SENATE BILL REPORT
SB 5478

As of February 8, 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: Senators Liias, Keiser, Conway, Hunt, Pedersen, Kuderer and McCoy.

Brief History:
Committee Activity: Labor & Commerce: 1/29/19.

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.
- Allows a court to order a violator to pay the greater of actual damages or $5,000, 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.

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

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- 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 noncompetition agreements are void with respect to certain broadcast industry employees.

A number of states have laws restricting use of noncompetition agreements in some situations.

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, and certain agreements related to the sale of a business or franchise.

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 earnings are more than three times the average annual wage (AAW); and
- for a laid off employee, subject to enforcement of a covenant, the employee is paid certain compensation during the enforcement period.

A noncompetition covenant against an independent contractor is void unless the contractor's earnings from the other party exceed four times the AAW. Covenants related to performers generally may not exceed three calendar days.

Noncompetition covenants exceeding eighteen months are presumed unreasonable and unenforceable. For Washington State based employees and independent contractors, covenants are void if they require adjudication outside Washington or deprive the person of the protections under the bill.

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

No employer may restrict an employee earning less than one and one-half times the AAW from having other jobs or work.

A court may order a violator to pay the aggrieved party the greater of actual damages or $5,000, in addition to fees and costs.

State and local government noncompetition covenants are void.

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: For our best talent, the reality is our state and the innovative sector that we have founded here depends on the best and brightest people being able to chase their innovation and their dreams to where those lead. That is what has led us to have global companies and other innovators who are free to follow that inspiration. Today though in our economy across the United States, we see that non-competition agreements are hampering that competitive spirit. Statistics show that over 40 percent of those earning more than $100,000 in our economy are encumbered by non-competition agreements. Where there are unique trade secrets or important proprietary information, some kind of non-competition agreement may make sense. The idea that 40 percent of our workers are exposed to that level of secrecy or that level of trade secrets is difficult to believe. What is even more difficult to believe is that the 14 percent of workers who make under $40,000 a year and are forced to sign these agreements have some special proprietary information. Noncompetes have left the realm of high tech and have been applied to food service workers, security guards, and even delivery people.

This bill will begin to move our economy away from hampering talent and tying people up from pursuing their innovation. This bill is still a work in progress and we are trying to match what some of our competitors, like Massachusetts California are doing. This will ensure that the smartest and the best and brightest can follow their dreams and the folks that are in low wage professions are not being hampered from putting food on the table for their families.

Many grocery workers were detrimentally affected by noncompetes during the debacle the merger, buyout, and bankruptcy of Hagen by Albertsons/Safeway in 2015. Teamsters have worked to pass legislation more in line with Washington State's progressive labor law reputation.

Non-competition covenants are being used by more and more employers. Many are blue-collar workers working paycheck to paycheck. Approximately 30 million workers in the United States have non-competition covenants. These covenants are drafted to prohibit any activity by an ex-employee in a given industry. By their nature they are overly broad and that chills two different groups of people. It tends to terrorize employees who have limited resources to get legal advice or to pay an attorney to defend another lawsuit. It tends to chill potential new employers. Employers face no downside in drafting overly broad noncompetes.

In the music industry, noncompetes or blackout dates annually cripples the ability to cobble together a living. There are venues and festivals going out of business because there are not enough workers to do the work. This disrupt the arts community.

It sounds like people are trying to chain their employees to their jobs and that should be disturbing. There are intellectual property protections under the Trade Secrets Act that protect most IP. California has not suffered at all in their noncompete environment.

For many workers, the noncompete is just one of many documents they sign when they start a job. No one explains it to them. There are restrictions on noncompetes that are harming people's abilities to make ends meet, make career decisions that are best for themselves and their families, allow them to get enough hours to pay their bills, be closer to home, earn more money, and use their learned skills. Noncompetes can cause workers to pay a lot in attorneys fees. This bill establishes clarity, consistency, and reduction of litigation.

CON: Non competes with physicians, nurse practitioners, physicians assistants, among others, are a crucial tool to help protect hospital resources. They are used by hospitals, big and small, urban and rural. Non-competes are a crucial tool to help protect the hospital's resources. They make significant investments to bring providers to the community, including student debt relief, moving expenses, licensure and certification costs, marketing, income guarantees, leasing office space, equipment purchases. These are often long term major investments and can easily reach hundreds of thousands of dollars. The health care workforce in Washington, particularly for specialists in rural settings, is in high demand and short supply. The bill is worrisome to Washington hospitals. Section (3)(b) would make a non-compete unenforceable if an employee makes less than $185,000 a year. This exceptionally high threshold it would prevent hospitals from protecting investments. These people have strong bargaining positions and a lot of leverage. Also the anti-moonlighting bar is not a competition issue. It speaks to concurrent employment and is at odds with our state conflict of interest laws. There are valid reasons for restricting work at hospitals, such as scheduling policies exclusivity, prior permission policies for several specialized workers, and safety considerations. Small, rural community hospital and health clinics use non compete clauses. Section 11 prohibits the use this tool by all public hospital districts. Some serve an older sicker and poorer segment of our patients and the most remote areas of our state. It puts them at a competitive disadvantage to non public hospitals. When a physician leaves, the hospital loses the upfront investment and may be forced to lay off other staff and it disrupt access to the care and the treatment for the community. Section 11 will treat UW hospital different than competitors. The playing field should be equal. A lot of hospital employees do seek prior permission to go and work in other settings but public entities have to comply with the Ethics and Public Services Act and must get this permission.

This this bill has the potential to being corrected. Some requested changes have been incorporated. Noncompetes are currently regulated by the courts. There is a common law requirement that regulates duration, and geographical location. The $180,000 amount is phenomenal. Ninety percent of the states have noncompete laws similar to Washington's. None of those states incorporate a barrier or an absolute line. Because this number is so high, it really eliminates the use of noncompetes in most cases. If that is the intent, then we may have the California system. There should be a range. There could be an amount where

there is a rebuttable presumption which allow employers to explain why they are needed and have then a lower end ban.

The Hagan grocery issue was a federal issue. The federal government was slow in the process. The noncompete existed because there was a sale of stores and they needed to know they had employees to operate the stores.

For small businesses, integrating an employee into the clients, suppliers, regulators, and community is the lifeblood of your business. For many small businesses, $180,000 is more than the owner takes out of the business. The bill makes this protection unavailable to small businesses. The bar on moonlighting is a problem. An employer has an obligation to make sure that it is a safe workplace for all of the employees. When employees are burning the candle at both ends, this bill would prevent the employer from stopping that problem that is very critical for safety sensitive positions. The penalties provision in the bill turns a shield into a sword if you go into court. There is a timing problem; when do you measure the compensation?

Persons Testifying: PRO: Senator Marko Liias, Prime Sponsor; Debbie Gath, Teamsters 38; Lawrence Cock; Nathan Omdal, citizen; Shiela Leslie, Phoenix Protective Corporation; Samantha Grad, UFCW 21; Jesse Wing, citizen; Joseph Williams, Commerce.

CON: Julie Weisenburg, Human Resource Officer Samaritan Healthcare; Ian Goodhew, University of Washington; Jaclyn Greenberg, WSHA; Bob Battles, Association of Washington Business; Tim O'Connell, Stoel Rives.

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