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House Commerce and Economic Development
Room 35
115 State Street
Montpelier, VT 05633

Re: 21 V.S.A. § 495o - Proposed Legislation - Agreements not to compete

To House Commerce and Economic Development Committee:

As an intellectual property attorney who has represented many employers and employees in a wide range of industries, I have seen first hand how covenants not to compete punish employees by preventing them from engaging in their chosen livelihood; go far beyond the legitimate needs of any business; and ultimately stifle competition. As Governor Scott clearly outlined in his Budget address last week, Vermont has a significant problem of a declining workforce to meet Vermont's growing economic needs. The proposed legislation will help Vermont attract a professional and high-capability workforce. As many of you may realize, much of the technical innovation that comes out of California is accomplished in no small part because it encourages robust competition by making non-compete covenants illegal.

According to the Harvard Business Review, "a growing body of evidence shows that innovation, productivity, and economic growth are all greater in regions where local laws don't allow (or authorities don't enforce) such contracts—most notably, Silicon Valley. Presumably, positive effects spread to many companies when employees are free to move around." Interestingly, researchers On Amir and Orly Lobel also found evidence that non-compete agreements, which limit future employment, may even de-motivate employees in their current jobs by decreasing their perceived ownership of those jobs, and hence their desire to develop their skills fully. See, On Amir and Orly Lobel, How Noncompetes Stifle Performance, Harvard Business Review, Jan.-Feb. 2014, <https://hbr.org/2014/01/how-noncompetes-stifle-performance>.

There are two opposing concerns, and then public policy:

First, there are employers, who need to protect their businesses from ex-employees divulging trade secrets to competitors. In my view, however, both State (9 V.S.A. § 4601, et seq.) and Federal (18 U.S.C. § 1836, et seq.) trade secrets laws already provide ample protections to an employer to prevent the disclosure of trade secrets. Moreover, the majority of scrupulous -- and smart -- businesses require new employees to sign agreements stating that they will not divulge trade secrets or confidential information from their former employers. Preventing an employee from working altogether is unnecessary.



Second, there are employees, who need to be able to earn a reasonable livelihood and not be forced, as they often are with non-compete agreements, to change what they do for a living, because a non-compete agreement says that they can't perform services, or work in areas, that may be in competition with their former employer.

Simple economics tells us that when employees can no longer perform the services in which they have gained expertise, their abilities are being squandered. Moreover, as a society, we should not be passing laws that prevent people from providing for themselves and their families at the highest level they can achieve.

In some of the situations in which I have been involved, the employees were hired because of their knowledge and experience in the field of the prospective employer - this is what made them of sufficient interest to be hired in the first place. When the employees moved on to other jobs after several years, they were hounded by their former employers, who insisted that they essentially change jobs -- and the non-compete agreements pretty much required it. There is no question from what I observed that this stifled their economic prospects.

Unfortunately, current case law requires courts to uphold these provisions. When looking at non-competes, the courts look to the length of time, the geographic extent, and scope. With businesses now being nationwide and international, and individuals being ever more specialized -- in ever more specialized jobs -- these tests are archaic, in addition to being unfair to the employee, and bad for society in general.

Lastly, I commend the legislature for proposing legislation that encompasses all agreements that provide for restrictive covenants. This is particularly important here in Vermont, where a large number of the people affected by restrictive covenants are not employees but are in other contracting relationships.

Thank you.

Respectfully submitted,

Gordon E. R. Troy

