May 18, 2021

Hon. Phil Mendelson, Chairman
Council of the District of Columbia
1350 Pennsylvania Avenue, NW
Washington, DC 20004

Dear Chairman Mendelson:

On behalf of the District's employer community, we would like to thank you for taking the time to meet with us last month regarding Law 23-209, the "Ban on Non-Compete Agreements Amendment Act of 2020" and our collective request for limited and immediate changes to the underlying law to not only align the law with best practices and jurisdictions with similar statutes but to ensure employers can comply with existing federal and local laws and regulations; that bona fide business interests are protected; and that local employers have the flexibility to navigate conflicts of interests for their workforce when necessary.

Councilmember Silverman has informed us that she plans to introduce legislation this week on the matter, and while we have not seen the bill, we are hopeful that the proposed revisions to the legislation address the concerns of the employer community as reflected in the attached proposed revisions to L23-209. We appreciate the thoughtful dialogue that many coalition members have had with Councilmember Silverman about the legislation.

As we have communicated, this law needs to be changed expeditiously as businesses are preparing for the full return of their workforce in the near future as the City begins to rebuild after the adverse effects of the pandemic to the local economy.

First, the proposed changes allow District employers to place reasonable limitations on employees' simultaneous outside employment activities. Currently, the District is the only jurisdiction that almost entirely bans limitations on both simultaneous and subsequent

employment. No other jurisdiction imposes an outright ban restricting an employer from having workplace policies that limit the outside employment of current employees. Indeed, while California, North Dakota, and Washington State have restrictions on non-compete agreements such only applies to post-employment work. Employers in these jurisdictions -- as well as the rest of the nation -- are permitted to have workplace policies that prevents undue influence and unlawful behavior, follows occupational mandates and ethics rules and protects business interests.

The revisions we propose will not hinder worker mobility, will not prevent someone from freelancing in the gig economy or impede current employees from seeking supplemental part-time employment in retail or hospitality. Without these tailored amendments, employers with legitimate confidentiality needs, mandated professional rules of conduct, or conflicts of interest requirements cannot meet those obligations or enter into future employment contracts.

Second, the proposed changes restore employers' ability to enter into certain *reasonably* enforceable post-employment agreements with high-level key employees. The same rights employers have under the existing law to enter into post-employment agreements with medical professionals should also extend to other sensitive employees. These employees are often highly compensated and have access, or are privy to highly confidential and sensitive business information. Providing for limited exceptions to restrict certain post-employment work by a well-defined subset of these employees is appropriate and still maintains the integrity and purpose of the Act. The proposed changes continue to protect employees from *unreasonable* restrictions on their ability to pursue a subsequent position with another employer. For example, where there is no reasonable expectation that an employee would be compensated at or above $150,000 or have access to competitive or proprietary information beneficial to a subsequent employer, the employee under the proposal would be free to accept whatever post-employment work they choose, including work with direct competitors.

Third, the proposal makes vital technical and critical clarifying changes to the enacted law by making plain that it only applies to employees who spend 50% or more of their time working in the District, this excluding employees who may travel in and out of the City but do not engage in routine work here. It also clarifies that otherwise lawful provisions that restrict the *use of or access of* employer information or the *solicitation of* an employer's clients and employees is excluded. Thus aligning the language in the enacted law's definitions to the Council's intent and bringing explicit clarity to the District's workforce and employer community.

As employers are considering, and in some cases, reevaluating their virtual policies and are realizing L23-209 is problematic in its broadness. As shared previously, the statute is far more expansive than needed to achieve its stated goals and it is important that the issues identified above are addressed and District businesses have ample time to design, disseminate, and explain policies to workers, before the law goes into effect next fiscal year. Again, thank you for your continued support of our local job creators and we appreciate your support on this issue.

Sincerely,

Angela Franco, President & CEO
DC Chamber of Commerce

Peggy Jeffers, Executive Vice President
Apartment & Office Building Association of Metropolitan Washington

Andrew Flagel, President & CEO
Consortium of Universities of the Washington Metropolitan Area

Lisa María Mallory, President & CEO
District of Columbia Building Industry Association

Anthony Williams, Executive Director & CEO
Federal City Council

Jack McDougle, CEO
Greater Washington Board of Trade

Nicole Quiroga, President & CEO
Greater Washington Hispanic Chamber of Commerce

Corey Arnez Griffin, Chairman of the Board
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Lisa Reynolds, Executive Manager
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Cc: Legislative Staff