
Labor & Workplace Standards Committee

HB 2903

Brief Description: Concerning work restrictions.

Sponsors: Representatives Stanford, Valdez, Gregerson, Hudgins and Pollet.

Brief Summary of Bill

- Makes noncompetition agreements unenforceable for employees earning less than five times the average weekly wage or who are terminated during a probationary period without just cause; requires "garden leave" for a noncompetition agreement to be enforceable; and places other limits on employment agreements.
- Prohibits employers from restricting employees working fewer than 40 hours per week or earning less than 200 percent of the applicable minimum wage from having other jobs.
- Makes violations Consumer Protection Act violations.

Hearing Date: 1/25/18

Staff: Joan Elgee (786-7106).

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:

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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 general, if a noncompetition agreement is agreed to after an employee is hired, the agreement is enforceable only if the employer gives the employee independent consideration, such as a raise or a promotion. 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.

Under the Consumer Protection Act (CPA), unfair or deceptive acts or practices in trade or commerce are unlawful. The CPA provides that any person injured in his or her business or property through such practices may bring a civil action to recover actual damages sustained and costs of the suit, including reasonable attorneys' fees. Treble damages may also be awarded in the court's discretion, provided the damage award does not exceed \$25,000. The Attorney General may bring an action under the CPA to restrain and prevent unfair and deceptive acts and practices.

Summary of Bill:

Certain noncompetition agreements are declared to be unreasonable, and void and unenforceable:

- if the annual compensation, excluding benefits is less than five times the average weekly wage at the time of entering the contract. The current average weekly wage is \$1,133; or
- the employee is terminated during a probationary period without just cause, including a reduction in force.

In addition, a noncompetition agreement between an entity engaging an independent contractor and an independent contractor is unenforceable.

A rebuttable presumption is established that a noncompetition agreement is unreasonable and void and unenforceable beyond a one-year duration. The presumption may be rebutted with clear and convincing evidence that the duration beyond one year is reasonably necessary to protect business or goodwill.

Certain requirements must be met for a noncompetition agreement to be enforceable.

- The agreement must have a "garden leave" clause under which the employer agrees to pay the employee during the restricted period. The wages must be based on the average of wages reported to the Employment Security Department for the four quarters prior to the restricted period, prorated to the employer's pay period. If the employee worked for less than four complete quarters, the average must be based on the completed quarters. In addition, an employer may not restrict an employee from employment during the garden leave, if the employment is consistent with a reasonable noncompetition agreement.
- The employer must disclose the terms of the agreement in writing to the prospective employee no later than the time of the acceptance of the employment offer, or, if the

agreement is entered into after employment commences, the employer must provide independent consideration.

A provision in a contract or agreement signed by an employee who primarily resides and works in Washington is unenforceable if it requires the employee to adjudicate a noncompetition agreement outside the state. A provision in a contract or agreement signed by an employee who primarily resides and works in the state is void and enforceable if it deprives the employee of the substantive protection of Washington law.

A noncompetition agreement between a performer and a performance space, or a third party scheduling the performer for a performance space, may not restrict the performer from performing in a geographic region for a period longer than three days.

A "noncompetition agreement" includes every written or oral covenant, agreement, or contract by which an employee is prohibited or restrained from engaging in a lawful profession, trade, or business of any kind. Certain agreements are declared not to be noncompetition agreements, including non-solicitation and confidentiality agreements. A "non-solicitation agreement" is an agreement that prohibits solicitation by an employee of any employee of the employer to leave the employer or of any customer to cease doing business with the employer.

Except as provided, the provisions do not revoke, modify or impede the development of the common law. The noncompetition provisions apply to agreement entered into on or after the effective date.

An employer may not restrict an employee working fewer than 40 hours per week or earning less than 200 percent of the applicable minimum wage (\$23.00 per hour based on the state minimum wage for 2018) from having an additional job, supplementing their income by working for another employer, working as an independent contractor, or being self-employed.

Any enforcement or attempted enforcement of a noncompetition agreement that violates the provisions or is overly broad or only partially unenforceable, or a violation of prohibition on restricting workers in part-time jobs or earning less than 200 percent of the minimum wage from other employment is declared to be an unfair or deceptive act and an unfair method of competition for purposes of the Consumer Protection Act.

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.