HOUSE BILL REPORT
HB 2931

As Reported by House Committee On:
Labor & Workplace Standards

Title: An act relating to noncompetition agreements.

Brief Description: Restricting the use of noncompetition agreements.

Sponsors: Representatives Stanford and Ormsby.

Brief History:
Committee Activity:
Labor & Workplace Standards: 2/1/16, 2/2/16 [DP].

Brief Summary of Bill

- Provides that courts may not reform noncompetition agreements.
- Makes void noncompetition agreements with temporary or seasonal employees, with independent contractors, or for employees terminated without just cause or laid off.
- Creates a rebuttable presumption that a noncompetition agreement for more than one year or for employees who are not executives is unreasonable and void.

HOUSE COMMITTEE ON LABOR & WORKPLACE STANDARDS

Majority Report: Do pass. Signed by 4 members: Representatives Sells, Chair; Gregerson, Vice Chair; Moeller and Ormsby.

Minority Report: Do not pass. Signed by 1 member: Representative Manweller, Ranking Minority Member.

Minority Report: Without recommendation. Signed by 1 member: Representative McCabe.

Staff: Joan Elgee (786-7106).

This analysis was prepared by non-partisan legislative staff for the use of legislative members in their deliberations. This analysis is not a part of the legislation nor does it constitute a statement of legislative intent.

Background:

Washington disfavors restraints on trade. However, restraints are permitted in some circumstances. A noncompetition agreement, one type of restraint, is an agreement between parties where one party promises not to compete with the other party for a specific period of time, and sometimes within a specified geographic area. Statutory law addresses noncompetition agreements only in the broadcasting industry.

Under the common law, Washington courts will enforce a noncompetition agreement if the agreement is reasonable. Whether an agreement is reasonable involves consideration of three factors:

1. whether the restraint is necessary for the protection of the business or goodwill of the employer;
2. whether the restraint imposes on the employee any greater restraint than is reasonably necessary to secure the employer's business or goodwill; and
3. whether the degree of injury to the public is such loss of the service and skill of the employee as to warrant non-enforcement of the agreement.

In evaluating the reasonableness of an agreement, the courts examine the time and geographic scope of the restraint. If a court finds that an agreement is unreasonable, the court may reform the terms of the agreement.

Summary of Bill:

A court may not reform a noncompetition agreement. Unreasonable noncompetition agreements are void and unenforceable in their entirety.

Noncompetition agreements between employers and employees are unreasonable and void and unenforceable if the employee is:

- a temporary or seasonal employee; or
- terminated without just cause or laid off.

Noncompetition agreements with independent contractors are also void and unenforceable.

For other types of agreements, a rebuttable presumption is established that the agreement is unreasonable. These are agreements:

- that restrict competition for more than one year after termination of employment; or
- for employees who are not executives.

The provisions do not restrict the right of an employer or entity engaging an independent contractor to enter a confidentiality or non-solicitation agreement.

A "noncompetition agreement" is an agreement between an employer and an employee, or between a hiring entity and an independent contractor, that is specifically designed to impede the ability of the employee or independent contractor, respectively, to compete with the employer or hiring entity upon termination of the relationship.

An "executive employee" is an employee:

- whose primary duty is managing the enterprise or a department or subdivision;
- who customarily and regularly directs the work of two or more employees, and who has hiring and firing authority, or whose suggestions are given particular weight;
- who customarily and regularly exercises discretionary powers; and
- who does not devote more than certain specified amounts of time to activities which are not directly related to executive work.

Definitions are also provided for "employee," "employer," "confidentiality agreement," and "non-solicitation agreement."

The provisions apply to agreements entered into on or after the effective date.

Appropriation: None.

Fiscal Note: Not requested.

Effective Date: The bill takes effect 90 days after adjournment of the session in which the bill is passed.

Staff Summary of Public Testimony:

(In support) Basic ground rules are needed around noncompetes to bring relief to workers while protecting businesses. This bill is not about nondisclosure. Workers should be free to leverage their skills. Market power for employees only works if employees can leave. This bill will curb the abuses of workers. This bill is flexible enough for all industries. It is hard to see why more than a year of restriction would be needed. Stakeholder work continues.

Noncompetes affect many workers, including doctors, musicians, warehouse workers, and grocery workers. Musicians have to deal with blackout dates, which sometimes extend into Oregon and Canada. The gigs may be low paying. These clauses inhibit musicians, who may be young immigrants, from developing their art and also harm the economy as a whole. A technology worker had to sign an agreement with a temporary agency. Why should a temporary worker not be able to work for a different temporary company? A physician had a noncompete for three counties for 18 months and was out of work for 6 months. Litigation was necessary. Another person felt harassed, but could not leave because of a noncompete. Grocery workers lost seniority, benefits, and hours because of a noncompete.

Saying that courts cannot reform agreements will be a big change. Current law encourages businesses to write noncompetes as broad as possible. Workers don't have the market power to negotiate, resulting in adhesion contracts. If the court reforms the agreement, the worker may end up paying the employer's and their own legal costs because the worker is considered not to have prevailed. It can cost $30,000 to $200,000 in legal fees to challenge a noncompete.

(Opposed) Noncompetes are not an issue in the technology industry and this bill could have a ripple effect on the industry. Current law works. The exception for those who are not executives is upside down because engineers are the intellectual property. What people work on is more important than why they were terminated.

Noncompetes are used to protect investments in physicians and in hospital executives. Agreements for these people are negotiated. The definition of executive does not work for these people. The bill may impact the availability of physicians to serve communities. A definition of "just cause" is needed. The bill needs clarity about nondisclosure for independent contractors. Case law addressing noncompetes is sufficient. Sometimes two years is needed. This bill could affect a huge number of businesses. An employee solicited business away from the former employer.

(Other) There is concern about sales and property managers. Flexibility is needed on duration and the definition of executive.

Persons Testifying: (In support) Representative Stanford, prime sponsor; Jesse Wing, Employment Lawyers Association and Washington State Association for Justice; Dan Kalish, Washington Employment Lawyers Association; Eric Gonzalez Alfaro, Washington State Labor Council; Nate Omdal, American Federation of Musicians 76-493; Lapreia Allen, Teamsters Local 38; Kerry Biermann; and Kristin Spear.

(Opposed) Michael Schurtzler, Washington Technology Industry Association; Lisa Thatcher, Washington State Hospital Association; Gary Smith, Independent Business Association; and Robert Battles, Association of Washington Business.

(Other) Carolyn Logue, Washington Food Industry Association.

Persons Signed In To Testify But Not Testifying: None.