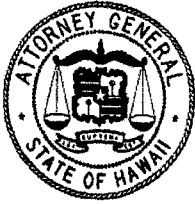


HB1090 HD2

Measure Title: RELATING TO EMPLOYMENT AGREEMENTS.
Report Title: Technology; Employment Covenants or Agreements
Description: Prohibits noncompete agreements and restrictive covenants that forbid post-employment competition for employees of a technology business. (HB1090 HD2)
Companion:
Package: None
Current Referral: EDT/CPN, JDL
Introducer(s): C. LEE, EVANS, MIZUNO, NISHIMOTO, OHNO, SAIKI, SOUKI



**TESTIMONY OF
THE DEPARTMENT OF THE ATTORNEY GENERAL
TWENTY-EIGHTH LEGISLATURE, 2015**

ON THE FOLLOWING MEASURE:

H.B. NO. 1090, H.D. 2, RELATING TO EMPLOYMENT AGREEMENTS.

BEFORE THE:

**SENATE COMMITTEES ON ECONOMIC DEVELOPMENT AND TECHNOLOGY
AND ON COMMERCE AND CONSUMER PROTECTION**

DATE: Monday, March 16, 2015 **TIME:** 3:00 p.m.

LOCATION: State Capitol, Room 016

TESTIFIER(S): Douglas S. Chin, Attorney General, or
Rodney I. Kimura, Deputy Attorney General

Chairs Wakai and Baker and Members of the Committees:

The Attorney General submits a comment on the bill.

The new subsection (d) prohibits any employment contract containing a noncompete or nonsolicit "clause" relating to an employee of a technology business. The wording then provides that the "agreement" shall be void and of no force and effect.

It is not clear whether the term "agreement" was intended to only refer to the noncompete or nonsolicit clause, or the entire employment contract. If the latter, the prohibition may be too broad and otherwise prohibit provisions which have nothing to do with the offending clause, and which may serve a beneficial purpose to both the employee and the employer.

We suggest that the term "agreement" on page 6, line 6, be changed to "clause."

Thank you for the opportunity to testify on this matter.

Written Statement of
ROBBIE MELTON
Executive Director & CEO
High Technology Development Corporation
before the
SENATE COMMITTEES ON ECONOMIC DEVELOPMENT AND TECHNOLOGY
AND
COMMERCE AND CONSUMER PROTECTION
Monday March 16, 2015
3:00 p.m.
State Capitol, Conference Room 16
In consideration of

HB1090 HD2 RELATING TO EMPLOYMENT AGREEMENTS.

Chairs Wakai and Baker, Vice Chairs Slom and Taniguchi, and Members of the Committees on Economic Development and Technology and Commerce and Consumer Protection.

The High Technology Development Corporation (HTDC) respectfully **offers comments** on HB1090 HD2 relating to employment agreements.

HTDC comments that the bill favors employee mobility which can provide benefits of retaining spin-off companies and entrepreneurial employees within the state. HTDC comments that companies utilize nondisclosure agreements to protect its intellectual property and corporate knowledge. HTDC also comments that eliminating all non-compete agreements may not be advantageous for some small technology businesses to protect its business strategy, and customers.

HTDC suggests that companies should have the right to protect its company knowledge for a reasonable time period. SB1279 SD2 attempts to clarify the definition of “reasonable period of time” by disallowing non-competes exceeding one year.

Thank you for the opportunity to offer these comments.

Jeffrey D. Hong
TechMana LLC
Honolulu, HI, 96813

SENATE COMMITTEE ON ECONOMIC DEVELOPMENT AND TECHNOLOGY

SENATE COMMITTEE ON COMMERCE AND CONSUMER PROTECTION

Monday, March 16, 2015, 03:00 PM
State Capitol Conference Room 016

Aloha Chair Wakai, Chair Baker, Vice Chair Slom, Vice Chair Taniguchi, and Members of the Committees:

We would like to suggest changes to HB 1090 HD2 for consideration by your committees. We have worked with the Hawaii Association of Broadcasters and Hawaiian Telcom throughout the drafting process. Both organizations strongly oppose any adjustment to the current enforcement of noncompetition agreements in their industries. Hawaiian Telcom has acknowledged the intent of their concerns have been addressed with the amendments in the bill. They are still evaluating the latest modifications approved in the HD2 draft. The Broadcasters feel the bill has evolved with better language but still have reservations with any adjustments to noncompetes.

This bill will provide new opportunities for growth in Hawaii's technology industry. The momentum of support for this legislation has only grown with time. Many local technology businesses, and businesses needing technology employees have testified in support. The Honolulu Star-Advertiser Editorial Board requested in its pages to "Give Tech workers Contract Freedom."

The committee report from the Senate JDL hearing of SD1279 HD2 stated concerns in using the term "Majority of its revenue" to define a "Technology business".

In particular the term "revenue" could present different interpretations and is not defined with respect to any temporal measurement relative to the time of employment

We respectfully submit these amendments to HB1090 HD2 for your consideration to address the concerns raised by the Senate JDL Committee.

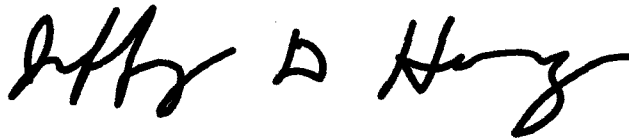
We propose replacing the term "revenue" with "gross income". "Gross income" is defined in the IRS code. We have defined specific time frames for the measurement of the "Majority of gross income" to provide clarity at the time of employment.

"Technology business" means a trade or business that derives the majority of its gross income from the sale or license of products or services resulting from its software development or information technology development, or both. "Technology business" excludes any trade or business that is considered by standard business practice as part of the broadcast industry or any telecommunications carrier as defined in section 269-1, which holds a franchise or charter enacted or granted by the legislative or executive authority of the State or its predecessor governments.

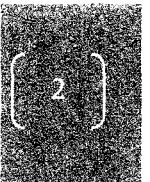
"Majority of its gross income" means greater than 50% of the gross income reported by said business on its federal tax returns for the prior tax year in which said contract was executed. If the trade or business has not filed a federal tax return for the prior year, gross income shall be the gross income recognized at the time the contract was executed.

Thank you for your consideration of these changes and the opportunity to testify.

Mahalo,



Jeffrey D. Hong
Chief Technology Officer
TechMana LLC



TECHNOLOGY

Give tech workers contract freedom

The development of a thriving high-technology sector in Hawaii has been long on promise, short on results. Those who want to increase technology's tiny share of Hawaii's economy bemoan the difficulty in hiring and keeping qualified employees. So does the state Department of Education, which is struggling to fill positions in its Office of Information Technology Services.

State lawmakers are considering two bills that take a modest step in the right direction. House Bill 1000 and Senate Bill 1279 would restrict the ability of technology companies to insert "non-compete" clauses into employment contracts. The House bill would prohibit them, while the Senate bill would restrict them to one year. They deserve support as they move through the Legislature.

Non-compete clauses are fairly common in the technology sector. Employers keen on protecting trade secrets and their competitive advantage often require their highly trained workers to sign contracts forbidding them from taking another job in the same geographic area or with another company in the similar line of business for a period of time. In the highly competitive tech industry, employers legitimately fear their substantial investments in talent and research can be lost to competitors poaching their best employees.

Even so, non-compete covenants can unreasonably restrict the ability of skilled tech professionals to practice their trade and advance their careers. Employers don't have to worry so much about their workers leaving for greener pastures, so work conditions and pay need not be truly competitive. Those who do change jobs may find themselves unable to work in their field of expertise for a year or more, even if other businesses are eager to hire them. And in the fast-changing world of technology, sitting out a year or so can be crippling to a tech professional's career.

Furthermore, there's evidence that non-compete covenants can be bad for business. A 2010 study by researchers at Yale University and Brock University concluded that "enforcement of non-compete clauses significantly impedes entrepreneurship and employment growth." They found that states that impose restrictions on non-compete covenants fare better in regards to the number of patents, number of business starts and employment than those states that enforce non-competes. California, for example, does not recognize non-compete clauses except in rare cases. Still, Silicon Valley thrives.

And HB 1000 and SB 1279 would not strip employers of their ability to defend their trade secrets, which remain protected by state statute and the federal Uniform Trade Secrets Act.

The goal of a low-impact, high-paying industry that will lessen Hawaii's economic dependence on tourism and the military remains mostly aspirational. In 2011, the state's technology sector accounted for only about 3 percent of all civilian jobs in Hawaii. A new study by the Brookings Institution ranked Hawaii dead last, behind all other states and Washington, D.C., for its overall advanced tech industry presence.

Raising those numbers has been difficult, and it's not for lack of trying. The state offered technology tax credits. It created the High Technology Development Corp. to help private companies get established and thrive. Schools aggressively promote robotics and STEM (science, technology, engineering and mathematics) education.

HB 1000 and SB 1279 won't create a Silicon Valley in Hawaii. But they could help agencies like the public DOE, which supports HB1000, find and hire skilled tech workers. And the bills would allow the state's small, entrepreneurial technology sector to be more nimble and give innovative start-ups and those who want to work for them a better chance to grow — and compete.