HOUSE BILL REPORT
ESHB 1450

As Passed Legislature

Title: An act relating to restraints, including noncompetition covenants, on persons engaging in lawful professions, trades, or businesses.

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

Sponsors: House Committee on Labor & Workplace Standards (originally sponsored by Representatives Stanford, Kloba, Bergquist, Fitzgibbon, Sells, Ramos and Ormsby).

Brief History:
Committee Activity:
Labor & Workplace Standards: 1/29/19, 2/21/19 [DPS].
Floor Activity:
Passed House: 3/12/19, 55-41.
Passed Senate: 4/17/19, 29-19.
Passed Legislature.

Brief Summary of Engrossed Substitute Bill

- Makes noncompetition covenants unenforceable unless an employee earns more than $100,000 per year.
- Creates a presumption that a noncompetition covenant longer than 18 months is unreasonable and unenforceable.
- Establishes other provisions relating to competition and creates remedies.

HOUSE COMMITTEE ON LABOR & WORKPLACE STANDARDS

Majority Report: The substitute bill be substituted therefor and the substitute bill do pass. Signed by 4 members: Representatives Sells, Chair; Chapman, Vice Chair; Gregerson and Ormsby.

Minority Report: Do not pass. Signed by 3 members: Representatives Mosbrucker, Ranking Minority Member; Chandler, Assistant Ranking Minority Member; Hoff.

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.

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:

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.

Summary of Engrossed Substitute Bill:

Restrictions on Noncompetition Covenants.
Certain restrictions apply to noncompetition covenants (covenant or noncompete) 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 $100,000. 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 $250,000 per year. The dollar thresholds for enforceable covenants with employees and with independent contractors are adjusted annually by the Consumer Price Index. 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 an 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.

Other Limits on Employment.
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 twice the state minimum wage from having an additional job, supplementing their income by working for another employer, working as an independent contractor, or being self-employed. This provision does not apply in specified circumstances, including if the additional services raise safety issues. In addition, the obligations of an employee to an employer under existing law are not altered.

Remedies.
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. An aggrieved person who is a party to the covenant may bring a cause of action for these remedies, and the Attorney General (AG), on behalf of an employee or employees, may pursue any and all relief.

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" is the compensation reflected on box one of the Internal Revenue Serve Form W-2 for employees and Form 1099 for independent contractors.

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 with 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.

Staff Summary of Public Testimony:

(In support) With very few exceptions, a worker should be able to leave a job for a new job–sitting out of the workforce is hard. This bill protects against against overbroad and widespread use of noncompetes. Noncompetes are part of the standard paperwork provided to new staff, with no explanation. Security guards, grocery workers, camp counselors, and fast food workers are subject to noncompetes. The agreements harm workers who are prevented from taking second jobs or even changing jobs. Some workers gain skills but then cannot use those skills. Thirty million workers in the United States are under noncompetes. New businesses also have to deal with noncompetes, such as defending their hires. Blackout dates harm musicians trying to make a living.

Courts have applied contract law, which is biased toward enforcement. There is no downside to drafting an overly broad agreement. Several states have enacted recent reforms. Noncompetes are a way to limit wages rather than to protect employers. Workers are scared by noncompetes and it is expensive and risky to challenge them. A judge might rewrite the noncompete and a worker may still have to pay the employer's attorney's fees. The bill gives clear lines that are not in the law now.

It is absurd for an independent contractor to sign a noncompete. The thresholds are appropriate. The bill will give workers more opportunities. Innovation is important to this state. There are other ways to protect intellectual property. A noncompete is not to recoup money invested in a worker. The moonlighting provision does not prevent protecting against conflicts of interest or assuring workers are too tired to work safely. The provision on agreements that come into effect later needs to be changed. Stakeholder work continues.

(Opposed) There are ongoing conversations with proponents. The biggest issue is the $180,000 salary threshold to have a noncompete; this essentially eliminates noncompetes. In technology, a noncompete may be needed for a lower wage job. Investment in a physician is substantial with debt repayment and other investments. The threshold would not allow hospitals to protect their investment in physicians and other medical professionals. A hospital may also have an agreement that a health care provider may not drop a shift to earn time and a half at another hospital. It is hard to hire physicians in rural areas. Public hospital districts are at a disadvantage because of the section prohibiting noncompetes for

governments. The moonlighting provision is in conflict with ethics provisions for public employees.

There is an issue with timing as to when the compensation is determined. An employer could have to pay penalties even when the employer prevailed. The moonlighting provision would prevent an employer from making sure a worker was not fatigued and assuring that there are no conflicts of interest.

Persons Testifying: (In support) Representative Stanford, prime sponsor; Samantha Grad, United Food and Commercial Workers, Local 21; Lawrence Cock; Nate Omdal; Joe Kendo, Washington State Labor Council; Joseph Williams, Department of Commerce and Office of the Governor; and Jesse Wing, Washington Employment Lawyers Association.

(Opposed) Bob Battles, Association of Washington Business; Tim O'Connell, Stoel Rives; Jaclyn Greenberg, Washington State Hospital Association; Julie Weisenburg, Samaritan Healthcare; and Ian Goodhew, University of Washington.

Persons Signed In To Testify But Not Testifying: None.