

HOUSE BILL REPORT

SSB 5935

As Passed House:
February 22, 2024

Title: An act relating to noncompetition covenants.

Brief Description: Concerning noncompetition covenants.

Sponsors: Senate Committee on Labor & Commerce (originally sponsored by Senators Stanford, Keiser, Conway, Dhingra, Frame, Kuderer, Lias, Nobles and Saldaña).

Brief History:

Committee Activity:

Labor & Workplace Standards: 2/14/24, 2/16/24 [DP].

Floor Activity:

Passed House: 2/22/24, 55-38.

Brief Summary of Substitute Bill

- Amends the definition of "noncompetition covenant" to: (1) include agreements that directly or indirectly prohibit the acceptance or transaction of business with a customer; and (2) exclude covenants where the person signing the covenant purchases, sells, acquires, or disposes of an interest representing 1 percent or more of the business.
- Makes changes related to: (1) circumstances under which noncompetition covenants are void and unenforceable; (2) causes of action by aggrieved persons; (3) displacement of other laws; and (4) statutory construction.

HOUSE COMMITTEE ON LABOR & WORKPLACE STANDARDS

Majority Report: Do pass. Signed by 6 members: Representatives Berry, Chair; Fosse, Vice Chair; Bronoske, Doglio, Ormsby and Ortiz-Self.

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.

Minority Report: Do not pass. Signed by 3 members: Representatives Schmidt, Ranking Minority Member; Rude and Ybarra.

Staff: Trudes Tango (786-7384).

Background:

A noncompetition covenant (covenant or noncompete) is a written or oral agreement by which an employee or independent contractor is prohibited or restrained from engaging in a lawful profession, trade, or business of any kind. Certain agreements are declared not to be noncompetes, including nonsolicitation agreements and covenants entered into by persons purchasing, selling, acquiring, or disposing of an ownership interest in the business.

A nonsolicitation agreement is an agreement that prohibits an employee, upon termination of employment, from soliciting other employees to leave the employer or from soliciting customers to cease or reduce doing business with the employer.

There are certain circumstances under which a noncompete is void and unenforceable. For example, a noncompete is void and unenforceable against an employee unless: (1) the employer discloses the covenant's terms in writing to the prospective employee before acceptance of the employment offer; or (2) the employee's earnings exceed a certain amount; or (3) enforcement of the noncompete includes compensation to the employee, if the employee is being laid off.

A provision in a noncompete signed by an employee or independent contractor who is Washington-based is void and unenforceable if the provision requires the employee or independent contractor to adjudicate the noncompete outside the state and to the extent it deprives the employee or independent contractor of the protections or benefits of Washington's noncompete statutes.

For violations of the noncompete statutes, a person aggrieved by a noncompete to which the person is a party may bring a cause of action for damages. However, a cause of action may not be brought on a noncompete signed prior to January 1, 2020, if the noncompete is not being enforced.

The noncompete statutes displace conflicting tort, restitutionary, contract, and other laws related to liability for competition by employees or independent contractors.

Summary of Bill:

Definitions.

The definition of a "noncompetition covenant" is expanded to include agreements that directly or indirectly prohibit the acceptance or transaction of business with a customer. A noncompetition covenant does not include a covenant where the person signing the

covenant purchases, sells, acquires, or disposes of an interest representing 1 percent or more of the business. Language is also added to specify that nonsolicitation agreements apply to current customers.

Void and Unenforceable Provisions.

The provision making a noncompete void and unenforceable unless the employer discloses it to a prospective employee before acceptance of the offer of employment is amended to specify the acceptance includes an initial oral or written acceptance.

A provision in a noncompete is void and unenforceable if it allows or requires the application of choice of law principles or the substantive law of any jurisdiction other than Washington.

Changes are made to specify that noncompetition covenants are void and unenforceable, rather than void and unenforceable "against an employee."

Cause of Action.

For purposes of bringing a cause of action for violations, the requirement that the aggrieved person be a party to the noncompete is removed.

A cause of action may not be brought for a noncompete signed prior to January 1, 2020, if the noncompete is not being explicitly leveraged.

Displacement of Other Laws.

A provision is added to specify that contract principles relating to discharge by assent or alteration are also displaced by the noncompete statutes.

Statutory Construction.

Language is added to the intent section to specify that the provisions of the act must be liberally construed and exceptions narrowly construed.

Appropriation: None.

Fiscal Note: Available.

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) The statutes need to be clarified because of the way the law is being interpreted. The bill would prevent employers from forcing employees to litigate outside of Washington or under the forum of another state. It prohibits employers from threatening employees even when the employer is not enforcing the noncompetition agreement. New

employers have an interest in getting talented employees. The bill clarifies that a covenant on the acceptance of business is not a violation of the statutes.

(Opposed) Many of the provisions in the bill are redundant. Nonsolicitation agreements were intentionally excluded from the definition when the statutes were created in 2020, and this bill puts nonsolicitation agreements back in. Removing the provision requiring standing to sue will give unlimited third parties standing to privately litigate. That looks like qui tam actions. The standing provision needs to be narrowed.

Persons Testifying: (In support) Jesse Wing, Washington State Association for Justice; Lawrence Cock, Washington Employment Lawyers Association; and Sung Shin.

(Opposed) Robert Battles, Association of Washington Business; and Kris Tefft, Washington Liability Reform Coalition.

Persons Signed In To Testify But Not Testifying: None.