GOVERNMENT OF THE DISTRICT OF COLUMBIA
OFFICE OF THE ATTORNEY GENERAL

Karl A. Racine
Attorney General

Public Advocacy Division
Workers' Rights and Antifraud Section

December 16, 2022

By U.S. Mail & E-mail
Legal Ethics Committee
District of Columbia Bar
901 4th Street, NW
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RE: Proposal for Formal Opinion on Advising Clients on Illegal Contract Provisions

Dear Members of the D.C. Bar Legal Ethics Committee:

On behalf of the Workers' Rights and Antifraud Section of the Office of the Attorney General for the District of Columbia, we write to request a formal ethics opinion on a topic of importance to District workers and the Bar's missions of improving the legal system and enhancing access to justice. Specifically, we seek an opinion on whether an attorney's participation in the drafting, review without objection, approval, or execution of contractual language in an employment contract that is unambiguously illegal or unenforceable is a violation of Rule 1.2, Rule 3.1, Rule 8.4, or any other rules of the D.C. Bar Rules of Professional Conduct.

It should be uncontroversial that a lawyer may not advise a client to use a provision in its contracts that is illegal and unenforceable. Despite this, clauses that are harmful to workers remain pervasive in employment contracts even where they are illegal and unenforceable.

Consider noncompete clauses, which the D.C. Council recently banned for most District workers.[1] Noncompete clauses prohibit workers from pursuing employment similar to their current role, working for another employer who competes against their current employer, or operating their own business. While noncompete clauses vary in terms of time period and geographic scope, all noncompetes limit employees' job opportunities. Empirical research has repeatedly borne this out:

[1] On October 1, 2022, the District's Non-Compete Clarification Amendment Act of 2022 took effect, banning the use of noncompete clauses for most D.C. workers. *See* D.C. Code § 32-581, *et seq*. While noncompete clauses are sometimes referred to as noncompete "agreements," we avoid that terminology in recognition of the reality that many workers lack meaningful power and opportunity to bargain over the terms of their employment.

noncompetes depress the mobility and wages of all types and wage-levels of workers,[2] but noncompetes are especially harmful to middle- and low-wage workers, who lack the bargaining power to negotiate the terms of their employment. Despite these documented harms, the use of noncompete clauses is growing in virtually every industry.[3] Almost 20% of American workers are subject to noncompetes, 12% of whom are in low-skill and low-wage jobs.[4]

The District's ban on noncompetes is a positive step but it is not sufficient to end the harm to District workers. Research shows that contract provisions like noncompetes not only continue to exist, but proliferate, even in jurisdictions where they are illegal and unenforceable.[5] For example, the U.S. Department of Treasury's Office of Economic Policy has reported that approximately 19% of California workers are required to enter a noncompete by their employer–a percent even higher than the national average–despite the fact that noncompete contracts are unenforceable there.[6] One recent study found almost no difference in the incidence of noncompetes between states that will and will not enforce noncompetes, and this phenomenon was consistent across all employers, including those with both local and national workforces.[7] The same study found that the use of noncompetes was only slightly higher in states that enforce noncompete contracts most zealously, by a difference of 2%.[8]

The proliferation of noncompetes, even where they are legally prohibited, has significant consequences for workers. One study, aptly titled "The Behavioral Effects of (Unenforceable) Contracts," found that noncompetes reduce employee mobility significantly in both states that do and do not enforce noncompetes.[9] Relatedly, even in states that do not enforce noncompetes,

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[2] *See, e.g.*, Matt Marx & Lee Fleming, *Non-Compete Agreements: Barriers to Entry . . . and Exit?*, *in* 12 INNOVATION POL'Y & ECON. (2012), https://www.journals.uchicago.edu/doi/full/10.1086/663155; Natarajan Balasubramanian et al., *Locked In? The Enforceability of Covenants Not to Compete and the Careers of High-Tech Workers*, U.S. CENSUS BUREAU CTR. FOR ECON. STUD. (2019), https://www2.census.gov/ces/wp/2017/CES-WP-17-09.pdf.

[3] Alexander J.S. Colvin & Heidi Shierholz, *Noncompete Agreements*, ECON. POL'Y INST. (Dec. 10, 2019), https://www.epi.org/publication/noncompete-agreements; *also see* Statement of Randolph Chen before the Committee on Labor and Workforce Development, Public Hearing on Bill 23-0494, the "Ban on Non-Compete Agreements Amendment Act of 2019," https://oag.dc.gov/release/testimony-ban-non-compete-agreements-amendment-act.

[4] Evan Starr, J.J. Prescott & Norman Bishara, *Noncompetes in the U.S. Labor Force*, 64 J.L. & ECON. 53, 58-59 (2021).

[5] *Id*.

[6] U.S. DEP'T TREASURY OFF. ECON. POL'Y, *Non-compete Contracts: Economic Effects and Policy Implications*, 4 (March 2016) https://home.treasury.gov/system/files/226/Non_Compete_Contracts_Econimic_Effects_and_Policy_Implications_MAR2016.pdf.

[7] *Supra* note 5, at 61.

[8] *Id*.

[9] J.J. Prescott, Evan Starr & Norman D. Bishara, *The Behavioral Effects of (Unenforceable) Contracts*, 36 J.L. ECON. & ORG. 633 (2020).

workers frequently point to their noncompete as an important reason for declining offers from competitors.[10]

Illegal and unenforceable contracts like noncompetes remain pervasive because employers know that many workers are poorly informed about the existence or enforceability of these terms, and many workers lack the ability to meaningfully bargain with their employer. In other words, employers can reap many of the benefits of noncompetes even where they are not enforceable. These "in terorrem" effects of illegal and unenforceable contracts on workers are well documented and studied.[11] And these results are supported by findings that many workers sign employment contracts without researching their legality: one study found that when presented with a noncompete, most workers simply read and sign it (88%), some workers do not even read it (6.7%), and a mere 17% actually consult with friends, family, or a lawyer before signing.[12] A similar study concluded that 88% of workers do not even attempt to negotiate over noncompete provisions included in their employment contracts.[13]

This research all suggests that it is not enough to render noncompete contracts illegal or unenforceable. Rather, truly protecting workers from the harms of noncompetes and other illegal or unenforceable contract terms requires eliminating these clauses from employment contracts altogether. To achieve that goal, we urge you to hold responsible the lawyers who draft these terms in employment contacts.

The requested opinion is vital to ensure that attorneys uphold their ethical obligations and do not contribute to the proliferation of unlawful provisions. Specifically, we request an opinion stating that it is misconduct for an attorney to participate in the drafting, review without objection, approval, or execution of contractual language in an employment contract that is unambiguously illegal or unenforceable. Rule 1.2, Rule 3.1, Rule 8.4, and potentially other rules of the D.C. Bar Rules of Professional Conduct provide a basis for issuing such an opinion. Rule 1.2 states that a "lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent." Rule 3.1 further states that a lawyer "shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous, which includes a good-faith argument for an extension, modification, or reversal of existing law." Further, Rule 8.4 states that it is professional misconduct for an attorney to, "[e]ngage in conduct involving dishonesty, fraud, deceit, or misrepresentation." Any of these Rules could serve as a basis for the requested opinion.[14]

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[10] *Id.*

[11] Charles A. Sullivan*, The Puzzling Persistence of Unenforceable Contract Terms*, 70 OHIO ST. L.J. 1127 (2009); *supra* note 5.

[12] *Supra* note 5, at 61.

[13] *Id*.

[14] Beyond existing legal rules of ethics, other areas of District law reflect a public policy in favor of protecting the District residents from deceptive contracts. For example, the D.C. Consumer Protection Procedures Act states that it is an unfair or deceptive trade practice to "[r]epresent that a transaction confers or involves rights, remedies, or obligations which it does not have or involve, or which are prohibited by law." D.C. Code § 28–3904(e-1).

In order to be effective, we request that any ethics rule to this effect be accompanied by concrete examples of misleading contracts. For example, the rule should illustrate that it is misleading, and therefore misconduct, for an attorney to draft a contract with an illegal or unenforceable term, even where the contract utilizes disclaimer language that purports to comply with all relevant laws. For example, such a rule should illustrate that an attorney may not draft a contract that includes a noncompete or other illegal term and then merely state that "nothing in this contract should be construed to conflict with District law," or any other boilerplate legal disclaimer. Permitting contracts like this would be misleading to workers who are in a worse position to know the law than the attorneys who draft employment contracts.

Finally, we note that the problem of illegal or unenforceable contract provisions exists outside of the employment context. For example, one recent study found that as many as 73% of rental leases contain unenforceable clauses.[15] We encourage the Committee to solicit input from advocates in other areas of law regarding whether such an opinion is necessary in other contexts.

We are grateful for the work of the Legal Ethics Committee and hope that you will consider this important request.

Sincerely,

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[15] Meirav Furth-Matzkin, *On the Surprising Use of Unenforceable and Misleading Clauses in Consumer Contracts: Evidence from the Residential Rental Market*, 9 J. LEGAL ANALYSIS 1 (2016).

* Admitted to practice only in New Jersey. Practicing in the District of Columbia under the direct supervision of Graham Lake, a member of the D.C. Bar, pursuant to D.C. Court of Appeals Rule 49(c)(8).