SENATE BILL REPORT
SB 6522

As of January 26, 2018

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

Brief Description: Limiting noncompetition agreements.

Sponsors: Senators Liias and Fain.

Brief History:
Committee Activity: Labor & Commerce: 1/25/18.

Brief Summary of Bill

- Establishes the conditions in which a noncompetition agreement is enforceable and makes certain types of noncompetition agreements void and unenforceable.
- Creates a presumption that an agreement not to compete for one year or longer is void and unenforceable.
- Provides that attempts to enforce an unenforceable or partially enforceable noncompetition agreement is a violation of the Consumer Protection Act.

SENATE COMMITTEE ON LABOR & COMMERCE

Staff: Jarrett Sacks (786-7448)

Background: Noncompetition agreements are provisions in an employment contract that impose post-employment restrictions on an employee's ability to work within a specific geographic area or in a particular industry for a specific period of time. Statutory law only addresses noncompetition agreements in the broadcasting industry. However, under common law, courts will enforce reasonable noncompetition agreements, taking into consideration three factors:

- whether the restraint is necessary for the protection of the business;
- whether the restraint imposes on the employee any greater restraint than reasonably necessary to secure the employer's business; and
- whether the loss of the employee's services or skills injures the public to such a degree that the agreement should not be enforced.

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.

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

Summary of Bill: For a noncompetition agreement to be enforceable:

- the employer must disclose the terms in writing to a prospective employee no later than the acceptance of an offer of employment, or, if after the commencement of employment, provide independent consideration for the agreement; and
- the agreement must be supported by a garden leave clause, where the employer agrees to continue to pay the employee's wages during the restricted period.

There is a rebuttable presumption that a noncompetition agreement is void and unenforceable for any time beyond one year in duration. A party to the agreement may rebut the presumption with clear and convincing evidence that the duration beyond one year is reasonably necessary to protect the business or goodwill of the party.

A non-competition agreement is void and unenforceable if:

- the annual compensation, excluding benefits, of the employee is less than five times the average weekly wage calculated by the Employment Security Department;
- the employee is terminated during a probationary period or without just cause, including due to a reduction in force;
- the agreement requires an employee who resides and works in Washington to adjudicate the noncompetition agreement outside of Washington;
- the agreement deprives an employee who resides and works in Washington the substantive protection of Washington law; or
- the agreement restrains an independent contractor.

An employer may not restrain an employee working fewer than 40 hours per week or earning less than 200 percent of the applicable state or local minimum wage 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 of the bill, is overly broad, or only partially enforceable is a violation of the Consumer Protection Act.

A noncompetition agreement between a performer and a performance space or a third party scheduler 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. The definition of noncompetition agreement does not include:

- a non-solicitation agreement;
- a confidentiality agreement;
- an agreement prohibiting the use or disclosure of trade secrets; or
- an agreement entered into by an employee with an ownership interest in a limited liability company or a partnership.

Appropriation: None.

Fiscal Note: Requested on January 22, 2018.

Creates Committee/Commission/Task Force that includes Legislative members: No.

Effective Date: The bill contains an emergency clause and takes effect immediately.

Staff Summary of Public Testimony: PRO: Almost 20 percent of the U.S. population is subject to a noncompete clause. Noncompete clauses hurt competition and innovation. There are other tools and laws businesses can use instead of noncompete agreements. This bill impacts all sectors of the economy and all income brackets. Many times, noncompete clauses are used on low wage workers for no reason and the agreements are non-negotiable. Current law forces people to litigate to prove a noncompete clause is unreasonable. Noncompete clauses force workers to leave the state. Many people subject to noncompete clauses do not have the money to litigate, which is a barrier for workers to assert their rights. Noncompete clauses are used unfairly to blackout musicians for venues that are hundreds of miles away. We have seen examples of unfair noncompete clauses stifling workers at Jimmy Johns and at grocery stores. Temp agencies use noncompete clauses to prevent employees from finding permanent jobs.

CON: Banning noncompete clauses hurts innovation and prevents startups from forming in Washington. There are ways to get around trade secret laws that only noncompete clauses can prevent. The current law works just fine and is a reason why Washington is a leader in innovation. The bill that passed the House is better and is a result of compromise. This bill is a step backwards. The one year presumption is arbitrary. Noncompete clauses protect a business that invests money in training new employees. The garden clause in this bill is effectively a severance and requires employers to pay even if an employee voluntarily leaves. The bill creates a huge penalty for valid disagreements.

Persons Testifying: PRO: Senator Marko Liias, Prime Sponsor; Jesse Wing, Washington Employment Lawyers Association; Michael Schendell, WashTech/Communication Workers of America; Nate Omdall, American Federation of Musicians; David Barnes, UFCW 21 member; Debbie Gath, Teamsters Local 38; Gayle Mitchell, Teamsters 38 member; Wendy Garrett-Drake, Teamsters 38 member; Senator Joe Fain.

CON: Lisa Thatcher, Washington State Hospital Association; Mike Budig, Evergreen Tree Care; Bob Battles, Association of Washington Business; Thomas Walters, citizen; Marc Miller, The PolyClinic; Amber Carter, The Vancouver Clinic.

OTHER: Michael Schutzler, CEO, Washington Technology Industry Association.

Persons Signed In To Testify But Not Testifying: No one.