

SENATE BILL REPORT

SSB 6081

As Passed Senate, February 17, 2020

Title: An act relating to the calculation of compensation of an employee of a medical school and an affiliated faculty group practice for purposes of a noncompetition agreement.

Brief Description: Concerning the calculation of compensation of an employee of a medical school and an affiliated faculty group practice for purposes of a noncompetition agreement.

Sponsors: Senate Committee on Labor & Commerce (originally sponsored by Senators Liias, King, Stanford, Becker, Keiser, Braun, Wellman and Conway).

Brief History:

Committee Activity: Labor & Commerce: 1/14/20, 2/04/20 [DPS, w/oRec].

Floor Activity:

Passed Senate: 2/17/20, 46-1.

Brief Summary of First Substitute Bill

- Modifies the definition of earnings related to noncompetition agreements for employees receiving compensation from a medical school and an affiliated faculty group practice when the affiliation was prior to January 1, 2020.
- Combines compensation from both the medical school and the group practice as earnings for these employees.
- Requires employers to report annually to the Department of Labor and Industries the number of employees who are and who are not subject to the laws on noncompetition agreements based on the combined compensation, including the medical school department in which the employees perform their work.

SENATE COMMITTEE ON LABOR & COMMERCE

Majority Report: That Substitute Senate Bill No. 6081 be substituted therefor, and the substitute bill do pass.

Signed by Senators Keiser, Chair; Conway, Vice Chair; King, Ranking Member; Braun, Saldaña, Stanford, Walsh and Wellman.

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.

Minority Report: That it be referred without recommendation.

Signed by Senator Schoesler.

Staff: Susan Jones (786-7404)

Background: Employee Noncompete Agreements. An employee noncompetition covenant is void and unenforceable unless:

- the employer discloses the covenant terms in writing to the prospective employee no later than the time of the acceptance of the offer of employment and, if the agreement becomes enforceable only at a later date due to changes in the employee's compensation, the employer specifically discloses that the agreement may be enforceable against the employee in the future, or 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 compensation equivalent to the employee's base salary at the time of termination for the enforcement period less the compensation earned through subsequent employment during the enforcement period.

A noncompetition covenant exceeding 18 months after termination of employment is 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.

Other Restrictions. 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.

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

Relief and Remedies. 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.

Definitions. Noncompetition covenant includes every written or oral covenant, agreement, or contract where an employee or independent contractor is prohibited or restrained from engaging in a lawful profession, trade, or business of any kind. They do not include nonsolicitation, confidentiality, and trade secret agreements, and certain agreements related to the sale of a business and to franchises.

Earnings for employees means the compensation reflected on box one of the employee's Internal Revenue Service 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 noncompetition covenant is sought or the date of separation from employment.

Summary of First Substitute Bill: The definition of earnings related to noncompetition agreements is modified for employees receiving compensation from a medical school and an affiliated faculty group practice, when the affiliation was prior to January 1, 2020. Earnings for these employees include the combined compensation from both the medical school and the group practice.

The employers of employees who receive compensation from both a medical school and an affiliated faculty group practice, with the affiliation before January 1, 2020, must report annually to the Department of Labor and Industries (L&I) the number of employees who are and who are not subject to the laws on noncompetition agreements based on the combined compensation, including the medical school department in which the employees perform their work.

Provides legislative findings.

Appropriation: None.

Fiscal Note: Not requested.

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

Effective Date: Ninety days after adjournment of session in which bill is passed.

Staff Summary of Public Testimony on Original Bill: *The committee recommended a different version of the bill than what was heard.* PRO: The bill provides a technical fix to the noncompete law from last session. When the \$100,000 amount was determined for employee wages, we did not know UW Medical School had a unique way of paying compensation. This will make it clear what is paid by the medical school and the clinical group. The physicians may be paid less than \$100,000 for one side but the compensation exceeds the amount from both groups. We do not want to create an incentive with this statute. This helps with transparency. This honors the spirit of the bill that passed.

It is common practice to use noncompetes in physician contracts because there are often recruitment and training costs associated with new physicians that health care facilities need to protect. UW has two physicians' practice groups within the UW School of Medicine. Members total 2900. Prior to the bill's passage, earnings was changed to the W-2 amount rather than total compensation. These physicians have one job with two sources. There are two W-2s for the total compensation. Over 1200 receive under \$100,000 but total compensation is over the threshold. This creates an unequal playing field for UW Medicine. The current law would treat UW differently because it is the only medical school in the state with faculty practice groups. All medical schools should have a level playing field for recruitment.

CON: This Legislature and this committee labored long and hard to come up with the bill last year. It was a fine balance. This is incredibly premature. It is only 12-13 days into the bill's effective date. We are concerned about changing it. One of the first issues that came up was health care providers that were trying to leave a practice and they were prohibited by a noncompete. When we went back to them, they were gone. They had left the state.

UW believes that those physicians will leave. They failed to provide one physician who will leave and harm UW Medical School. This is a speculative issue. Physicians are the last group of people that noncompetes should be allowed because physicians leaving impacts patient care if they have to go outside a certain area. We are not seeing the transparency issue. UW does not let their physicians participate in cases with their patients. There should be transparency all the way through.

This violates the state constitution's special privileges provisions. With all the care that went into the law, we should be careful not to change it. If this bill is passed, we believe legislators will get calls to make exceptions.

Persons Testifying: PRO: Senator Marko Liias, Prime Sponsor; Jim Justin, UW Medicine; Timothy Dellit, UW Medicine.

CON: Larry Shannon, Washington State Association for Justice; Dan Kalish, Washington Employment Lawyers Association; Sybill Hypollite, Washington State Labor Council.

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