HOUSE BILL REPORT
HB 2903

As Reported by House Committee On:
Labor & Workplace Standards

Title: An act relating to protecting workers from work restrictions.

Brief Description: Concerning work restrictions.

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

Brief History:
Committee Activity:
Labor & Workplace Standards: 1/25/18, 2/1/18 [DP].

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.
- Provides that enforcement of certain noncompetition agreements or a violation of the other job provision is a violation of the Consumer Protection Act..

HOUSE COMMITTEE ON LABOR & WORKPLACE STANDARDS

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

Minority Report: Do not pass. Signed by 2 members: Representatives McCabe, Ranking Minority Member; Manweller.

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 nonenforcement 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 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 unenforceable 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 nonsolicitation and confidentiality agreements. A "nonsolicitation 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 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 contains an emergency clause and takes effect immediately.

Staff Summary of Public Testimony:

(In support) Economic prosperity depends on employee mobility and the ability to seek a better job. Noncompetition agreements (noncompetes) make workers sit out of the labor force and lose benefits. The use of noncompetes is spreading from high level executives to low wage workers, musicians, and many others. Now, approximately 20 percent of the workforce is subject to a noncompete. The terms may be very restrictive and employees may be terminated when they challenge a noncompete. The bill does not affect nondisclosure or non-solicitation agreements. The bill will prevent workers and families from going through hardship stemming from noncompetes. Workers were harmed by noncompetes required because of a grocery store merger. Workers do not have money for attorneys and risk having to pay the employers' fees. New businesses are also affected. Musicians may be subject to a noncompete for 60 days for the entire state for a short event. The bill has objective standards which will reduce legal expenses. Other states have restricted noncompetes. Noncompetes should be illegal.

(Other) The bill destroys protections that make the state attractive to investors. Damage can be done even though no intellectual property is taken.

(Opposed) This bill is very different from last year's bill. The notice, low-wage worker, and out-of-state provisions are supported. Other provisions need work. The restrictions make noncompetes extinct. Many in the technology industry could not be under a noncompete. Garden leave is severance pay. Clear and convincing is a very high standard. A Consumer Protection Act violation is a huge penalty. The independent contractor provision is a concern. The bill does not address part-time workers who make high wages. Employers are comfortable sharing knowledge if it can be protected. The bill would destroy these protections, which harms customers.

Persons Testifying: (In support) Representative Stanford, prime sponsor; Michael Knaack; Lawrence Cock; Nate Omdall, American Federation of Musicians; Michael Schendell, WashTech/Communication Workers of America; Debbie Gath, Teamsters Local 38; Gayle Mitchell, Wendy Garrett-Drake; and David Barnes.

(Other) Michael Schutzler, Washington Technology Industry Association.

(Opposed) Lisa Thatcher, Washington State Hospital Association; Mike Budig, Evergreen Tree Care; and Bob Battles, American Association of Washington Business.

Persons Signed In To Testify But Not Testifying: None.