HOUSE BILL REPORT
HB 1967

As Reported by House Committee On:
Labor & Workplace Standards

Title: An act relating to noncompetition agreements.

Brief Description: Concerning noncompetition agreements.

Sponsors: Representatives Stanford, Ormsby and Pollet.

Brief History:
Committee Activity:
Labor & Workplace Standards: 2/14/17, 2/16/17 [DP].

Brief Summary of Bill

- Makes void noncompetition agreements with temporary or seasonal employees or independent contractors, and for employees terminated without just cause or laid off.
- Creates a rebuttable presumption that a noncompetition agreement for more than one year, or for employees who are not executives, is unreasonable and void.
- Provides that if a court reforms an unreasonable noncompetition agreement, the party seeking to declare the agreement void is deemed the prevailing party under the contract and in law.
- Allows damages for an employee required to enter into an unenforceable noncompetition agreement under certain circumstances.

HOUSE COMMITTEE ON LABOR & WORKPLACE STANDARDS

Majority Report: Do pass. Signed by 4 members: Representatives Sells, Chair; Gregerson, Vice Chair; Doglio and Frame.

Minority Report: Do not pass. Signed by 3 members: Representatives Manweller, Ranking Minority Member; McCabe, Assistant Ranking Minority Member; Pike.

Staff: Joan Elgee (786-7106).

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.

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. Whether an agreement is reasonable involves consideration of three factors:

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

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.

Summary of Bill:

An unreasonable noncompetion agreement is void and unenforceable. A court may reform an agreement to make it reasonable; however, the party seeking to declare the agreement void is deemed the prevailing party for purposes of the contract and under law. For an agreement to be enforceable, the employer must disclose the terms in writing to a prospective employee no later than the offer of employment or must provide independent consideration.

Noncompetition agreements between employers and employees are unreasonable, void, and unenforceable if the employee is:

- a temporary or seasonal employee; or
- terminated without just cause or laid off.

An employer who requires an employee to enter into a noncompetition agreement with provisions the employer knows, or reasonably should know, are unenforceable is liable for actual damages, $5,000 statutory damages, and reasonable attorneys' fees.

Noncompetition agreements with independent contractors are also void and unenforceable. For other specified types of agreements, a rebuttable presumption is established that the agreement is unreasonable. These are agreements:

- that restrict competition for more than one year after termination of employment; or
- for employees who are not executives.

The provisions do not restrict the right of an employer or entity engaging an independent contractor to enter a confidentiality or nonsolicitation agreement, or other terms and conditions of employment. Further, the reformation or unenforceability of a noncompetition agreement does not affect the enforceability of a confidentiality, nonsolicitation, or other agreement, or other terms and conditions, regardless of whether the other agreement or terms and conditions are in the same document as the noncompetition agreement.

A "noncompetition agreement" is an agreement between an employer and an employee, or between a hiring entity and an independent contractor, that is specifically designed to impede the ability of the employee or independent contractor, respectively, to compete with the employer or hiring entity upon termination of the relationship.

An "executive employee" is an employee:
- whose primary duty is managing the enterprise or a department or subdivision;
- who customarily and regularly directs the work of two or more employees and who has hiring and firing authority, or whose suggestions are given particular weight;
- who customarily and regularly exercises discretionary powers; and
- who does not devote more than certain specified amounts of time to activities which are not directly related to executive work.

Definitions are also provided for "employee," "employer," "confidentiality agreement," and "nonsolicitation agreement."

The provisions apply to agreements entered into on or after the effective date.

Appropriation: None.

Fiscal Note: Not requested.

Effective Date: The bill takes effect 90 days after adjournment of the session in which the bill is passed.

Staff Summary of Public Testimony:

(In support) Companies have many tools to protect themselves. Noncompetition agreements (noncompetes) should only be used to protect time sensitive, confidential information. Most employees do not have access to marketing strategies and other high level information. Noncompetes are overused. This bill will reduce the use of noncompetes for temporary workers, independent contractors, sandwich makers, and others, and will help low wage and gig economy workers. Musicians, who are independent contractors, get blackout dates which may be for months and for a large geographic area. Grocery workers were harmed by noncompete clauses they were forced to sign when a chain was bought out. Noncompetes are often unfair and coercive, and they target the young and uneducated. Few are actually negotiated. Some are enforced even if the person is fired

during the probationary period. It does not make sense to lay someone off and then say you cannot work anywhere else. The courts have upheld a five-year noncompete. The geographic scope may be so broad the person cannot find a job. A person should be able to continue working in their profession. Noncompetes prevent worker mobility, harm economic growth, and hurt taxpayers. Work is still needed on the bill.

A plaintiff would be a prevailing party while under current law, a plaintiff may end up paying attorneys' fees even if they "win." The rebuttable presumption makes the employer prove the noncompete is reasonable. Costs should be added to the provision on damages and attorneys' fees available if the employer requires a noncompete the employer knows is unreasonable. Noncompetes should be permitted when a business is purchased.

(Opposed) The bill threatens the integrity of peer reviews by physician independent contractors and quality improvement efforts by hospitals. The noncompetes that hospitals use are freely negotiated, and many are for longer than one year. The bill is unclear and will lead to uncertainty. "Termination" is not defined and the definition of "executive" is too restrictive. Physicians and other medical professionals may not be covered, and other persons such as technology and sales workers would not be executives. The provision on damages if the employer knew the provision was enforceable will be impossible to enforce. There is already a three-part test in law, and duration and geography are considered. The grocery store matter was a Federal Trade Commission issue and is not comparable. Assets such as good will, customer relationships, and other assets will be at risk. The state would be interfering with arms length agreements with independent contractors. Nondisclosure agreements are not sufficient to protect business. Opponents will work with the sponsor.

(Other) Noncompetes harm entrepreneurship and particularly impact women and underrepresented groups who are less likely to risk enforcement of the noncompete. Washington noncompetes in the technology industry are some of the most onerous in the country. Noncompetes hurt startups and technology worker careers, and Washington loses the talent of employees who leave the state. The federal 2016 Trade Secrets Act protects intellectual property.

Persons Testifying: (In support) Representative Stanford, prime sponsor; Jesse Wing, Washington Employment Lawyers Association; Nate Omdal, Musicians Association of Seattle, American Federation of Musicians Local 76-493, American Federation of Labor–Congress of Industrial Organizations; Debbie Gath, Teamsters–Local 38; and Tom McBride, Google.

(Opposed) Zosia Stanley, Washington State Hospital Association; Beth Zborowski, Washington Hospital Services; and Bob Battles, Association of Washington Business.

(Other) Holli Johnson, Washington Food Industry Association; Joseph Williams, Department of Commerce; and Jim Justin, Washington Technology Industry Association.

Persons Signed In To Testify But Not Testifying: None.