintains policies with both conflict of interest and conflict of commitment limitations. See: <https://policy.cornell.edu/policy-library/conflicts-interest-and-commitment-excluding-financial-conflict-interest-related> [↑](#footnote-ref-5)
5. See, for example, testimony of Linwood Jolly, Vice President, Business Development, Codice. [↑](#footnote-ref-6)
6. White House Task Force on Worker Organizing and Empowerment, US Department of Labor, “How Unions Advance Equity for Underserved Populations,” available online at: <https://www.dol.gov/sites/dolgov/files/general/labortaskforce/docs/508_union-fs-1.pdf>. [↑](#footnote-ref-7)
7. Email to the Committee, July 27, 2021 9:30 PM. [↑](#footnote-ref-8)
8. Section 101(11)(b) of the bill details that this minimum qualifying compensation will increase annually beginning on January 1, 2024, according to the Consumer Price Index published by the Bureau of Labor Statistics of the United States Department of Labor. [↑](#footnote-ref-9)
9. 2020 Non-Compete Report. [↑](#footnote-ref-10)
10. Marx, Matt. *The firm strikes back: non-compete agreements and the mobility of technical* *professionals*, 76 Am. Soc. Rev. 695, 706 (2011), available online at: <https://scholar.google.com/citations?view_op=view_citation&hl=en&user=rXhhLccAAAAJ&citation_for_view=rXhhLccAAAAJ:ZeXyd9-uunAC>; <https://hired.com/salaries/washington-d-c>. [↑](#footnote-ref-11)
11. 2020 Non-Compete Ban Report, p. 3. [↑](#footnote-ref-12)
12. “Massachusetts Noncompetition Agreement Act,” Mass. General Laws c.149 § 24L; Or. Rev. Stat.§ 653.295 (2020). [↑](#footnote-ref-13)
13. David Stephen also expressed concern that low-income people would be disadvantaged at getting a new job after being out of the workforce. [↑](#footnote-ref-14)
14. 2020 Non-Compete Ban Report, p.2, “It is simpler, fairer, more practical, and more enforceable to have a complete ban on non-competes.” [↑](#footnote-ref-15)
15. See also 2020 Non-Compete Ban Report, Attachment 6, Testimony of Randolph Chen, Co-Acting Chief, Social Justice Section - Public Advocacy Division, Office of the Attorney General for the District of Columbia. [↑](#footnote-ref-16)
16. Utah and Massachusetts limit non-competes to twelve months; Oregon recently amended their law down to 12 months from 18. [↑](#footnote-ref-17)
17. Courts generally limit a non-compete agreement to one or two years’ duration and only for the geographic region where the former employee worked or was assigned, provided an employer can show that the agreement is protecting a legitimate business interest. This is due to the burden a non-compete places on an individual’s livelihood. See generally Kelly, Catherine Pastrikos, American Bar Association, “Non-Compete Agreements: What Every Company and Employee Should Know,” July 26, 2016. [↑](#footnote-ref-18)
18. B14-812, the Broadcast Industry Contracting Freedom Act of 2002, was approved unanimously by the Council and enacted as D.C. Law 14-258 on March 27, 2003; see DC Code §32-571 et seq. [↑](#footnote-ref-19)
19. Email to Committee from Mary Cavallaro, Chief Broadcast Officer, SAG-AFTRA, December 14, 2021 4:27 PM. [↑](#footnote-ref-20)
20. Email to the Committee from Tim Nelson, Broadcasters Association, February 10, 2022 1:50 PM. [↑](#footnote-ref-21)
21. Email to the Committee from Tim Nelson, Broadcasters Association, July 16, 2021 12:46 PM. [↑](#footnote-ref-22)
22. Washington Business Journal, “Montgomery County finalizes incentive package to lure Fox 5 to Bethesda,” Nov. 27, 2019, available at: https://www.bizjournals.com/washington/news/2019/11/27/montgomery-county-finalizes-incentive-package-to.html [↑](#footnote-ref-23)
23. The DC Line, “When DC broadcasters move to the suburbs, what’s lost?” September 7, 2018, available at: https://thedcline.org/2018/09/07/when-dc-broadcasters-move-to-the-suburbs-whats-lost/ [↑](#footnote-ref-24)
24. Washington Business Journal, “Nexstar to dramatically expand local TV news operations in D.C. area,” May 26 2022, available at: <https://www.bizjournals.com/washington/news/2022/05/26/nexstar-dc-news-now-wdcw-wdvm.html>. [↑](#footnote-ref-25)
25. “Medical specialists” was defined as: “an individual who performs work in the District on behalf of an employer engaged primarily in the delivery of medical services and who: (A) Holds a license to practice medicine; (B) Is a physician; (C) Has completed a medical residency; and (D) Has total compensation of at least $250,000 per year.” [↑](#footnote-ref-26)
26. Email to the Committee from Janene Jackson, Holland & Knight, LLP, May 16, 2022 4:41 PM. [↑](#footnote-ref-27)
27. The draft’s list of protected employer information was condensed into the final bill’s defined terms of “confidential employer information” and “proprietary employer information.” [↑](#footnote-ref-28)
28. Email to the Committee from the office of Councilmember Brooke Pinto, September 23, 2021. [↑](#footnote-ref-29)
29. For employees earning at least $80,000 and up to $150,000 annually, their former employer would be required to pay garden leave at 100 percent of the employee’s wages while employed. Employees earning $150,000 or more would be required to pay at least $150,000 per year, subject to other negotiated terms. [↑](#footnote-ref-30)
30. See, for example, testimony of Kevin Wrege, DC Chamber of Commerce, and Laura Miller Brooks, Federal City Council. [↑](#footnote-ref-31)