SENATE BILL REPORT
ESHB 1450

As of March 29, 2019

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: Passed House: 3/12/19, 55-41.
Committee Activity: Labor & Commerce: 3/28/19.

Brief Summary of Bill

- Voids noncompetition covenants against employees and independent contractors unless certain provisions are met.
- Presumes covenants exceeding 18 months are unreasonable and unenforceable.
- Prevents franchisors from restricting franchisees from hiring other franchisees' employees or the franchisor's employees.
- Prohibits employers from restricting certain employees from having other jobs or work, with limited exceptions.
- Allows a court to order a violator to pay the greater of actual damages or $5,000, attorney's fees, and costs.

SENATE COMMITTEE ON LABOR & COMMERCE

Staff: Susan Jones (786-7404)

Background: Noncompetition agreements or covenants are generally provisions in an employment contract that impose post-employment restrictions on an employee. Typically, a noncompetition agreement restricts a person's ability to work within a specific geographic area, or industry, for a specific period of time.

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.

Courts in Washington State enforce reasonable noncompetition agreements, taking into consideration:

- whether the agreement is necessary to protect a legitimate business interest, the employer's business, or goodwill;
- whether the agreement is any broader than reasonably necessary to secure the employer's business or goodwill; and
- whether the loss of the employee's services or skills injures the public to such a degree the agreement should not be enforced, such as violations to public policy.

Under Washington State law, the court has power to modify an overly broad covenant to make it reasonable.

Washington State law provides that noncompetition agreements are void with respect to certain broadcast industry employees.

Summary of Bill: Noncompetition covenants include written and oral covenants, agreements, or contracts where an employee or independent contractor is prohibited or restrained from engaging in a lawful profession, trade, or business. They do not include nonsolicitation or confidentiality agreements, agreements related to trade secrets or inventions, and certain agreements related to the sale of a business or to franchises.

Employee noncompetition covenants are void unless:

- the employer discloses the covenant terms no later than the employment offer's acceptance, and if enforceable later due to changes in compensation, only if specific disclosures are made;
- there is independent consideration for a covenant entered into after the employment starts;
- the employee's annualized earnings exceed $100,000, adjusted for inflation; and
- for a laid off employee, subject to enforcement of a covenant, the employee is paid certain compensation during the enforcement period.

Noncompetition covenants exceeding 18 months after employment are presumed unreasonable and unenforceable. The presumption may be rebutted by clear and convincing evidence that a longer duration is necessary to protect the party's business or goodwill.

A noncompetition covenant against an independent contractor is void unless the contractor's earnings from the other party exceed $250,000, adjusted for inflation. Covenants related to performers generally may not exceed three calendar days.

For Washington based employees and independent contractors, covenants are void if they require adjudication outside of Washington or deprive the person of the protections under the act.

Franchisors may not restrict franchisees from soliciting or hiring other franchisees' employees or the franchisor's employees.

No employer may restrict an employee earning less than twice the applicable state minimum hourly wage from having other jobs or work, except when the additional work raises safety issues for the employee, coworkers, or the public, or interferes with the reasonable and normal scheduling expectations of the employer. These provisions do not alter the employee's legal obligations to an employer, including the common law duty of loyalty and conflicts of interest laws.

Upon a violation, the attorney general may pursue any and all relief. A person aggrieved by a noncompetition covenant may bring a cause of action for relief. A court may order a violator to pay the aggrieved party the greater of actual damages or $5,000, in addition to attorneys' fees and costs. A cause of action may not be brought regarding a covenant signed before the effective date if the covenant is not being enforced.

Earnings means: (1) for an employee, the compensation on box one of the employee's form W-2 that is paid to an employee over the prior year, or portion thereof for which the employee was employed, annualized and calculated as of the earlier of the date enforcement of the covenant is sought or the date of separation from employment; (2) for an independent contractor, payments reported on internal revenue service form 1099-MISC.

Appropriation: None.

Fiscal Note: Not requested.

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

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

Staff Summary of Public Testimony: PRO: There are a lot of reasons people might want to change jobs, for example, to pursue a different career or advance their career, or because of a move or family. There are other available tools such as nondisclosure or nonsolictation agreements to protect legitimate business interests without extreme noncompetes. The bill brings clarity for employees. The bill makes employers rethink the language in noncompetes and consider what is really needed to protect business interests. They are often overly broad and the employers just wait to see if a court rewrites the noncompete. Employers should make them reasonable to begin with.

Washington's current noncompete law is from a landscape that no longer exists where it was harder to protect trade secrets. There is no longer a compelling case to bind people to employers. California does not allow noncompetes.

In working on the bill, we realized that a lot of people were being restricted, including fast food, retail, and grocery workers as well as the tech industry. A lot of noncompetes have been overly broad for years and years. Some employers may be downloading forms from the Internet. It is expensive, time consuming, and hard for the worker to challenge noncompetes. Some agreements also restricted people taking a second job to fill their hours. In the four years working on this bill, there have been incredible strides. Many people feel there should be no noncompetes or there should be different dollar amounts. This is an important step forward. The bill makes it predictable for the worker.

OTHER: This has been a long process. We signed in as other because there are still some concerns. We found definition for wages that includes bonuses and other things in real life. We are still not happy with dollar amounts. Enforcement is the issue. You have a striker amendment that allows the court or arbitrator to decide if a change is substantial enough to give an award. This allows the court discretion. We appreciate all the work that was done.

Persons Testifying: PRO: Representative Derek Stanford, Prime Sponsor; Rebecca Johnson, Washington State Association for Justice; Leslie Wolff, Washington Department of Commerce.

OTHER: Bob Battles, AWB.

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