

JAN 17 2014

A BILL FOR AN ACT

RELATING TO EMPLOYMENT AGREEMENTS IN THE TECHNOLOGY INDUSTRY.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF HAWAII:

1 SECTION 1. The legislature finds that postemployment
2 restrictive covenants in employment agreements impede the
3 development of new technology and intellectual property within
4 the State by driving skilled workers to other jurisdictions.
5 Eliminating restrictive covenants and noncompete clauses in the
6 technology business sector will stimulate Hawaii's economy by
7 preserving and providing jobs for technology employees and by
8 providing opportunities for those employees to establish new
9 companies to expand the technology industry in the State.

10 A restrictive covenant not to compete with a former
11 employer imposes a special hardship on technology employees, as
12 these highly specialized professionals are trained to perform
13 specific jobs in the industry. Because the geographic area of
14 Hawaii is unique and limited, noncompete agreements unduly
15 restrict future employment opportunities for technology workers
16 and have a chilling effect on the creation of new technology
17 business start-ups within the State by innovative employees.



1 Hawaii has a strong public policy promoting the growth of
2 the technology sector of the economy, and academic studies have
3 concluded that embracing employee mobility is a superior
4 strategy for nurturing an innovation-based economy. In
5 contrast, a noncompete atmosphere hinders innovation, creates a
6 restrictive work environment for technology employees in the
7 State, and forces spin-offs of existing technology companies to
8 choose places other than Hawaii to establish their businesses.

9 In *Technicolor, Inc v. Traeger*, 57 Haw. 113, 551 P. 2d 163
10 (1976), the Hawaii supreme court ruled that noncompete covenants
11 and agreements which are not per se violations under section
12 480-4(b), Hawaii Revised Statutes, may be enforced in Hawaii as
13 long as they pass a 'reasonableness analysis'. Employer's trade
14 secrets are already protected under the federal Uniform Trade
15 Secrets Act and under Section 480-4(c)(4), Hawaii Revised
16 Statutes, therefore, the benefit to the employer of a noncompete
17 agreement is an unnecessary and overreaching protection that
18 unreasonably imposes undue hardship to technology employees and
19 the Hawaii economy.

20 The purpose of this Act is to encourage the development of
21 the technology industry in Hawaii by statutorily prohibiting



1 technology businesses from using noncompete agreements and
2 restrictive covenants which forbid postemployment competition.

3 SECTION 2. Section 480-4, Hawaii Revised Statutes, is
4 amended to read as follows:

5 **"§480-4 Combinations in restraint of trade, price-fixing**
6 **and limitation of production prohibited.** (a) Every contract,
7 combination in the form of trust or otherwise, or conspiracy, in
8 restraint of trade or commerce in the State, or in any section
9 of this State is illegal.

10 (b) Without limiting the generality of the foregoing no
11 person, exclusive of members of a single business entity
12 consisting of a sole proprietorship, partnership, trust, or
13 corporation, shall agree, combine, or conspire with any other
14 person or persons, or enter into, become a member of, or
15 participate in, any understanding, arrangement, pool, or trust,
16 to do, directly or indirectly, any of the following acts, in the
17 State or any section of the State:

18 (1) Fix, control, or maintain, the price of any commodity;

19 (2) Limit, control, or discontinue, the production,
20 manufacture, or sale of any commodity for the purpose
21 or with the result of fixing, controlling, or
22 maintaining its price;



1 (3) Fix, control, or maintain, any standard of quality of
2 any commodity for the purpose or with the result of
3 fixing, controlling, or maintaining its price;

4 (4) Refuse to deal with any other person or persons for
5 the purpose of effecting any of the acts described in
6 paragraphs (1) to (3) of this subsection.

7 (c) Notwithstanding the foregoing subsection (b) and
8 without limiting the application of the foregoing subsection (a)
9 it shall be lawful for a person to enter into any of the
10 following restrictive covenants or agreements ancillary to a
11 legitimate purpose not violative of this chapter, unless the
12 effect thereof may be substantially to lessen competition or to
13 tend to create a monopoly in any line of commerce in any section
14 of the State:

15 (1) A covenant or agreement by the transferor of a
16 business not to compete within a reasonable area and
17 within a reasonable period of time in connection with
18 the sale of the business;

19 (2) A covenant or agreement between partners not to
20 compete with the partnership within a reasonable area
21 and for a reasonable period of time upon the
22 withdrawal of a partner from the partnership;



1 (3) A covenant or agreement of the lessee to be restricted
2 in the use of the leased premises to certain business
3 or agricultural uses, or covenant or agreement of the
4 lessee to be restricted in the use of the leased
5 premises to certain business uses and of the lessor to
6 be restricted in the use of premises reasonably
7 proximate to any such leased premises to certain
8 business uses;

9 (4) A covenant or agreement by an employee or agent not to
10 use the trade secrets of the employer or principal in
11 competition with the employee's or agent's employer or
12 principal, during the term of the agency or
13 thereafter, or after the termination of employment,
14 within such time as may be reasonably necessary for
15 the protection of the employer or principal, without
16 imposing undue hardship on the employee or agent.

17 (d) Except as provided in subsection (c)(4), any covenant,
18 agreement, ancillary restrictive covenant, or agreement which is
19 similar, related, or subordinate to another agreement or valid
20 transaction containing a noncompete clause relating to an
21 employee of a technology business is prohibited. Such agreement
22 shall be void and of no force and effect.



1 As used in this subsection:

2 "Information technology" means any equipment or
3 interconnected system or subsystem of equipment that is
4 used in the automatic acquisition, storage, manipulation,
5 management, movement, control, display, switching,
6 interchange, transmission, or reception of data or
7 information. The term includes computers, ancillary
8 equipment, software, firmware and similar procedures,
9 services, and support services, and related resources.

10 "Noncompete clause" means a clause in an employment
11 contract that prohibits an employee from working in a
12 specific geographic area for a specific period of time
13 after leaving employment with the employer.

14 "Principal business activity" means an activity from
15 which a trade or business derives its largest percentage of
16 gross receipts, or cost incurred if the gross receipts do
17 not exceed the cost incurred for that activity.

18 "Software development" means the creation of coded
19 computer instructions.

20 "Technology business" means a trade or business the
21 principal business activity of which involves software
22 development, information technology, or both.



1 This subsection shall apply to all written, binding
 2 noncompete clauses entered into after June 30, 2014, and to all
 3 amendments adding or amending noncompete clauses in existing
 4 written agreements created prior to July 1, 2014."

5 SECTION 3. New statutory material is underscored.

6 SECTION 4. This Act shall take effect upon its approval.

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INTRODUCED BY: _____

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S.B. NO. 2619

Report Title:

Restrictive Technology Employment Covenants or Agreements

Description:

Prohibits technology businesses from using noncompete agreements and restrictive covenants which forbid postemployment competition.

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