RESOLUTION OF THE
VERMONT EMPLOYMENT LAWYERS' ASSOCIATION, INC.

The Vermont Employment Lawyers' Association, Inc. is a Vermont non-profit corporation established in 1992 for the purpose of promoting the rights of employees, with members who are Vermont lawyers who primarily represent the interests of employees.

The members of the Association are familiar with the issues raised by covenants not to compete and related agreements, as many members have represented clients facing such agreements.

It is the view of the Association that -- except in connection with the purchase and sale of a business or substantial interest of a business -- covenants not to compete are anti-competitive, restrict workers from moving to more productive opportunities, and potentially harm not only workers but reduce social productivity.

Covenants not to compete have become common-place in the American workplace such that it appears that one in five workers are currently subject to such a covenant, and almost 40 percent say they have been subject to such a covenant at some time in their work lives.[1]

While highly paid workers are more likely to have been subject to a covenant not to compete (including 85 percent of executives) than low income workers, some 14 percent of those making under $40,000 a year were subject to such a covenant.[2]

In 2016, the U.S. Treasury Department declared that the overuse of restrictive covenants was harming the American economy.[3] Recent studies suggest that covenants not to compete decrease employee mobility[4] and depress employee wages.[5]

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[1] Evan Starr, J.J. Prescott & Norman Bishara, *Noncompetes in the U.S. Labor Force, U. of Mich. Law & Econ.* Research Paper No. 18-013 (2019); Alan Krueger & Eric Posner, *A Proposal for Protecting Low-Income Workers from Monopsony and Collusion,* Hamilton Project Policy Proposal 2018-05; Cicero Group, *Utah Non-Compete Agreement Research* (Feb. 24, 2017), available at https://issuu.com/saltlakechamber/docs/utah_non-compete_agreement_research See also, J.J. Prescott, Norman Bishara & Evan Starr, *Understanding Noncompetition Agreements: The 2014 Noncompete Survey Project*, 2016 Michigan St. L. Rev. 369.

[2] *See J.J. Prescott, Norman Bishara & Evan Starr, Understanding Noncompetition Agreements: The 2014 Noncompete Survey Project," 2016 Michigan St. L. Rev. 369.*

[3] U.S. Dep't of Treasury, Office of Econ. Policy, Non-compete Contracts: Economic Effects and Policy Implications (March 2016) available at https://www.treasury.gov/resource-center/economic-policy/Documents/UST%20Non-competes%20Report.pdf;

[4]Matt Marx, *The Firm Strikes Back: Non-Compete Agreements and the Mobility of Technical Professionals*, 76 Am. Sociological Rev. 695 (2011); (The study used a 2015 ban on covenants not to compete for high tech workers in Hawaii, which allowed researchers to compare high tech workers in Hawaii to other industries in Hawaii unaffected by the ban and to high tech workers in other states. The general findings are that after the ban for high tech workers, high-tech job mobility in Hawaii rose by 11 percent and new-hire wages rose by 4 percent, suggesting that banning DNCs improved the livelihood of tech workers.)

[5] *Id.* and Evan Starr, J.J. Prescott & Norman Bishara, *Noncompetes in the U.S. Labor Force,* U. of Mich. Law & Econ. Research Paper No. 18-013 (2019). Natarajan Balasubramanian, Evan Starr & M. Sakakibara, *Enforcing Covenants Not to Compete: The Life-Cycle Impact on New Firms,* 64 Management

California, North Dakota, and Oklahoma ban covenants not to compete except in connection with the sale of a business.[6] Since 2015, at least twelve states have enacted or amended noncompete statutes, and many other states are considering noncompete legislation.

The legitimate interests of employers are already adequately protected by the Vermont Trade Secrets Act, 9 V.S.A. § 4601, et seq., the Vermont version of the Uniform Trade Secrets Act, which safeguards the right of employers to protect trade secrets and business-related confidential information and is substantially the law in 49 states.

The Association has examined H.1 as originally introduced and it has been amended by the text designated as Draft No. 2.3.

It is the view of the Association that the original draft of H.1, which follows the California model, prohibiting covenants not to compete except in connection with the sale of businesses, is the preferable draft of the legislation, as it would increase competition and the productivity of Vermont economy, improve pay and working conditions for Vermont workers, and virtually eliminate an entire category of expensive and unproductive employment litigation.

It is also the view of the Association that draft 2.3 of H.1 would be a positive improvement in the law of Vermont on covenants not to compete and related agreements, if revised as set out below:

(I) That the concept of "Garden leave" in draft 2.3 incompletely expresses the idea as it has been developed elsewhere and would create uncertainty and unnecessary litigation.

Instead, the Association recommends that the definition of "Garden leave" in subsection (e) be revised to read as follows:

> (e) "Garden leave" means a provision within a noncompetition agreement by which an employer agrees to continue to pay the employee during the restricted period, at rate not less than 50% of the employee's prior salary, calculated based on the employee's highest annualized gross compensation, including salary, bonuses and incentive compensation, but not benefits, earned during the 24 months prior to the termination of his or her employment. "Garden leave" need not be paid if the employer waives the restriction of the noncompete agreement.

Science 552 (2018). See also, Michael Lipsitz & Evan Starr, *Low-Wage Workers and the Enforceability of Non-Compete Agreements* (mimeo August 23, 2019). (Comparing hourly workers before and after Oregon's 2008 ban on covenants not to compete as to hourly workers relative to a set of control states, suggests that hourly wages rose 2-3 percent and job-to-job mobility rose 12-18 percent.).

[6] The White House, *Non-Compete Agreements: Analysis of the Usage, Potential Issues, and State Responses* (May 2016). https://obamawhitehouse.archives.gov/sites/default/files/non-competes_report_final2.pdf (last accessed January 9, 2020.)

(II) Experience under the new Massachusetts covenant not to compete reform "Garden leave" statute suggests that permitting "a nonqualified deferred compensation plan funded solely by the employer, or other similar consideration that is mutually agreed to" will eviscerate the statute.

Instead, the Association recommends, in the strongest possible terms, that subsection (b)(2) (A) of draft 2.3 be revised to read as follows:

> (A) The agreement is supported by garden leave, as that term is defined below in subsection (e) and that is specified in the agreement.

(III) It is the view of the Association that while an employee may choose to give up the right to solicit business, consumers and businesses buying goods and services should free to do business with whomever they choose. Accordingly, the Association recommends that he phrase "or transact" be deleted from subparagraph (e)(3)(B).

(IV) It is also view of the Association that, in order to avoid the law being circumvented by "choice of law" provisions in employment agreements, it is necessary that either draft be further amended to include language similar to that contained in the Massachusetts 2018 reform of the law of covenants not to compete:

> No choice of law provision that would have the effect of avoiding the requirements of this [statute] will be enforceable if the employee is, and has been for at least 30 days immediately preceding his or her cessation of employment, a resident of or employed in [Vermont].

Accordingly, and with the understanding that revisions described above need to made, the Vermont Employment Lawyers' Association supports H. 1, both as originally introduced and as amended in draft 2.3.