Date: 03/14/2014
Time: 09:00 AM
Location: Conference Room 312
Committee: House Economic Development & Business

Department: Education

Person Testifying: Kathryn S. Matayoshi, Superintendent of Education

Title of Bill: SB 3126, SD2(sscr2573) RELATING TO EMPLOYMENT AGREEMENTS.

Purpose of Bill: Prohibits noncompete agreements and restrictive covenants in employment contracts, post-employment contracts, or separation agreements that forbid post-employment competition of employees of a technology business or licensed physicians. (SD2)

Department's Position:
The Department of Education supports this measure. As one of the largest technology employers in the state, finding talented, experienced individuals to fill our openings is a challenge for a number of reasons. One being that there appears to be a lack of available individuals either qualified or available to work in this state. In some cases, we are unable to approach or attract candidates working for large mainland technology companies because their noncompete agreements prevent them from seeking subsequent employment at organizations their current employer does business with. This may not be difficult for individuals working for small employers, but for employees of companies like Apple, Microsoft, or IBM, a noncompete agreement effectively prevents them from working in any technology capacity in the state, and certainly at the Department of Education, where we do business with numerous technology vendors (local and mainland based). Noncompete agreements tend to encourage technology workers to move out of state to secure employment in their chosen field, thus reducing the available candidate pool to fill our most experienced positions.

We believe that limiting the use of noncompete agreements would help to increase the pool of technology employees in the state of Hawaii, and encourage innovation and growth in the technology industry as a whole.

Written Testimony of Phyllis Kihara
Vice-President/General Manager – KIKU-TV

Before the House Economic Development & Business Committee
March 14, 2014
RELATING TO EMPLOYMENT AGREEMENTS

My name is Phyllis Kihara and I am the Vice-President and General Manager of KIKU-TV. I am submitting written testimony in opposition to Senate Bill 3126 – S.D.2.

SB 3126, by description (page 1 lines 5-7) indicates that it is targeted at the technology business sector and licensed physicians. As a broadcaster, my primary concerns are with the vagueness of the definition of the technology business sector (page 6 lines 4-11) of the Bill. The Bill defines "Information Technology" as "any technology that is used in the automatic acquisition, storage, manipulation, management, movement, control, display, switching, interchange, transmission, or reception of data or information. The term includes computers, ancillary equipment, software, firmware, and similar procedures, services, and support services, and related resources." It further states "Technology business means a trade or business that relies on software development, information technology, or both."

In today's digital age, this definition could be applied to just about any industry that is computerized, including radio and television broadcasting, and this creates the potential for numerous unintended consequences.

There is no legitimate public policy reason to insert the State of Hawaii into the negotiation of an employment contract in the broadcasting industry. Hawaii courts, including the Hawaii Supreme Court in Technicolor, Inc v. Traeger, 57 Haw. 113, 551 P. 2d 163 (1976) have held that non-compete agreements are only valid when they pass a "reasonable analysis." They must be reasonable with respect to subject matter, time period, geographical area and made to reasonably protect the employers' business interests. Each case is determined upon its own unique facts, which gives our courts the ability to find a fair resolution to each situation. A rigid statutory approach does not provide this flexibility. SB3126 quotes this same case, but draws a conclusion contrary to the Supreme Court's decision. It suggests that employers' interests are protected because trade secrets are already covered by the Uniform Trade Secrets act.

However, non-compete agreements in the broadcast industry are about more than trade secrets. TV and radio stations across the state of Hawaii invest hundreds of thousands of dollars to train and promote on-air, as well as off-air talent. These employees come to represent the station in the community, building viewership, listenership, and revenue for the station(s). Non-compete agreements allow stations to protect its investment in its employees and protect its businesses.

Mr. Chairman and committee members, as I mentioned at the beginning of my testimony, we are opposed to SB 3126 as written. If the intent of the Bill is specific to high technology and the medical sectors, our concerns would be easily addressed by adding a single line amendment to the Bill excluding radio and television broadcasters from this measure. If that is not the intent, we ask that you consider the valid business interest we seek to protect. It's an interest that has been validated by the Hawaii Supreme Court so long as it passes a "reasonableness analysis."

Thank you for your time and consideration.

Hazel Glenn Beh
Professor of Law and Co-Director, Health Law Policy Center

March 12, 2014

The House of Representatives
The Twenty-Seventh Legislature
Regular Session of 2014
Committee on Economic Development and Business

Dear Representative Clift Tsuji, Chair and Representative Gene Ward, Vice Chair and Committee Members:

This testimony is submitted in strong support of SB 3126, SD2.

I am a Professor of Law at the William S. Richardson School of Law; I have taught Contract law here since 1995. I am writing in my personal capacity; however, this testimony is based on my professional research on the effects of non-compete clauses in Hawaii. I am the co-author (with student H. Ramsey Ross) of Non-Compete Clauses in Physician Employment Contracts Are Bad for Our Health, 14 Haw. Bar J. 79 (2010).

Senate Bill 3126 SD2 wisely prohibits non-competition agreements between employer and employees in two important fields where Hawai‘i must become keenly competitive. My personal belief is that non-competition clauses should be prohibited in all classes of employment contracts. Non-compete agreements impose a economic and family burden on employees and are typically exacted by employers from a position of unfair bargaining strength. This Bill represents a modest first step and I hope that Hawai‘i will eliminate them altogether in the employment context.

Non-compete clauses hurt Hawaii businesses and consumers and contribute to our "brain drain" and skilled workforce shortages. Under current case law in Hawaii, employer imposed non-competition agreements of three year duration and state-wide scope have been upheld. This means that a departing worker has three choices: leave the state, change careers, or remain in an unhappy job. If the worker defies the non-compete, they can be sued and forced to pay damages well beyond what they might have earned. Unfortunately, even among jurisdictions that allow non-compete clauses, Hawai‘i is an outlier because its courts have enforced extraordinarily restrictive and onerous clauses without a requiring the employer to show a commensurate legitimate interest.

Hawai‘i has lost doctors, skilled workers, and inventors to other states, because these non-compete clauses are so liberally upheld by our courts. Most of these valuable employees leave silently, choosing to go elsewhere rather than endure challenging these clauses and risking a lawsuit.

Non-compete clauses are costly and unfair to workers, to our consumers, and to our state economy. In the case of doctors, enforcement of a non-compete is particularly unfair to patients and patient communities who lose choice and expertise. Our taxpayers lose the investment we

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made through subsidized medical education and residency when we allow employers to enforce non-compete clauses that drive doctors from our state. Likewise, in the tech industry, all the incentives we give to the high tech industry to attract and recruit inventors to our state are lost each time a worker leaves the state because of an employer imposed non-compete.

Other states have already banned non-compete clauses and are reaping economic benefits all around. Most notably, California bans almost all non-compete clauses in employer agreements, allowing them only in conjunction with the sale of goodwill of a business. Studies examining why and how Silicon Valley became ground zero for the high tech revolution have found that other regions failed in part because non-compete clauses drive away inventors, and do not foster the development of a synergistic community needed to advance tech industries. You cannot build a community of entrepreneurs if you do not allow them mobility within that community. In order to succeed, Hawaii needs to learn this lesson: our regional success depends on a mobile workforce that remains wedded to our community.

No one wants employees to steal trade secrets, secret recipes, client lists, or other intellectual property. Our existing laws adequately protect those legitimate concerns without enforcement of non-compete clauses. But employers should not be able to stagnate our state by preventing fair competition among those who brought their own skills, education, and entrepreneurial drive to their work.

Thank you for your consideration of this important matter.

Sincerely,

/s/Hazel Beh
Co-Director
Health Law Policy Center

Massachusetts Institute of Technology
Sloan School of Management
Matthew Talin Marx
Mitsui Career Development Professor of Entrepreneurship
Assistant Professor of Technological Innovation, Entrepreneurship, and Strategic Management

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HOUSE COMMITTEE ON ECONOMIC DEVELOPMENT AND BUSINESS

Friday, March 14, 2014

9:00 a.m.

State Capitol, Conference Room 312

Greetings Chair Tsuji, Vice Chair Ward, and Members of the Committee on Economic Development and Business:

My name is Matt Marx. I am the Assistant Professor of Technological Innovation, Entrepreneurship, and Strategic Management at the MIT Sloan School of Management. My research, supported by others in my field, concludes regional "brain drains" are directly related by public policy affecting employee mobility. I strongly support SB 3126, SD 2 as a means for Hawaii to retain its top talent.

2014 marks an inauspicious anniversary: 600 years since the first employee non-compete lawsuit was filed. It was in northern England, in the very high-tech industry of clothes-dyeing. An apprentice was sued by his master for setting up his own clothes-dyeing shop in the same town in 1414. The judge, appalled that the master would try to prevent his own apprentice from practicing his profession, threw out the case and threatened the plaintiff with jail time.

Much has changed in 600 years, but employee non-compete agreements still bear painful resemblance to medieval practices. As a professor at the MIT Sloan School of Management, my research focuses on the implications of non-competes for individuals, firms, and regions. I am not alone in this effort; during the last ten years, several scholars have contributed to a body of work including

- Toby Stuart of the University of California at Berkeley
- Olav Sorenson of Yale University
- Mark Garmaise of UCLA
- Mark Schankerman of the London School of Economics
- Lee Fleming of the University of California at Berkeley
- Jim Rebitzer of Boston University
- April Franco of the University of Toronto
- Ronald Gilson of Stanford University
- Ken Younge of Purdue University
- Sampsa Samila of the National University of Singapore
- Ivan Png of the National University of Singapore

My work, as well as that of those of these scholars, has almost universally found non-competes to be detrimental to individual careers and regional productivity. Non-competes, do not, as is often claimed, spur R&D investment by companies. Just to summarize a few points:

- Although it is frequently claimed that non-competes are usually only a year in duration, a survey I conducted of more than 1,000 members of the IEEE engineering organization revealed that fully one-third of these are longer than one year and 15% are longer than two years.
- An article of mine in the American Sociological Review reveals that firms rarely tell would-be employees about the non-compete in their offer letter. Nearly 70% of the time, they wait until after the candidate has accepted the job and, consequently, has turned down other job offers. Half the time the non-compete is given on or after the first day at work. At this point it is too late for the employee to negotiate—indeed, I found that barely one in ten survey respondents had a lawyer review the non-compete.
- Several articles including my own with Lee Fleming and Debbie Strumsky in Management Science, by Jim Rebitzer and two Federal Reserve economists in the Review of Economics and Statistics, by Mark Garmaise in the Journal of Law, Economics, and Organization find that non-competes make it difficult for employees to change jobs. Instead, workers are trapped in their jobs with little possibility of moving elsewhere.

In the remainder of my testimony I wish to comment on the "chilling effect" non-competes can have regardless of the best intentions of judges and the possible implications for regional economic performance.

Jay Shepherd of the Shepherd Law Group reports that there were 1,017 published non-compete decisions in 2010. The Bureau of Labor Statistics reported that there were 154,767,000 workers in the U.S. as of June 2010. If the effect of non-competes were limited to the courtroom, simple math would suggest that 0.0007% of workers were affected by non-competes. Yet data from my IEEE survey indicate that nearly half of engineers and scientists are required to sign non-competes (including states where they are unenforceable). Why are 50% of workers asked to sign non-competes when barely a thousandth of a percent of them ever involve a court case? It is because of *the chilling effect*—because non-competes affect worker behavior even in the absence of a lawsuit. Thus it is essential to account for and anticipate how non-competes affect workers outside the courtroom.

In my own research including interviews with dozens of workers, I have rarely if ever come across an actual lawsuit. However, I have seen several instances where workers have taken a *career detour*, leaving their industry for a year or longer due to the non-compete. They took a pay cut and lost touch with their professional colleagues—not because they were sued, but for other reasons. They may have been verbally threatened by their employer; they may not have been threatened but have assumed that if they were sued, they would lose due to the expense of defending themselves; in some cases they felt that they were under obligation to honor the agreement they had signed—no matter how overreaching it might have been.

Non-compete reform is not just about protecting workers; it is also about growing the economy. Some will say it is impossible to operate their business without non-competes. Perhaps it is easier not to worry about people leaving, but one need look no further than California's Silicon Valley or the San Diego biotech cluster for proof that a thriving economy does not depend on non-competes. Non-competes have been banned in California for more than 100 years. Again, I acknowledge that as a manager life is easier when you can rely on employees not leaving for rivals thanks to the non-compete they were required to sign. When I was managing a team of engineers in Boston, I never really worried about people quitting. Whereas when I managed a team in Silicon Valley, I realized that we as a company had to keep them engaged. We had a saying: "you never stop hiring someone." I think it made us a better company, and it made me a better manager.

Non-competes hurt the economy because it is more difficult to start new companies and also to grow those companies. Professors Olav Sorenson of Yale University and Toby Stuart of the University of California at Berkeley published a study in 2003 showing that the spawning of new startups following liquidity events (i.e., IPOs or acquisitions) is attenuated where non-competes are enforceable. Professor Sorenson followed up this study with a more recent article, coauthored with Professor Sampsa Samila at the National University of Singapore. They show that a dollar of venture capital goes further in creating startups, patents, and jobs where non-competes are not enforceable. Their finding is moreover is not just a Silicon Valley story but holds when Silicon Valley is excluded entirely.

Non-competes not only make it more difficult to start a company; they make it harder to grow a startup. One of the randomly-selected interviewees in my American Sociological Review article said that he "consciously excluded small companies because I felt I couldn't burden them with the risk of being sued. [They] wouldn't necessarily be able to survive the lawsuit whereas a larger company would." Also, whereas large companies are able to provide a holding-tank of sorts for new hires to work in a different area while waiting for the non-compete to expire, this is more difficult for smaller firms.

Finally, and perhaps of even greater concern, is that non-competes chase some of the best talent out of a region. I have included my research on a 1985 change in public policy in Michigan to start enforcing noncompetition agreements. My research indicated that the change accelerated the emigration of inventors from the state and moreover to other states that continued not to enforce non-compete agreements. This finding is not simply an artifact of the automotive industry or general westward migration; in fact, it is robust to a variety of tests including pretending that the policy change happened in Ohio or other nearby, mid-sized Midwestern states. Worse, this "brain drain" due to non-compete agreements is greater for the most highly skilled workers. It stands to reason that a change in public policy like SB 3126, SD 2 would promote the retention of top talent in Hawaii.

References

Fallick, Bruce, Charles Fleischman, and James Rebitzer, "Job-Hopping in Silicon Valley: Some Evidence Concerning the Micro-Foundations of a High Technology Cluster," *The Review of Economics and Statistics,* 88 (2006), 472-481.

Garmaise, Mark, "The Ties That Truly Bind: Noncompetition Agreements, Executive Compensation, and Firm Investment," *Journal of Law, Economics, and Organization,* 27(2):376-425.

Gilson, Ronald, "The Legal Infrastructure of High Technology Industrial Districts: Silicon Valley, Route 128, and Covenants Not to Compete," *New York University Law Review,* 74.

Marx, Matt, Deborah Strumsky, and Lee Fleming, "Mobility, Skills, and the Michigan Non-Compete Experiment," *Management Science,* 55 (2009), 875-889.

Marx, Matt, "The Firm Strikes Back: Non-compete Agreements and the Mobility of Technical Professionals." *American Sociological Review* 76(5):695-712.

M. Marx and L. Fleming. "Non-compete Agreements: Barriers to Entry…and Exit?" in J. Lerner and S. Stern, eds., *Innovation Policy and the Economy* 12. (2012)

Samila, Sampsa, and Olav Sorenson. "Noncompete covenants: Incentives to innovate or impediments to growth." *Management Science* 57.3 (2011): 425-438.

Stuart, Toby E., and Olav Sorenson. "Liquidity events and the geographic distribution of entrepreneurial activity." *Administrative Science Quarterly* 48.2 (2003): 175-201.

March 13, 2014

Jim Takatsuka
520 Lunalilo Home Road #230
Honolulu, HI 96813
jtakatsuka@outlook.com

Greetings Chair Tsuji, Vice Chair Ward, and Members of the Committee on Economic Development & Business:

I am writing in strong support of **SB 3126 SD 2**– a bill to invalidate restrictive employment covenants or agreements. Research has shown that restrictions on employee mobility can inhibit innovation in high-velocity industries like information technology (IT) and can lead to an exodus of skilled workers (and their important knowledge) to other regions.

I have been a part of Hawaii's IT sector for 25 years working for Apple, Sun Microsystems, and currently as the Enterprise Account Manager for Microsoft. I testify today in a personal capacity. Over this time, I have seen Hawaii companies struggle to find enough skilled IT workers to help them best leverage their investments in information technology. Although there are certainly many skilled technology workers here, we have never approached the critical mass of IT professionals needed to drive our businesses forward.

When compared to their mainland peers, many Hawaii companies are far behind in their use of information technology, simply because the skills to deploy hardware and software are difficult to find. It is not uncommon to find companies here running on software that is more than 10 years old – an eternity in the IT world. The need and the desire to modernize are certainly there, but because skilled labor is difficult to find, many companies simply make do with outdated technology.

When Hawaii businesses do decide they need to push forward and innovate, they are often forced to look outside the state, which of course means shipping dollars to the mainland and beyond. Two recent projects that I have been involved with illustrate this point well:

- A large local company needed to redesign and rebuild their company web site, not just to improve their ability to market their products, but also to serve as a platform to transact hundreds of millions of dollars worth of business. Using the internet allowed them to increase their reach, reduce their costs, and accelerate their growth. Their finished project allowed them to reach their goals, but the site was designed and built almost exclusively using out-of-state contractors.

- Another large local company needed to build a new system for managing their customer activity. The new system would allow them not only to keep track of

all customer interactions, but reveal new sales opportunities and help the company identify which products were successful and which were not. The system would allow the company to operate more efficiently (quicker, higher quality interactions) and effectively (the right product to the customer most likely to buy). This project was completed entirely by out-of-state contractors.

In both examples, the companies have strong ties to the Hawaii community and would very much have preferred to hire local and keep their spending in Hawaii (expenditures on the customer management project were well over $1M and those for the web site were triple that). But in each case, the appropriate skills were not available locally and the companies were forced to import the technology skills required to meet their needs.

Of course, the paucity of skilled IT workers in Hawaii is not solely due to impediments to employee mobility. But in the technology industry, removing any restriction on employment would serve as an important step towards catalyzing growth in a sector that can have broad, meaningful impact in our community.

Thank you for your consideration,

Jim Takatsuka
Enterprise Account Manager
Microsoft Corporation

HTDC Cultivating Hawaii's tech sector
HIGH TECHNOLOGY DEVELOPMENT CORPORATION

Written Statement of
ROBBIE MELTON
Executive Director & CEO
High Technology Development Corporation
before the
HOUSE COMMITTEE ON
ECONOMIC DEVELOPMENT & BUSINESS

Friday, March 14, 2014
9:00 a.m.
State Capitol, Conference Room 312
In consideration of

SB 3126 SD2 RELATING TO EMPLOYMENT AGREEMENTS.

Chair Tsuji, Vice Chair Ward, and Members of the Committee on Economic Development and Business.

The High Technology Development Corporation (HTDC) offers **comments** on SB 3126 SD2 relating to Employment Agreements. SB3126 SD2 adds specific language to invalidate employment contracts, post-employment contracts, or separation agreements containing a noncompete or nonsolicit clause for employees of a technology businesses or licensed physicians. Technology businesses are defined as businesses that rely on software development, information technology, or both. HTDC comments this is a broad definition which may be applicable to many modern businesses yet may be ambiguous for some businesses conducting research and development. HTDC comments that the bill favors employee mobility which can provide benefits of retaining spin-off companies and entrepreneurial employees within the state. HTDC also comments that the "reasonable" non-compete agreement currently afforded to employers can be essential for certain technology companies in building a globally competitive business.

Thank you for the opportunity to offer these comments.

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Strong Support SB3126 SD2

Welcoming Technology Businesses & Physicians

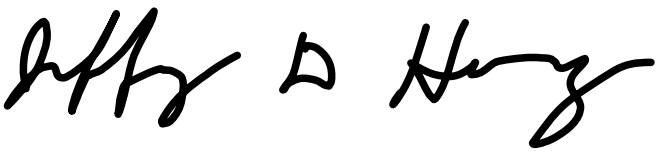
Hawai‘i courts have enforced statewide, multi-year non-compete clauses in the employment context; these provisions force our citizens to leave the state in order to continue advancing in their fields. Although many professions would benefit from the elimination of covenants not to compete, the unique damage to Hawai‘i from enforcement of these contracts to technology and medical professionals merit special consideration.

Protecting intellectual property is vital to growing Hawaii's innovation economy. The adoption of the Uniform Trade Secret Act in Hawai’i provides a means for protecting the legitimate trade secrets of innovation businesses. Covenants not to compete are an obsolete approach to protecting trade secrets. It drives local technology innovators from Hawai‘i and forces businesses into expensive searches for talent from outside the State.

Hawai‘i competes for physicians in a time of national shortage, allowing non-competes in physician employment contracts works against our state’s interests in building a skilled, competent, and experienced medical workforce. Non-competes in physician employment contracts also are unfair to taxpayers, who have subsidized medical education and residency, and then lose the benefits of that investment when doctors are forced to leave the state because of onerous non-compete provisions in employment contracts.

In founding Techmana LLC, a Hawaii based travel technology company, I have personally experienced the subtle and explicit barriers non-compete agreements create for businesses. Advocating for SB 3126 has brought together a broad coalition of support for eliminating an avoidable cause of brain drain from our State. We ask your positive consideration of SB 3126 SD2.

Mahalo,



Jeffrey Hong
Chief Technology Officer
Techmana LLC

SB3126 SD2 Supporters

Academic Faculty:

Professor Hazel Beh - University of Hawaii, Richardson School of Law
Professor Matt Marx – MIT, Sloan School of Management
Frances Miller- Professor of Law Emerita, Boston University, Visiting Professor of Law, University of Hawaii

Government:

Councilmember Stanley Chang – Honolulu City Council
Steven Levinson - Associate Supreme Court Justice, State of Hawaii, Retired
Mark Wong - CIO, City & County of Honolulu
David Wu - CIO, State of Hawaii Department of Education

Technology Industry:

Jacob Buckley-Fortin – CEO, eHana LLC
Jay Fidell – Founder, ThinkTech
Cort Fritz – Principle Program Manager, Microsoft
Jeffrey Hong – Chief Technology Officer, Techmana LLC
Chris Lee – Motion Picture Producer, Founder and Director, ACM System
Cinthia Miller – Owner – O&A Consulting
Jim Takatsuka – Hawaii Account Executive - Microsoft
Edward Pileggi – Owner – Lunasoft LLC
William Richardson – General Partner, HMS Hawaii Management Partners
Aaron Schnieder – Founder, Church Office Online
Glenn Scott - IT Executive, Creative Artist Agency
John Vavricka – Program Director, RTI International

Attorneys and Physicians:

Richard Chisholm
Lois Perrin
David Simons
Chris Flanders
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** All individuals are expressing their personal views and not representing the views of their associated organizations. The views of their organizations are expressed in submitted testimony.*

Jeffrey Hong
TechMana LLC
Honolulu, HI, 96813

HOUSE COMMITTEE ON ECONOMIC DEVELOPMENT & BUSINESS

Friday, March 14, 2014, 9:00 AM
State Capitol Conference Room 312

Aloha Chair Tsuji, Vice Chair Ward, Members of the Committee on Economic Development & Business:

Techmana LLC strongly supports SB 3126 SD2 as a step forward in enhancing Hawaii as a home for skilled professionals. The legislation enhances Hawaii by:

- Eliminates a source driving skilled workers from Hawaii
- Lowers costs through increased competition
- Establishes Hawaii as another "City of Refuge" for ideas and innovation.

In California people generally cannot enter into a contract restraining them from working. The freedom to work is legally protected in the California Business & Professions Code.

> **“Except as provided in this chapter, every contract by which anyone is restrained from engaging in a lawful profession, trade, or business of any kind is to that extent void.”**

Hawaii's citizens lacks these protection and can be driven from the State for up to 3 years. Here are a few examples of non-competition agreements.

> **"..become employed by or perform services for any existing customer or client of the Company for whom Employee has performed services while employed at the Company"**

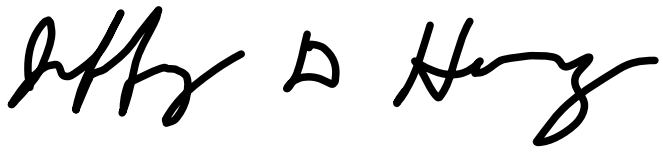
This broad non-competition clause when applied to the limited markets of Hawaii would easily drive people to leave the State. These contracts have been enforced on employees to protect skills as "unique" as a tour "briefer" for the HIS Travel Company.

> **"Employee agrees that, during the terms of this Agreement and for a period of three (3) years thereafter, within the County of Honolulu (Island of Oahu), State of Hawaii, Employee will not directly or indirectly, own, manage, operate, control, be employed as a "Briefer" …"**

The woman who lost this case had to drive a bus to survive.

My previous testimony to this committee in the companion bill hearing (HB2617) described the economic and public benefits of eliminating these agreements for Physicians and Technology professional. I urge the committee to protect Hawaii's employers against themselves and pass this legislation for the benefit of all.

Mahalo,



Jeffrey Hong
Chief Technology Officer
TechMana LLC

March 13, 2014

Jacob Buckley-Fortin
eHana LLC

Chair Tsuji and Members of the Committee on Economic Development and Business,

I am a technology entrepreneur who grew up in Waimanalo. At 21 years old I left college on the mainland and returned to Hawaii to co-found a company building Electronic Health Records software for local social service agencies. I've been running and growing that company, eHana, for 13 years.

I support SB3126 SD2 because it will enable technology employers to grow in Hawaii, enable talented employees to remain in Hawaii, and because it represents a more humane approach to business.

In 2006 my company opened an office on the East Coast, and we've since found it substantially easier to recruit and retain technical talent there. The reality of Hawaii's unique geographic location and relatively limited high-tech employment opportunities mean that talented product managers, business analysts, software developers, quality assurance personnel, and the like are always in short supply. Any tool that serves to restrict employer access to Hawaii's already-limited pool of technical talent--and I count non-compete agreements in this category, because they remove qualified employees from the workforce--serves only to further reduce Hawaii's competitiveness and encourage growing employers like eHana to seek talent elsewhere.

Additionally, once an employee who is covered by a broad non-compete leaves their job, they have little choice but to look elsewhere for employment if they want to keep their technical skills sharp and prevent an awkward gap on their resume (as an employer I can speak to how deadly that is when reviewing applications). In some respects Hawaii employees are lucky: California, hotbed of innovation and a state completely ambivalent if not hostile to non-competes, is just a short flight away. Hawaii's loss is Silicon Valley's (usually permanent) gain.

Finally, non-competes are simply a terrible way to do business. As an employer, I'm likely to interview and hire dozens, hundreds, or thousands of people, while as an employee you are likely to accept a new job at most only a few times a decade. It's a completely asymmetric relationship and non-competes generally exploit this asymmetry. They are often buried in "onboarding" paperwork on the employee's first day--at this point the employee has already left their previous position--and they are usually non-negotiable. This is an abuse of power that many employees acquiesce to (if they even realize the non-compete clause is there in the first place).

I recently attempted to hire a talented senior engineer with experience in our industry who had been laid off from her previous position. While she would have been an exceptional fit, she was covered by a non-compete agreement with her previous employer, and we were unable to

accept the legal risk associated with bringing her on. Incredibly, even though the previous employer had let her go, and had no ongoing financial relationship with her, it held her to an agreement she had signed twelve years earlier in the normal course of her employment paperwork. She ended up leaving the industry she loved entirely rather than spend a year twiddling her thumbs.

Hawaii is a unique and beautiful place, and I can speak from experience in saying that its climate, people and attitude make it a fabulous location from which to start and grow a high-tech business. Today's interconnected and networked word has made it more feasible than ever to do so. The biggest challenge has always been, and continues to be, access to trained technical talent, and SB3126 SD2 will eliminate one barrier to addressing this challenge.

Thank you for your consideration.

Jacob Buckley-Fortin
eHana LLC

Testimony in Strong Support of SB 3126 SD 2

House Committee on Economic Development & Business
Rep. Cliff Tsuji, Chair
Rep. Gene Ward, Vice Chair

Friday, March 14, 2014
9:00am
Conference Room 312
State Capitol

Chair Tsuji, Vice Chair Ward, Members of the Committee, thank you for the opportunity to testify today.

My name is Chris Lee and I am the Founder and Director of the Academy for Creative Media System at the University of Hawaii. I am also a motion picture producer and testify today as an individual and not on behalf of the University.

I strongly support SB3126. The Bill provides better opportunities for technology professionals to call Hawaii home and to keep our emerging entrepreneurs in creative IP home in the islands. It's just better for business and better for employees.

A primary concern for owners of innovation businesses is policy protecting intellectual property. Hawaii has adopted the Uniform Trade Secret Act to provide a legal framework for protecting trade secrets. The current use of noncompetition agreements to protect trade secrets encourages and discourages behavior that inhibits our technology industries. Among the issues:

- Used broadly and indiscriminately across many industries.This causes kama'aina to leave the State if they want to remain employed in their field. The alternative is to work a "penalty box" job for up to 3 years with skills underutilized. For example, our supreme court has upheld barring a Japanese tour "briefer" from her job. One of her 3 year penalty box professions was driving a bus.

- Almost half of technology professionals surveyed are subject to

these agreements.

- Discourages the formation of new businesses and competition in an already small and isolated marketplace.

- Non-competes prevent innovators from creating businesses.

- Non-competes and non-solicitation agreements prevent entrepreneurs from staffing businesses.

- Discourages the growth of a critical mass of technology professionals in Hawaii

- Discourages technology professionals from moving to a place of limited employment mobility.
- Encourages the best to leave because they are driven out by a covenant not to compete.

- Forces Hawaii employers to make expensive searches outside the State to fill a talent void.

- Discourages the fruits of these searches from creating local roots.

Academic studies have concluded that public policy supporting employee mobility encourages the innovation economy. Studies indicate jurisdictions enforcing noncompete regimes discourages worker creativity leaving underperforming employees to linger in noncompete geographies.

As many of you know, Hawaii has a history of producing brilliant, innovative thinkers who have only been able to achieve their dreams on the mainland and elsewhere. HB 2617 will be an important tool in making sure those dreams can be realized in the islands to everyone's benefit.

Mahalo for the opportunity to testify.

Testimony of Chris Leonard
President – Hawaii Association of Broadcasters
President / General Manager – New West Broadcasting Corp.

Before the House Economic Development & Business Committee
March 14, 2014

RELATING TO EMPLOYMENT AGREEMENTS

Good morning Chairman Tsuji and members of the Committee. For the record, my name is Chris Leonard. I am the President and General Manager of New West Broadcasting Corp. We own and operate five radio stations in Hilo and Kona. I am also the President of the Hawaii Association of Broadcasters. The Association represents 55 Television & Radio stations that serve local communities across the State of Hawaii. I am here to testify in opposition to Senate Bill 3126 – S.D.2.

SB 3126, by description (page 1 lines 5-6) indicates that it is targeted at the technology business sector and licensed physicians. We have concerns that the definitions of these sectors contained in the bill (page 6 lines 4-11) are very vague. The bill defines "Information Technology" as "any technology that is used in the automatic acquisition, storage, manipulation, management, movement, control, display, switching, interchange, transmission, or reception of data or information..." and further states (page 7 lines 5-6) "Technology business means a trade or business that relies on software development, information technology, or both." The vague language in this bill creates the potential for numerous unintended consequences. It could be applied to just about any industry that is computerized including our local radio and television broadcasters.

There is no legitimate public policy reason to insert the State of Hawaii into the negotiation of an employment contract in the broadcasting industry. Broadcasters who use non-competition agreements are protecting well recognized proprietary investments that they make in the employees of their business.

Hawaii courts including the Hawaii Supreme Court in Technicolor, Inc v. Traeger, 57 Haw. 113, 551 P. 2d 163 (1976) have held that non-compete agreements are only valid when they pass a "reasonable analysis." They must be reasonable with respect to subject matter, time period, geographical area and made to reasonably protect the employers' business interests. Each case is determined upon its own unique facts, which gives our courts the ability to find a fair resolution to each situation. A rigid statutory approach does not provide this flexibility. SB3126 quotes this same case, but draws a conclusion contrary to the Supreme Court's decision. It suggests that employers' interests are protected because trade secrets are already covered by the Uniform Trade Secrets act. Non-compete agreements in the broadcast industry are about more than trade secrets. TV and Radio stations across the state of Hawaii invest hundreds of thousands of dollars to train and promote new talent. The talent

becomes the good will of the station causing viewers and listeners to return each day. Without non-compete protection in place, the employer has no protection for its' investment in their employees. I was not a fan of non-compete agreements when we started our company 22 years ago. I was of the belief, that if an employee did not want to work for us then we didn't want them in the organization. However, I have learned from experience that it necessary to protect our investment from organizations that have no interest in developing talent when they can wait for talent to be fully developed and paid for by other organizations before poaching them. We lost a morning drive DJ a number of years ago to another organization that doubled his salary two-weeks before the start of our annual ratings survey period. They lured this employee away with the promise of higher pay, however near the end of the 12-week survey period informed the employee that they could no longer afford his high salary. The employee quit and has not worked a full-time position since and significant damage was done to my organization. Their intent was not for the benefit of the employee, it was solely to benefit from the goodwill created and the investment made by our company, or at least, ensure that we were unable to benefit from it. We have had non-competes in place with our company since that time as have many of our Hawaii broadcasters. They have not prohibited the movement of employees from station to station, however they have protected employers well-recognized interests for a reasonable period (in most cases 6 months) of time and geography.

Mr. Chairman and committee members, as I mentioned at the beginning of my testimony, we are opposed to SB 3126 as written. If the intent of the bill was specific to high technology and the medical sectors, our concerns would be easily addressed by adding a single line amendment to the bill that would specifically exclude radio and television broadcasters from this measure. If that is not the intent, we ask that you consider the valid business interest that we seek to protect. It's an interest that has been validated by the Hawaii Supreme Court so long as it passes a "reasonableness analysis."

I thank you for your time and consideration and would be happy to answer any questions that you may have.

LATE

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March 13, 2014
TESTIMONY OF STANLEY CHANG
CONCILMEMBER FOR THE CITY AND COUNTY OF HONOLULU
On
S.B. No. 3126, SD2, RELATING TO EMPLOYMENT AGREEMENTS
Committee on Economic Development & Business
Friday, March 14, 2014
9:00 a.m.
Conference Room 312

Dear Chair Tsuji and Committee Members:

Thank you for allowing me the opportunity to submit testimony in support of S.B. 3126, SD2 Relating to Employment Agreements in my capacity as Councilmember of the City and County of Honolulu.

S.B. 3126, SD2 prohibits non-compete agreements and restrictive covenants in employment contracts, post employment contracts, or separation agreements that forbid post-employment competition of employees of a technology business or licensed physicians.

Non-compete agreements are detrimental to individuals and businesses. Especially in an isolated state, non-compete agreements can be very detrimental. Individuals are faced with the choice of working "penalty box" jobs outside of their field which generally pay less and stagnate their careers or moving to the mainland to seek employment. Non-compete agreements actually stifle the formation of new businesses and hinder existing businesses from growing by increasing recruitment costs.

For these reasons, I respectfully ask for your favorable passage of S.B. 3126, SD2 Relating to Employment Agreements, and thank the Committee for allowing me to provide testimony.

Sincerely,

Stanley Chang
Councilmember, District IV

LATE

Edward Pileggi
Lunasoft LLC
Honolulu, HI 96815

March 14, 2014

HOUSE COMMITTEE ON ECONOMIC DEVELOPMENT & BUSINESS

Friday, March 14, 2014, 9:00 AM
State Capitol Conference Room 312

Aloha Chair Tsuji, Vice Chair Ward, Members of the Committee on Economic Development & Business:

As a technology professional with over 15 years of experience, I'm strongly in favor of SB 3126 SD2 because it would help Hawaii retain technology professionals.

I have first-hand experience with the negative impacts of non-compete agreements. I moved to Hawaii in September 2013 to work for Hawaiian Airlines. While I do enjoy working for Hawaiian Airlines, there is a staffing agency between myself and Hawaiian Airlines that has been treating me unfairly. Unfortunately my options are limited due to the non-compete clause put in place by the staffing agency and as a result I'm faced with either accepting the unfair treatment or moving back to California.

> **"Perform services directly on this project at any of the client's or client's client..."**

I believe that Hawaii does an excellent job of recruiting talented technology professionals, but it has a difficult time retaining these individuals due in large part to non-compete agreements. Supporting SB 3126 SD2 will help alleviate the need for technology professionals to seek employment opportunities outside of Hawaii.

Mahalo,

Edward Pileggi
Owner & Founder
Lunasoft LLC

LATE

Cinthia Miller
Owner

O&A Consulting LLC
Honolulu, HI 96816

3/14/2014

Greetings Chair Tsuji, Vice Chair Ward, and Members of the Committee on Economic Development & Business

I strongly support SB 3126 SD 2 Restrictive Technology Employment Covenants or Agreements. As an IT consultant with more than 15 years of working with companies in Hawaii, I have experienced first-hand the negative impacts and fear that non-competition agreements generate for someone who is seeking employment locally.

I started my career in Hawaii working for a small technology startup. I was later offered a job with Microsoft in Hawaii. I was laid off in 2010 and was contractually restrained from seeking employment with most businesses in Hawaii for 1 year through their non-competition agreement, which also applied to businesses outside of Hawaii since they were nationwide. Although my old employer did not enforce said non-compete agreement, I was under continual fear that it would be imposed and I would be forced to move to another state or temporarily change my trade for the 1 year period. In the IT field, 1 year of non-practice heavily hinders your ability to keep up with new technologies and maintain your marketability in a fast-changing industry. Non-competes not only vastly limits employment options in Hawaii technology employees, but also prevents progress in building the pool of talent that is already inadequate to begin with.

I was offered several employment opportunities by existing Hawaii clients that I consulted for through Microsoft. The solicitations of employment by these clients were also prohibited and could have been legally enforced. Under these confining circumstances, I subcontracted to my existing client, Hawaii's leading health insurance company, through a new employer, a small, local consulting firm. This new employer also required a non-competition agreement. Working under two non-competes, I was continually worried that lawful action could be taken against me at any time during the 1 year period.

In 2012, I first experienced the negative impacts of an enforced non-compete when one of my old clients, Hawaii's biggest airline company, requested my services for specific IT needs that very few local consultants specialize in. Under the non-competition agreement with my new employer, I was not able to practice IT consulting outside of their employment, even if the client was my own to begin with. The agreement required me to start any new work by subcontracting through them. I was told that in order to conduct IT consulting independently without any enforcement of their non-compete, I would need to "make them whole" through monetary recompense. After many uncomfortable conversations and tedious negotiation, my new employer allowed an exception with the new airline client, opening up one small hole in the non-compete but leaving lots of room for potential "make them whole" situations in the future.

This is no way to do business in Hawaii, where there is a limited pool of employers and employees. Throw in restraints on which of those businesses you can work for and you're left with almost no hope in finding stable employment. For employers looking to fill their positions with IT specialists, soliciting even laid-off staff locked into non-competition agreements puts their companies at risk. Outsourcing their work offshore becomes an attractive option.

Supporting the SB 3126 SD 2 bill will support local businesses and employees in Hawaii and solidify a path for growth in Hawaii's IT industry. Please help us keep our local talent and provide us an autonomous and cultivating environment to work in.

Thank you for the opportunity to testify.

Cinthia Miller

Owner

O&A Consulting LLC

ward2-Robin

LATE

From: mailinglist@capitol.hawaii.gov
Sent: Friday, March 14, 2014 5:08 AM
To: edbtestimony
Cc: thirr33@gmail.com
Subject: Submitted testimony for SB3126 on Mar 14, 2014 09:00AM
Attachments: SB 3126 SD2 SSCR 2573 IT Employment Agreement Reform.gif

SB3126
Submitted on: 3/14/2014
Testimony for EDB on Mar 14, 2014 09:00AM in Conference Room 312

Submitted By	Organization	Testifier Position	Present at Hearing
Arvid Tadao Youngquist	Sky Ohana	Support	Yes

Comments: Chair, EDB Committee Vice Chair, EDB Committee Right Honorable Committee Members The Sky Ohana is pleased to provide this testimony in support of a measure itroduced by a lone State Senator which has garnered so much acclaim and testimonials in support. Please report it out with your strongest report language without amendments that "may" further water it down. Mahalo. Arvid Tadao Youngquist Founder, Administrator, and Spokesman *Note: Registered Voter, CD1, U.S. House District (Oahu) and future voter...Primary & General Election.

Please note that testimony submitted less than 24 hours prior to the hearing, improperly identified, or directed to the incorrect office, may not be posted online or distributed to the committee prior to the convening of the public hearing.

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ward2-Robin

LATE

From: mailinglist@capitol.hawaii.gov
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Cc: WIMAHEXDIR@AOL.COM
Subject: Submitted testimony for SB3126 on Mar 14, 2014 09:00AM
Attachments: TESTIMONY SENATE BILL 3126 SD2.pdf

SB3126
Submitted on: 3/14/2014
Testimony for EDB on Mar 14, 2014 09:00AM in Conference Room 312

Submitted By	Organization	Testifier Position	Present at Hearing
GEORGE WAIALEALE	Individual	Support	Yes

Comments:

Please note that testimony submitted less than 24 hours prior to the hearing, improperly identified, or directed to the incorrect office, may not be posted online or distributed to the committee prior to the convening of the public hearing.

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WIMAH

WORK INJURY MEDICAL ASSOCIATION OF HAWAII
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MAULI OLA
THE POWER OF HEALING

MARCH 14, 2014

COMMITTEE ON ECONOMIC DEVELOPMENT & BUSINESS

SENATE BILL 3126 SD2 RELATING TO EMPLOYMENT AGREEMENTS

PROHIBITS NONCOMPETE AGREEMENTS AND RESTRICTIVE COVENANTS IN EMPLOYMENT CONTRACTS, POST-EMPLOYMENT CONTRACTS, OR SEPARATION AGREEMENTS THAT FORBID POST-EMPLOYMENT COMPETITION OF EMPLOYEES OF A TECHNOLOGY BUSINESS OR LICENSED PHYSICIANS. (SD2)

WIMAH SUPPORTS BARRING CONTRACTUAL NON-COMPLETE CLAUSES IN ALL EMPLOYMENT CONTRACTS. THE STATE OF HAWAII STANDS TO LOSE MUCH EXPERTISE BY HAVING THESE DAMAGING CONTRACTS.

WE ASK THAT YOU SUPPORT SENATE BILL 3126 SD2.

MAHALO,

GEORGE M. WAIALEALE
EXECUTIVE DIRECTOR
WORK INJURY MEDICAL ASSOCIATION OF HAWAII

EMAIL: WIMAHEXDIR@AOL.COM PHONE: (808)-383-0436