

# SENATE BILL REPORT

## SB 5935

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As of January 15, 2024

**Title:** An act relating to noncompetition covenants.

**Brief Description:** Concerning noncompetition covenants.

**Sponsors:** Senators Stanford, Keiser, Conway, Dhingra, Frame, Kuderer, Lias, Nobles and Saldaña.

**Brief History:**

**Committee Activity:** Labor & Commerce: 1/18/24.

### Brief Summary of Bill

- Provides that the term noncompetition covenant also includes an agreement that directly or indirectly prohibits the acceptance or transaction of business with a customer.
- Modifies the exclusions related to the sale or purchase of goodwill or a business interest to apply if the person signing the covenant purchases or sells a 25 percent or more interest.
- Limits nonsolicitation agreement to current customers.
- Modifies the timeline for one of the exceptions to making covenants void, related to acceptance of an offer of work, to an initial oral or written acceptance.
- Makes a covenant void if the covenant allows or requires the application of choice or substance of law of a jurisdiction other than Washington State.
- Removes a requirement that an aggrieved person be a party to a covenant to bring an action for relief.

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### SENATE COMMITTEE ON LABOR & COMMERCE

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*This analysis was prepared by non-partisan legislative staff for the use of legislative members in their deliberations. This analysis is not part of the legislation nor does it constitute a statement of legislative intent.*

**Staff:** Susan Jones (786-7404)

**Background:** In 2019, the Legislature passed laws making certain noncompetition covenants void and unenforceable.

Definitions. Noncompetition covenant includes every written or oral covenant, agreement, or contract by which an employee or independent contractor is prohibited or restrained from engaging in a lawful profession, trade, or business of any kind. It excludes a nonsolicitation agreement, a confidentiality agreement, a covenant prohibiting use or disclosure of trade secrets or inventions; a covenant related to a purchase or sale of the goodwill or an ownership of a business or related to franchises.

Nonsolicitation agreement is an agreement between an employer and employee that prohibits solicitation by an employee, upon termination of employment, of any coworkers or the employer's customers if it would cause them to cease or reduce doing business with the employer.

Void Noncompetes. A noncompetition covenant is void and unenforceable against an employee:

- unless the employer discloses the terms in writing 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 the agreement may be enforceable against the employee in the future; or if the covenant is entered into after the commencement of employment, unless the employer provides independent consideration for the covenant;
- unless the employee's earnings from the party seeking enforcement, when annualized, exceed a certain amount adjusted each year for inflation, currently \$120,559.99; or
- if the employee is terminated as the result of a layoff, unless enforcement of the noncompetition covenant includes certain compensation.

A noncompetition covenant is void and unenforceable against an independent contractor unless the independent contractor's earnings from the party seeking enforcement exceed a certain amount adjusted each year for inflation, currently \$301,399.98.

Certain Covenant Provisions. There is a rebuttable presumption that any noncompetition covenant exceeding 18 months after termination of employment is unreasonable and unenforceable. A party seeking enforcement may rebut the presumption by proving by clear and convincing evidence a duration is necessary to protect the party's business or goodwill.

A provision in a noncompetition covenant signed by a Washington-based employee or independent contractor is void and unenforceable if the covenant requires the individual to adjudicate a noncompetition covenant outside of Washington; and to the extent it deprives the individual of the protections or benefits of this chapter.

Remedies. The attorney general or a party to the noncompetition covenant may bring a private right of action to pursue relief for violations. If a court or arbitrator finds a violation or if a court or arbitrator reforms, rewrites, or only partially enforces any noncompetition covenant, the violator or person seeking enforcement of the covenant must pay the aggrieved person the greater of the actual damages or a statutory penalty of \$5,000, plus reasonable attorneys' fees, and costs. An action may not be brought for a covenant signed prior to January 1, 2020, if the noncompetition covenant is not being enforced.

Construction. The noncompetition covenant laws are an exercise of the state's police power and must be construed liberally for the accomplishment of its purposes.

**Summary of Bill:** Definitions. Noncompetition covenant also includes an agreement that directly or indirectly prohibits the acceptance or transaction of business with a customer. The exclusions related to the sale or purchase of goodwill or a business interest to apply if the person signing the covenant purchases or sells a 25 percent or more interest. Nonsolicitation agreements apply only to current customers.

Void Noncompetes. The bill removes the language that the covenant is void against an employee. The timeline for one of the exceptions to making covenants void related to acceptance of an offer of work is modified to include an initial oral or written acceptance. A covenant for an employee or independent contractor is void if the covenant allows or requires the application of choice of law or substantive law of a jurisdiction other than Washington.

Remedies. The requirement that an aggrieved person be a party to a covenant to bring an action for relief is removed. The bill does not prohibit a cause of action if a covenant signed before January 1, 2020 is being explicitly leveraged. The bill adds to the laws displaced by the noncompete provisions to include contract principles related to discharge by assent or alteration.

Construction. The legislative findings are modified to provide that the noncompetition covenants laws to need to be liberally construed and exceptions narrowly construed.

**Appropriation:** None.

**Fiscal Note:** Requested on January 14, 2024.

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

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