

SENATE BILL REPORT

SB 5437

As of February 18, 2025

Title: An act relating to encouraging competition and economic growth by prohibiting noncompetition agreements and clarifying nonsolicitation agreements.

Brief Description: Prohibiting noncompetition agreements and clarifying nonsolicitation agreements.

Sponsors: Senators Stanford, Dhingra, Saldaña, Valdez, Riccelli, Conway, Frame, Hasegawa, Nobles, Ramos and Shewmake.

Brief History:

Committee Activity: Labor & Commerce: 2/18/25.

Brief Summary of Bill

- Makes any noncompetition covenant void and unenforceable, regardless of when the parties entered into the covenant.

SENATE COMMITTEE ON LABOR & COMMERCE

Staff: Susan Jones (786-7404)

Background: Status of Noncompetition Covenants. A noncompetition covenant, also referred to as a noncompetition agreement or noncompete agreement, 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. It includes an agreement that directly or indirectly prohibits the acceptance or transaction of business with a customer. It does not include a nonsolicitation agreement, confidentiality agreement, covenant prohibiting the use of disclosure of trade secrets or inventions, covenant involving the purchase or sale of an interest representing 1 percent or more of a business, or certain agreements related to franchises.

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.

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 current customers to cease or reduce doing business with the employer.

State law imposes restrictions and limitations on the enforceability of noncompetition covenants, as follows:

- Employees. A noncompetition covenant is void and unenforceable unless the employer complies with certain restrictions and the employee's earnings from the person seeking to enforcement covenant exceed a specified amount adjusted annually for inflation by the Department of Labor and Industries (L&I), which is currently \$123,394.17.
- Broadcasting Employees. For certain employment relationships in the broadcasting industry, any applicable noncompetition covenant is void and unenforceable if the employee is terminated without just cause or laid off by action of the employer.
- Independent Contractors. A noncompetition covenant is void and unenforceable against an independent contractor unless the independent contractor's earnings from the person seeking to enforce the covenant exceed a specified amount adjusted annually for inflation by L&I, which is currently \$308,485.43. The duration of a noncompetition covenant between a performer and a performance space, or a third party scheduling the performer for a performance space, must not exceed three calendar days.
- Duration Exceeding 18 Months. A court or arbitrator must presume that any noncompetition covenant with a duration exceeding 18 months after termination of employment is unreasonable and unenforceable. A party seeking enforcement may rebut the presumption by proving clear and convincing evidence that a duration longer than 18 months is necessary to protect the party's business or goodwill.

Any provision in a noncompetition covenant signed by an employee or independent contractor who is Washington-based is void and unenforceable:

- if the covenant requires the employee or independent contractor to adjudicate a noncompetition covenant outside of Washington;
- if it allows or requires the application of choice of law principles or the substantive law of any jurisdiction other than Washington; or
- to the extent it deprives the employee or independent contractor of the protections or benefits of the state laws restricting noncompetition covenants.

Moonlighting and Franchisors. An employer may not restrict an employee who is earning less than twice the minimum wage from having an additional job, supplementing their income by working for another employer, working as an independent contractor, or being self-employed, with some exceptions. State law prohibits franchisors from restricting franchisees from soliciting or hiring any employee of the franchisor or a franchisee of the same franchisor.

Enforcement. The attorney general may enforce the restrictions against noncompetition

covenants and moonlighting, as well as the provisions applicable to franchisors.

Any person aggrieved by a noncompetition covenant may bring a cause of action for damages or statutory damages of \$5,000, attorneys' fees and costs. A cause of action may not be brought regarding a noncompetition covenant signed prior to January 1, 2020, if the noncompetition covenant is not being enforced or explicitly leveraged.

Summary of Bill: Definitions Expanded. The definition of noncompetition covenant is expanded by specifying that it also includes:

- any provision that threatens, demands, requires, or otherwise effectuates that an individual return, repay, or forfeit any right, benefit, or compensation, as a consequence of the individual engaging in a lawful profession, trade, or business of any kind; and
- agreements between performers and performance spaces or third-party schedulers.

Nonsolicitation agreement excludes an agreement directly or indirectly prohibiting the acceptance or transaction of business with a customer.

Status of Noncompetition Covenants. All noncompetition covenants are void and enforceable, regardless of when the parties entered into the covenant.

By October 1, 2025, employers must provide current and former employees and independent contractors, who are subject to a noncompetition agreement, a written notice stating that the agreement is void and unenforceable.

An employer may not: enforce or threaten to enforce an agreement that is prohibited against an employee or worker; represent that an employee or worker is subject to a prohibited agreement; or enter into or attempt to enter into an agreement with an employee or worker that is prohibited.

Enforcement. The attorney general or any person aggrieved by any violation of the provisions governing noncompetition covenants, moonlighting, or franchisors may bring a cause of action for damages, statutory damages, attorneys' fees, and costs.

The restrictions in the bill apply to all proceedings commenced on or after the effective date of the bill. A cause of action may not be brought based on the restrictions prior to the effective date of the bill. Legal proceedings commenced before the effective date of the bill are governed by the statutes as amended prior to the effective date of the bill.

Legislative findings are expanded.

Appropriation: None.

Fiscal Note: Requested on February 7, 2025.

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: PRO: Competition is crucial for progress in our economy. Noncompetes are inherently anti-competitive. Eliminating non-competes will remove barriers, allowing employees to seek better jobs for reasons such as gaining more responsibility, better pay, or for a family need. The bill will allow employees to start their own businesses, encouraging innovation. Criticism of the bill can be addressed by non-disclosure or non-solicitation agreements.

This was a game changer for low wage worker, but not higher paying fields, restricting career mobility, innovation and research development. Big tech companies are almost always a take it or leave it for noncompetes, without room for negotiation. About half the technology workers are subject to noncompetes.

The Federal Trade Commission tried to ban most noncompetes nationwide but that is in litigation. California has this ban. Join other states in holding noncompetes void.

The current statute removed unnecessary barriers to mobility of many workers making lower wages. It reduced confusion among employers and employees. Many people predicted that there would be problems with that law, but businesses remain as competitive as ever. Abuses that led to the enactment of that statute are continuing for those who make over the threshold.

A testifier described working for an employer who did not provide the promised support and disagreed with the employer decisions. The employee left and there was no potential harm to the employer since she did not take clients or intellectual property and had a confidentiality agreement. She had to litigate in another state, not Washington where she worked, causing lost work time and financial hardship.

Even though Washington has banned noncompetes below a certain income threshold, they are still illegally included in employment contracts for broadcasters making as low as \$80,000 per year. Even if not enforced, the workers are still placed in a state of confusion requiring help of their union or an attorney. Presently some broadcast employers in this state require their employees to pay back money in order to leave a contract early. The bill would prohibit this practice.

The current framework stops short of truly freeing the labor market from these uncompetitive restrictions on the movement of labor. The bill will finally ensure equal access to freedom for workers.

CON: People testify about challenging circumstances. However, just because contracts don't always work out the way people intended doesn't mean the Legislature should

invalidate an entire form of employment contracts.

With the existing salary threshold, non-competes in Washington are contracts negotiated by sophisticated parties and the person bound by the non-compete is compensated for their agreement. No one is required to sign a non-compete. They have the option to negotiate or walk away accept employment without a non-compete. It is the employer who is being limited under the bill.

There are concerns with the bill. For example, employers wouldn't be able to contractually prohibit employees from actively working for the competition at the same time they're working for that employer. The bill should be limited to post-employment restrictions.

Fairs, as an entertainment and music venue, often include provisions in their agreement that deal with distance and time restrictions on when a performer can do another show. These terms are commonplace to protect the large investment of the fair. Fairs are non-profits and margins can be pretty thin on these concerts. Entertainers may negotiate the terms.

Persons Testifying: PRO: Senator Derek Stanford, Prime Sponsor; Steven Bock, Computer Programmer/Digital Rights Advocate; Davis Powell, SAG-AFTRA, Seattle Local; Christoph Mair, Washington State Labor Council, AFL-CIO; Jesse Wing, Washington Employment Lawyers Association; Sung Shin; Taifa Harris; Tanya Donovan.

CON: Lindsey Hueer, Association of Washington Business; Mike Burgess, WA State Fairs Association.

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