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VIA EMAIL SUBMISSION

Senate Standing Committee On Labor
Senate Standing Committee On Commerce, Economic Development, and Small Business

Hearing Room A
Legislative Office Building
Albany, New York 12248

Re: Hearing on Non-Compete Agreements

Dear Chair Ramos, Chair Ryan and Committee Members:

Sanford Heisler Sharp, LLP is encouraged that the Senate Standing Committees on Labor and on Commerce, Economic Development, and Small Business are considering banning non-compete agreements in New York State. Sanford Heisler Sharp strongly encourages such a ban and submits this written testimony to highlight the harm non-competes impose upon individuals and the public.

Sanford Heisler Sharp is a public interest law firm with offices in California, New York, Washington D.C, Baltimore, and Tennessee. The firm represents plaintiffs in civil rights, employment, and whistleblower matters. As one of the largest worker-side employment law firms in the country, we have seen first-hand the extreme burden that non-compete agreements impose on workers.

Accordingly, we submit this comment to underscore the urgent need to ban non-competes in New York State. In Section 1, we detail the substantial harms that non-competes impose upon workers, including our clients. In Section 2, we describe the ways in which non-competes undermine fundamental workplace protections, including antidiscrimination, anti-retaliation, and whistleblower protections; this is a central reason why there should be no salary caps on any non-compete ban. In Section 3, we suggest that the legislature consider explicitly prohibiting the insidious practice of Training Repayment Agreement Provisions (TRAPs).

This testimony is not intended to be a comprehensive reflection of all the evils of non-compete agreements—there are many. Nor is this testimony intended to describe all the types of employer practices that operate as *de facto* non-compete agreements—there are also many.[1] Instead, we hope to highlight for the Committees certain key reason why, as advocates for civil

[1] In addition to TRAPs, they can include non-solicitation agreements, non-disclosure agreements, bonus claw backs (signing bonuses, retention bonuses, etc.), mandatory repayment of tuition assistance, mandatory repayment of relocation incentives, and the repayment of sales commissions upon separation from employment.

and workers' rights, we support banning non-competes, both in their explicit and *de facto* incarnations.

1. <u>Non-Competes Cause Immense Financial and Emotional Distress to Employees</u>

In the course of our practice representing employees in their claims of discrimination, harassment, and retaliation, we have seen firsthand the multifarious harms that non-competes impose upon individual employees. In addition to the financial and emotional distress caused by their employers' misconduct, our clients' suffering is exacerbated when a non-compete prevents them from securing further employment. While resolving their claims brings some closure to a difficult and upsetting chapter of their lives, we consistently find that securing new employment helps our clients to truly move on from traumatic situations. For example, one client wishes to share the following statement about how her non-compete impacted her both financially and emotionally:

> I was employed by a delivery logistics company for a number of years, where I experienced severe gender-based harassment and sexual assault. After reporting these abuses, the company terminated my employment, leaving me traumatized and demoralized. Adding insult to injury, I found myself in dire financial circumstances after my firing and faced the prospect that I would not be able to get another job, and therefore would not be able to pay my bills or support myself and my family. While I did my best to find a new job, I struggled to find positions to apply for given the expansive non-competition clause in my employment agreement. The provision provided that I could not work in any capacity for any organization whose "business, products, or operations" were "in any respect competitive with or otherwise similar" to my company's business. The provision restricted such employment in any state or country where the company "derived revenue or conducted business." As a delivery logistics company that assisted retail delivery for hundreds of retailers nationwide and internationally, the clause effectively made it impossible for me to apply for any job where I could use my skills and experience; in theory, every company that delivers products to customers would be "similar" to my former employer.
>
> On top of the devastation I felt as a result of the harassment I experienced, I was overwhelmed and despondent seeing how much my former employer could take from me. I was in constant distress that I would never work in my field again, and I was truly fearful that even applying for positions would expose me to action from my former employer.
>
> However, I was fortunate to have private counsel. In the course of negotiations with my private counsel, the company agreed to modify and substantially narrow the non-compete clause, voiding the expansive geographical range and instead listing a small handful of competitor companies that would need to be informed of my trade secret confidentiality obligations. Releasing me from the restrictions of the non-compete allowed me to apply to hundreds of jobs where I could apply my knowledge and skills in this particular industry, and has allowed me to continue my career. I was able to avoid the financially and

emotionally devastating consequences of the non-competition provision because I was fortunate enough to have hired an attorney to assist me; I am confident I would have had to drastically alter my career path, or even switch careers entirely, if not for the help of my lawyer.

Not all of our clients have been this fortunate. In one case, we represented the former female president of a company who was wrongfully terminated. She had spent nearly two decades in this position, and her entire career at this company, which operated nationwide. Her employment agreement prohibited her from taking any employment with any business that competes with the company in the geographic region where the company operated for a full year following her firing. Having spent her entire career in a niche industry, she had exclusive experience at the highest levels of this industry but could not apply to any other company as a result of the non-compete clause. As a result, she had no choice but to leave over two decades of expertise and experience and start an entirely new career in a completely different field.

Thus, the burden of these provisions on individual employees who are eager to get back into the workforce is palpable and may have lifelong consequences for employees like our clients.

2. <u>Non-Compete Agreements Undermine Anti-Retaliation and Whistleblower Protections</u>

In addition to the burdens that non-compete agreements impose on individual workers, they also diminish workers' ability to enforce employment laws and expose employer misconduct, threatening fundamental workplace protections.

New York State's workplace regulations depend upon workers bravely coming forward to report illegal conduct, including discrimination,[2] wage and hour violations,[3] health and safety

[2] *See* N.Y. Exec. Law § 297 (authorizing persons aggrieved to file a complaint with the Division of Human Rights and file civil actions in court); *See also* New York State Department of Human Rights, *available at* www.dhr.ny.gov (explaining that "Under the Human Rights Law in New York, every citizen has an 'equal opportunity to enjoy a full and productive life.' If someone feels they have been discriminated against they can file a complaint with the Division of Human Rights").

[3] The New York Labor Law is partially enforced based on complaints and information received from employees. *See e.g.* N.Y. Lab. Law § 196-a (authorizing employee complaints to commissioner); N.Y. Lab. Law § 663 (authorizing civil actions to recover unpaid wages)

concerns,[4] and corporate malfeasance.[5] For that reason, numerous state statutes contain anti-retaliation protections,[6] which have the "primary purpose" of "[m]aintain[ing] unfettered access to statutory remedial mechanisms." *Williams v. New York City Hous. Auth.*, 872 N.Y.S.2d 27, 34 (1st Dept. 2009) (quoting EEOC compliance manual).

Yet, despite these protections, workers often face illegal retaliation. Indeed, in FY 2021-22 alone, 38% of complaints made to the New York State Division of Human Rights included allegations of retaliation for opposing discrimination.[7] At the federal level, in each year between 2018 and 2021, over 50% of EEOC charges included allegations of illegal retaliation.[8] Yet, enforcement agencies often have insufficient staffing and funding to prosecute all meritorious claims. For example, between 2011 and 2021, the EEOC[9] filed litigation in only about 8% of cases (nationwide) in which the agency was unable to conciliate meritorious claims.[10] The New York State Department of Labor faces similar enforcement challenges, given current levels of staffing

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[4] *See Lawlor v. Wymbs, Inc.*, 212 A.D.3d 442, 443 (N.Y. App. Div. 1st Dept. 2023) (holding that employee stated a claim for unlawful retaliation when he was terminated after complaining about employer's failure to enforce a mask mandate in the midst of the COVID-19 pandemic, finding that the employee complaint concerned 'a substantial and specific danger to the public health or safety'"); *Sulieman v. Roswell Park Cancer Inst.*, No. 05-CV-766S, 2008 WL 2690278, at *12 n. (W.D.N.Y. June 30, 2008) (noting that the "purpose of New York's Healthcare Whistleblower's Protection Act, [Labor Law § 741,] [is] to protect reporting of improper patient care services by private or public health care providers in New York.")

[5] For example, New York State recently amended New York Labor Law § 740 to expand on the protections for employees who disclose or threaten to disclose a policy or practice that the employee believes violates the law, or who objects to participating in a practice or policy the employee believes is illegal. The new law specifically prohibits any adverse action an employer takes in response to an employee's exercise of their § 740 rights. *See also Ulysse v. AAR Aircraft Component Servs.*, 841 F. Supp. 2d 659, 678 (E.D.N.Y. 2012) (Noting purpose of former Labor Law § 740 was "to protect the whistleblower that makes a complaint," and thereby the statute "indirectly encourage these complaints to be made."); *Ferris v. Lustgarten Found.*, 189 A.D.3d 1002, 138 N.Y.S.3d 517, 521 (2020) (noting that "Not–For–Profit Corporation Law § 715–b is intended to protect, among others, employees who in good faith report any action . . . that is illegal [or] fraudulent.").

[6] *See e.g.*, N.Y. Lab. Law §§ 215, 740, 741; N.Y. Exec. Law § 296(7) (Human Rights Law); N.Y. Not-for-Profit Corp. Law § 715-b; N.Y. State Fin. Law § 191 (NYS False Claims Act).

[7] *See* New York State Department of Human Rights Annual Report Fiscal Year 2021-22, https://dhr.ny.gov/system/files/documents/2022/12/nysdhr-annualreport-2021-22.pdf.

[8] *See Charge Statistics (Charges filed with EEOC) FY 1997 Through FY 2021)*, U.S. Equal Employment Opportunity Commission, https://www.eeoc.gov/data/charge-statistics-charges-filed-eeoc-fy-1997-through-fy-2021.

[9] The EEOC has a work-sharing agreement with NYS Division of Human Rights. In that manner, the agencies cooperate in the enforcement of anti-discrimination law in New York.

[10] *See All Statutes (Charges filed with EEOC) FY 1997- FY 2021*, U.S. Equal Employment Opportunity Commission, https://www.eeoc.gov/data/all-statutes-charges-filed-eeoc-fy-1997-fy-2021; *EEOC Litigation Statistics, FY 1997 through FY 2021,* U.S. Equal Employment Opportunity Commission, https://www.eeoc.gov/data/eeoc-litigation-statistics-fy-1997-through-fy-2021.

and funding.[11] In this context, workers—especially those without the benefit of legal counsel—face tremendous disincentives to reporting illegal conduct.

Non-compete agreements further exacerbate this enforcement crisis. Employees subject to non-competes cannot easily exit their employment and find new work. This dramatically raises the stakes when they wish to report unlawful conduct.[12] If their employers retaliate by wrongfully terminating their employment, employees with non-compete agreements have no reasonable opportunity to secure substantially similar work.

In fact, employers often use non-compete agreements as a weapon to keep employees from speaking up. This is underscored by the fact that as soon as a departing employee asserts claims against the employer – usually discrimination or retaliation claims –the employer raises the issue of the non-compete restriction. This tactic is designed to intimidate the employee into backing down from his or her legitimate claims or forcing the employee to resolve the claims in a manner that is less favorable for the employee. Indeed, even when workers file lawsuits for discrimination and retaliation, employers often allege counterclaims for violation of their non-compete agreements putting the employee in legal and financial peril. *See Rao v. St. Jude Med. S.C., Inc.*, No. 19-CV-923 (MJD/BRT), 2022 WL 4485553, at *24 (D. Minn. Sept. 27, 2022). Non-compete agreements thus provide employers with a contractual buttress to the ever-present threat of illegal retaliation.

Banning non-competes is therefore a necessary measure to promote enforcement of state antidiscrimination, anti-relation, worker-protection and whistleblower policies. Indeed, for this reason, it would be unwise to impose an income cap on any non-compete ban. It is essential—and in the public interest—that workers at all income levels have an unfettered opportunity to report and oppose illegal conduct. In fact, highly compensated employees may have the greatest knowledge of such illegal conduct due to their senior positions in their companies. It is therefore imperative that they can blow the whistle without the fear of destroying their careers due to non-compete agreements.

Removing the burden of non-competes will clear the way for employees, at all incomes levels, to report illegal conduct within their organization and to state regulators. To be sure, the threat of illegal retaliation will remain. But workers will no longer have barriers preventing them from exiting hostile or illegal workplaces. Nor will non-competes stand in the way of restoring their careers following unlawful retaliation.

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[11] *See* Make the Road New York & Center For Popular Democracy, *Coming Up Short: The State of Wage Theft Enforcement in New York* (2019) *available at* https://maketheroadny.org/coming-up-short-the-state-of-wage-theft-enforcement-in-new-york/.

[12] *See e.g.,* Elizabeth Anderson, Private Government: How Employers Rule Our Lives (And Why We Don't Talk About It), 66 (2017) (describing the harm caused by non-compete clauses; the limitation on workers' ability to exit employment relationship; and the disproportionate power non-competes afford employers).

3. New York Should Ban Training Repayment Agreement Provisions (TRAPs)

Any ban on non-competes must also ban the various employer practices that operate as *de facto* non-competes agreements. Though there are many such practices, Training Repayment Agreement Provisions (or TRAPs) are a particularly insidious form of *de facto* non-compete.[13]

In general, TRAPs are contractual provisions that require an employee to repay training costs if they separate from their employer within a specified time. Those costs may reach thousands of dollars, and employers often expect these debts to be repaid even when an employee is terminated involuntarily.[14] These debts make it prohibitively expensive for workers—especially low wage workers[15]—to exit their employment and find new work. That is especially so because workers are often expected to work for lower wages during their training period.[16] Accordingly, the repayment obligation effectively serves as a sword hanging over employees, preventing them from leaving and finding new jobs.[17]

Any ban on non-competes must account for these realities. Accordingly, in addition to or in conjunction with legislation banning non-competes, we urge the legislature to pass law that explicitly bans TRAPs—i.e. any agreement where the employer demands that the employee repay training costs upon separation from employment.

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Sanford Heisler Sharp applauds the Committees' efforts to highlight the harms of non-compete agreement, and we encourage the legislature to ban non-compete agreements. As described in this testimony, such agreements impose substantial burdens on workers and

[13] In our view, S. 3100 would ban *de facto* non-compete agreements because the bill defines non-compete agreements as "any agreement" that "prohibits or restricts" a covered individual "from obtaining employment, after the conclusion of employment." Nevertheless, employers will likely make every effort to obtain judicial (mis)interpretations that narrow this definition. One way to insure against such misinterpretations is to explicitly ban particular forms of *de facto* non-competes, even if they are already prohibited by S. 3100.

[14] *See* Jonathan F. Harris, *Unconscionability in Contracting for Worker Training,* 72:4 Alabama Law Review 723, 740 (2021) (discussing TRAPs and involuntary termination); Jonathan Harris, *The New Noncompete: The Training Repayment Agreement Provision (TRAP) as a Scheme to Retain Workers Through Debt,* NULR of Note: Northwestern University Law Review (Nov. 9, 2022), https://blog.northwesternlaw.review/?p=2730; Stuart Lichten and Eric M. Fink, *"Just When I Thought I was Out…": Pos-Employment Repayment Obligations,"* 25:1:5 Washington and Lee Journal of Civil Rights and Social Justice at 74 (Mar. 11, 2019) (discussing repayment costs).

[15] *See* Lichten and Fink 25:1:5 Washington and Lee Journal of Civil Rights and Social Justice at 51, 88; *Trapped at Work: How Bigger Business Uses Student Debt to Restrict Worker Mobility,* ProtectBorrowers.org, at 14 (July 2022), https://protectborrowers.org/wp-content/uploads/2022/07/Trapped-at-Work_Final.pdf.

[16] *See* Harris, *supra* n. 14 at 725-726.

[17] We further note that TRAPs are part of an ongoing trend of employers shifting risks—here, the risk of losing an investment in training—onto their workers, which has increased financial instability for American households. *See generally* Jacob S. Hacker, The Great Risk Shift: The New Economic Insecurity and the Decline of the American Dream (2d Ed. 2019).

undermine fundamental workplace protections. Moroever, TRAPs—along with other *de facto* non-compete agreements—impose these same harms on workers and society. They should also be banned by statute.

We thank the Committees for their consideration of this testimony.

Sincerely,

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