
Labor & Workplace Standards Committee

HB 1450

Brief Description: Concerning restraints on persons engaging in lawful professions, trades, or businesses.

Sponsors: Representatives Stanford, Kloba, Bergquist, Fitzgibbon, Sells, Ramos and Ormsby.

Brief Summary of Bill

- Makes noncompetition covenants unenforceable unless the employee earns more than three times the annual average wage.
- Creates a presumption that a noncompetition covenant longer than 18 months is unreasonable and unenforceable.
- Establishes other provisions relating to competition.
- Creates a Consumer Protection Act violation and other remedies.

Hearing Date: 1/29/19

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. Reasonableness involves consideration of three factors, which are whether the:

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1. restraint is necessary for the protection of the business or goodwill of the employer;
2. restraint imposes on the employee any greater restraint than is reasonably necessary to secure the employer's business or goodwill; and
3. 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 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.

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.

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. The court may award treble damages of up to \$25,000 in the court's discretion. The Attorney General may bring an action under the CPA to restrain and prevent unfair and deceptive acts and practices.

Summary of Bill:

Restrictions on Noncompetition Covenants.

Certain restrictions apply to noncompetition covenants (covenant) with employees. A covenant is void and unenforceable unless the employer discloses the terms in writing to a prospective employee. If the covenant becomes enforceable only at a later date due to changes in the employee's compensation, the employer must specifically disclose that the covenant may be enforceable in the future. If the covenant is entered into after employment commences, the employer must provide independent consideration for the covenant.

A covenant is unenforceable unless the earnings from the party seeking enforcement exceed three times the average annual wage (\$185,661 under the current annual average wage). In addition, if an employee is terminated as the result of a layoff, the covenant is void unless enforcement includes compensation equivalent to the employee's base salary at the time of termination for the period of enforcement minus compensation earned through subsequent employment, a so-called "garden leave" clause.

A presumption is created that any covenant with a duration longer than 18 months is unreasonable and unenforceable. To rebut the presumption, a party must prove to a court or arbitrator by clear and convincing evidence that a longer duration is necessary to protect the party's business or goodwill.

Covenants with persons other than employees are also addressed. A covenant with an independent contractor is unenforceable unless the contractor's earnings from the party seeking enforcement exceed four times the average annual wage (\$247,548 under the current annual average wage). A covenant between a performer and a performance space, or a third party scheduling the performer for a performance space, may not exceed three calendar days.

A provision in a covenant signed by an employee or independent contractor who is Washington-based is unenforceable if it requires the employee to adjudicate a noncompetition agreement outside the state and to the extent it deprives the employee of the substantive protection of Washington law.

The state, including higher education institutions, and local governments may not impose covenants on employees or independent contractors.

Other Limits on Employment Provisions.

A franchisor may not restrict, restrain, or prohibit a franchisee from soliciting or hiring an employee of a franchisee of the same franchisor or any employee of the franchisor.

An employer may not restrict, restrain, or prohibit an employee earning less than one and one-half times the average annual wage (\$92,830 under the current annual average wage) from having an additional job, supplementing their income by working for another employer, working as an independent contractor, or being self-employed.

Remedies.

A violation of the provisions is a CPA violation.

If a court or arbitrator determines that a covenant violates the provisions, or if the court reforms or only partially enforces a covenant, the party seeking enforcement must pay the aggrieved person the greater of the actual damages or \$5,000, plus reasonable attorneys' fees, expenses, and costs.

Definitions.

A "noncompetition covenant" includes every written or oral agreement by which an employee or independent contractor 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 or reduce the extent to which it is doing business with the employer.

"Earnings" are the unconditionally promised monetary compensation and educational debt repayment plus the value of publicly traded stock awarded. The method for valuing stock is specified.

Other.

Except as provided, the provisions do not revoke, modify, or impede the development of the common law. The provisions displace conflicting tort, restitutionary, contract, and any other laws relating to liability for competition by employees or independent contractors and their employers or principals.

The act takes effect January 1, 2020, and applies to all proceedings commenced on or after the effective date, regardless of when the cause of action arose. Otherwise, the law applies prospectively.

The provisions must be construed liberally.

Appropriation: None.

Fiscal Note: Not requested.

Effective Date: The bill takes effect on January 1, 2020.