HOUSE BILL REPORT

2ESSB 5526

As Passed House - Amended
March 3, 1992

Title: An act relating to noncompetition agreements.

Brief Description: Governing employee noncompetition clauses.

Sponsor(s): By Senate Committee on Commerce & Labor (originally sponsored by Senators Bauer, Newhouse, Moore, Nelson and Johnson).

Brief History:
Reported by House Committee on:
Commerce & Labor, February 25, 1992, DPA;
Passed House, March 3, 1992, 96-0.

HOUSE COMMITTEE ON COMMERCE & LABOR

Majority Report: *Do pass as amended.* Signed by 11 members: Representatives Heavey, Chair; G. Cole, Vice Chair; Fuhrman, Ranking Minority Member; Lisk, Assistant Ranking Minority Member; Franklin; Jones; R. King; O'Brien; Prentice; Vance; and Wilson.

Staff: Chris Cordes (786-7117).

Background: Agreements that impose restraints on trade are generally disfavored in Washington. However, Washington courts have upheld reasonable agreements between employers and employees that restrict the employee's ability to compete with the employer after leaving employment. Restrictions on competition may include prohibitions against providing services to the employer's client for a certain period of time or not soliciting work from the employer's clients or in a specified geographical area during the time period.

To determine the reasonableness of these agreements, the courts consider (1) whether restricting the employee's activities is necessary for the protection of the employer's business; (2) whether the restrictions are greater than necessary to secure the employer's business or good will; and (3) whether the loss of the employee's services to the public is great enough to warrant nonenforcement of the agreement.

Summary of Bill: Employee noncompetition agreements entered into after July 1, 1992, are unenforceable unless certain conditions are met. An employee noncompetition agreement is an agreement, written or oral, express or implied, in which the employee agrees not to compete with the employer in providing products or services after termination of employment.

To be enforceable, the agreement must: (1) either be bargained for and agreed to as a condition of initial employment of the employee by the employer, or be bargained for during employment, with the employer providing additional consideration to the employee for entering into the agreement; and (2) be reasonable under all the circumstances existing at the time the agreement was entered into. Continued employment by itself is not additional consideration.

Whether an agreement is reasonable under all the circumstances is determined by giving consideration to at least: (1) whether the agreement is necessary for the protection of the business or goodwill of the employer; (2) whether the agreement imposes upon the employee no greater restraint than is reasonably necessary to secure the employer's business or goodwill; and (3) whether the degree of injury to the public from the loss of the service and skill of the employee is not so great that it warrants nonenforcement of the agreement.

The act does not restrict the right of a person to protect trade secrets or other proprietary information by lawful means. The act is intended to be additional to other remedies and is to be liberally construed.

Fiscal Note: Not requested.

Effective Date: The bill takes effect on July 1, 1992.

Testimony For: The original bill was unclear and ambiguous about the relationship to case law in this area. The amendment makes technical revisions and provides more guidance about the use of noncompetition agreements. The probable result will be that employers will use them sparingly and cautiously, and the employee should be able to protect him or herself from unreasonable agreements. The question should be whether the agreement was freely negotiated or whether it was coercive. Case law should not be changed by this amendment, except that there is an affirmative duty to bargain for an agreement as a condition of initial employment or as a later agreement. If an employer requests an employee to sign an agreement on the first day of work when it was not bargained for during

hiring, the agreement would not be valid as part of the conditions of initial employment.

Testimony Against: None.

Witnesses: Representative Marlin Appelwick.