Statement of Randolph Chen
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Before the

Committee on Labor and Workforce Development
The Honorable Elissa Silverman, Chairperson

Public Hearing

on

Bill 23-0494, the "Ban on Non-Compete Agreements Amendment Act of 2019"

December 6, 2019, 10:00 am
Room 500
John A. Wilson Building
1350 Pennsylvania Avenue, NW
Washington, District of Columbia 20004

Greetings Chairperson Silverman, Councilmembers, staff, and residents. I am Randolph Chen, Co-Acting Section Chief of the Social Justice Section in the Public Advocacy Division at the Office of the Attorney General ("OAG"), which advocates for the rights of District workers. I am pleased to appear on behalf of Attorney General Karl A. Racine to testify in favor of Bill 23-0494, the "Ban on Non-Compete Agreements Amendment Act of 2019." This Bill would prohibit employers from imposing on their employees "noncompete" agreements—agreements that restrict employees from being simultaneously or subsequently employed by another employer within a particular geographic region or for a period of time. The Bill's prohibition would only apply to middle and low-wage workers, defined as those who make an hourly rate less than or equal to three times the District's minimum wage.

Protecting the rights of District workers is one of Attorney General Racine's top priorities. In early 2017, the Council granted OAG the authority to enforce the District's wage laws and provided funding for the OAG's Social Justice Section to develop a more robust wage theft enforcement practice. We have focused our efforts on protecting low-income District workers through enforcing the District's wage-and-hour and worker misclassification laws. We have launched over 30 investigations and recovered hundreds of thousands of dollars in judgments and settlements against businesses that have stolen wages from District workers. This Bill would add important protections for District workers and allow OAG to enforce those protections to recover damages on behalf of affected employees as well as civil penalties.

Employers insist that noncompete agreements are necessary as a protective measure—for instance, to prevent an employee who has access to a trade secret from taking that secret to a competitor. However, such a justification is applicable to only a small slice of the D.C. workforce—for example, senior company executives who truly have access to company trade secrets. Conversely, noncompete agreements are rarely if ever appropriate for middle to low-wage workers. Indeed, in OAG's enforcement work, we have seen many situations where noncompete agreements impose harm on employees without any corresponding justification at all. In these cases, noncompete agreements lopsidedly benefit employers, who gain a more stable labor force at the expense of their employees' job mobility. These harms are particularly problematic where, as with middle and low-wage workers, employers often hold significantly greater bargaining power and employees seldom have the opportunity to negotiate the terms of their employment.

For example, in July 2018, OAG joined a coalition of state attorneys general in conducting an investigation of several fast food franchises that have branches across the nation, including in the District of Columbia. The investigation regarded the franchises' use of restrictive employment provisions—that included noncompete agreements—relating to their food service employees, who often work at rates at or around minimum wage and rarely if ever have access to trade secrets or sensitive commercial information. For low-wage workers who already face multiple challenges in making ends meet, these kinds of restrictive provisions only serve to limit job mobility and further depress wages. For instance, a noncompete agreement

would prevent a low-wage food service worker from taking a job at a competitor that offered better pay or benefits. Together with the multistate coalition, OAG won agreements in March 2019 from several of the fast food franchises to cease using similar kinds of restrictive employment provisions that this Bill would prohibit.

In addition, in July 2019, OAG led a multistate coalition in submitting a comment to the Federal Trade Commission ("FTC") relating to an FTC hearing on "Competition and Consumer Protection in the 21st Century." In the comment, our office discussed the use of noncompete agreements, particularly with respect to low-wage workers, as a competitive concern that could violate antitrust law. We again reiterated concerns that such restrictive agreements could limit worker mobility and earnings opportunities. Moreover, we also raised a separate concern that noncompete agreements can cause additional harm beyond affected workers. For example, the increased use of noncompete agreements could end up harming local businesses because they effectively deprive other employers from the opportunity to hire an otherwise qualified worker.

OAG supports the Bill's passage because it protects against these harms. The Bill, in prohibiting the use of noncompete agreements for middle and low-wage District employees, furthers workers' rights by encouraging job mobility and fair wages; it also cultivates a job market free of one-sided restrictions that weigh in employers' favor. The Bill is appropriately tailored to only apply to workers who make less than or equal to three times the District's minimum wage. This limitation appropriately balances business and worker interests by protecting the most vulnerable workers—middle and low-wage workers—who rarely deal with

trade secrets or sensitive commercial information. For these workers, noncompete agreements do little more than hinder their freedom to work and make a fair and living wage. The Bill thus reflects a reasoned balance in specifically protecting working-class residents from being forced to enter into noncompete agreements.

OAG also supports the Bill's express authorization of OAG to enforce its prohibitions and seek damages and civil penalties. As an initial matter, our office has demonstrated that when the Council grants us authority to protect District workers, we deliver results. Since the Council granted OAG authority to enforce the District's wage laws in 2017, our office has developed an increasingly robust wage theft enforcement practice—we have opened dozens of investigations, filed lawsuits, and recovered hundreds of thousands of dollars for District workers. And this Bill would be an additional tool our office could use to fight for District workers. Through allowing damages and civil penalties, the Bill also includes the necessary deterrent to ensure compliance with the law.

Finally, the passage of the Bill is consistent with actions taken by other states to address concerns about abusive noncompete agreements. In May 2019, Washington state passed a similar law that rendered noncompete agreements void and unenforceable against employees making under $100,000 per year. That same month, Maryland passed a law that both nullified noncompete agreements entered into with employees who made less than $15/hour and declared that such agreements were against Maryland public policy. New Hampshire, a smaller state with a population close to that of the District's, also passed a law in July 2019 prohibiting the use of

noncompete agreements for workers who make less than 200 percent of the federal minimum wage. In addition, states like California, Oklahoma, and North Dakota have laws that generally nullify noncompete agreements altogether. Other states like Colorado, Illinois, Hawaii, and Massachusetts prohibit the use of noncompete agreements for specific types of workers. Numerous states both large and small, which are home to a diverse array of industries, have passed legislation regulating the use of noncompete agreements. The Bill is consistent with that pattern of regulation.

OAG urges the Council to approve Bill 23-0494, and we look forward to working with the Committee on Labor and Workforce Development to continue protecting the rights of District workers. This concludes my testimony, and I am happy to answer any questions.