SB3126

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February 5, 2014
TESTIMONY OF STANLEY CHANG
CONCILMEMBER FOR THE CITY AND COUNTY OF HONOLULU
On
S.B. No. 3126, RELATING TO EMPLOYMENT AGREEMENTS
Committee on Technology and the Arts/Committee on Commerce and Consumer Protection
Thursday, February 6, 2014
1:30 p.m.
Conference Room 414

Dear Chairs Wakai and Baker and Committee Members:

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

S.B. 3126 prohibits technology businesses from using non-compete agreements and restrictive covenants which forbid postemployment competition.

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, career stagnation, 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 Relating to Employment Agreements, and thank the Committees for allowing me to provide testimony.

Sincerely,

Stanley Chang
Councilmember – District IV

HTDC Cultivating Hawaii's tech sector
HIGH TECHNOLOGY DEVELOPMENT CORPORATION

Written Statement of
ROBBIE MELTON
Executive Director & CEO
High Technology Development Corporation
before the
SENATE COMMITTEES ON TECHNOLOGY AND THE ARTS
AND
COMMERCE AND CONSUMER PROTECTION

Thursday, February 6, 2014
1:30 p.m.
State Capitol, Conference Room 414
In consideration of

SB 3126 RELATING TO EMPLOYMENT AGREEMENTS.

Chairs Wakai and Baker, Vice Chairs Nishihara and Taniguchi, and Members of the Committees on Technology and the Arts and Commerce and Consumer Protection.

The High Technology Development Corporation (HTDC) offers **comments** on SB 3126 relating to Employment Agreements. SB3126 adds specific language to invalidate non-compete agreements for technology businesses. 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.

2/3/2014

Jeffrey D. Hong
TechMana LLC
Honolulu, HI, 96813

Chair Wakai, Chair Baker, Members of the Commerce & Consumer Protection Committee, and Members of the Technology & the Arts Committee.

As the Chief Technology Officer of a local software company I strongly support SB3126. The Bill provides better opportunities for technology professionals to call Hawaii home. I have personally seen how noncompetition agreements are used in the technology industry with detrimental effects to employees and Hawaii's business community.

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:

- 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.
    - 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.

In 2002 SB2538 was a similar bill submitted to the legislature to encourage employee mobility for the technology industry. The bill did not pass and after 14 years of subtle damages by the current policy we are still left with a small technology industry in Hawaii. Ironically, many jobs that could be serviced by our local workforce is in a technology business that grew in Hawaii during this time period; offshored IT. I urge you to support this bill and change the trajectory of Hawaii from the last 14 years.

I have attached relevant articles and academic studies for your review.

Mahalo,

Jeffrey D. Hong
Chief Technology Officer
TechMana LLC

February 5, 2014

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

Aloha Chair Wakai, Chair Baker, Members of the Commerce & Consumer Protection Committee, and Members of the Technology & the Arts Committee.

I am writing in strong support of SB3126 – 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

Jay M. Fidell
900 Fort Street Mall, Suite 30
Honolulu, Hawaii 96813

February 5, 2014

Chair Wakai, Chair Baker, Members of the Commerce & Consumer Protection Committee, and Members of the Technology & the Arts Committee:

I am a business attorney licensed in Hawaii since 1968. I have also followed the tech industry and community in Hawaii for the some years, and I strongly support SB 3126. Actually, to build a tech industry, we should have passed a bill like this a decade ago.

The bill will incentivize creativity and avoid stagnation. It will make Hawaii a better place for tech jobs and will ameliorate what has become a huge brain drain where we regularly lose our best and brightest tech talent to the mainland, and limit any growth of the industry.

Under the bill, employees will have greater career and entrepreneurial prospects among Hawaii tech companies, and employers will still have the protection of the Uniform Trade Secrets Act. There is everything to gain and nothing to lose by the passage of this bill.

As a matter of policy, greater employee mobility, as under this bill, will encourage the development of our long-awaited innovation economy. Enforcing non-competes will discourage worker creativity and lose our most promising talent to the mainland.

Hawaii law on non-compete agreements has swung in favor of employers and needs to be liberalized to protect tech employees. This is the time to expand local tech opportunities and send a message that yes Hawaii does want to build a tech workforce and tech industry.

I strongly urge you to support this bill and thus the development of this critical industry as an important component of our state economy going forward.

Respectfully,

Jay M. Fidell

Jay M. Fidell

Chair Wakai, Chair Baker, and Members of the Committees on Technology & the Arts and Commerce & Consumer Protection:

I thank you for the opportunity to testify. I strongly support Bill SB 3126. Policies that provide for a larger pool of technology talent in Hawaii is needed.

I came from the mainland in 2003 and worked for both small and "larger" Hawaii businesses as a software developer. It was very difficult to find interesting work or a community of technology talent and entrepreneurs in Hawaii.

I founded my company Church Office Online in while living in Hawaii. For the past 5 years we have seen growth of 40+% year over year. The limited opportunities and lack of mentors in Hawaii was a major factor in my decision to relocate my family to the mainland where there were greater opportunities.

While the issue of non-competes is not common, when you hear about them it involves the intelligent, entrepreneurial developers you would want to keep. These key individuals form the heart of a community and losing just a few has repercussion to all.

I look forward to passage of this bill so that I can someday witness a Hawaii with a vibrant technology community.

Respectfully

Aaron Schnieder

President

Church Office Online

Dear Chair Wakai, Chair Baker, and Members of the Committees on Technology & the Arts and Commerce & Consumer Protection:

I write in strong support of SB2619, Relating to Employment Agreement, which seeks to eliminate restrictive covenants from businesses that rely on technology in the State of Hawaii.

I am currently General Counsel of Evolution Investment Advisers (EIA), a boutique investment firm, which is located in downtown Honolulu. The business of EIA, which is trading on the Tokyo Stock Exchange (TSE), depends on the use of specialized software and technology that assists in the placement of orders on the TSE.

Elimination of restrictive covenants such as non-compete and non-solicit clauses is essential to fostering the growth and development of businesses in Hawaii. As taught by Adam Smith such restrictive covenants hamper the development of a robust free market. More specifically, specialized labor and the free movement of that labor is a necessary component of a healthy, diverse economy. Promoting employee mobility and freedom will allow for innovative businesses to grow and stay in Hawaii.

Thank you for the opportunity to testify.

Respectfully,

Richard Chisholm
General Counsel
Evolution Investment Advisers

1132 Bishop. Street
Suite 2099
Honolulu, Hawaii 96813

SB3126
Submitted on: 2/4/2014
Testimony for TEC/CPN on Feb 6, 2014 13:30PM in Conference Room 414

Submitted By	Organization	Testifier Position	Present at Hearing
Matt Marx	Individual	Support	No

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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Matt Marx

JOINT SENATE COMMITTEES ON COMMERCE & CONSUMER PROTECTION

AND

TECHNOLOGY & THE ARTS

Greetings Chair Baker, Chair Wakai, Vice Chair Taniguchi, Vice Chair Nishihara, and members of the committees. I write in strong support of SB3126 Restrictive Technology Employment Covenants or Agreements.

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. I enclose a summary of this research and an article with Lee Fleming from the 11th volume of the Innovation Policy and the Economy series by the National Bureau of Economic Research and which was presented in April 2012 at the National Press Club. Just to summarize a few highlights of this article:

- 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 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 have non-competes. 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 hold 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 SB3126 would promote the retention of top talent in Hawaii.

References

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

February 4, 2014

The Senate
The Twenty-Seventh Legislature
Regular Session of 2014
Committee on Commerce & Consumer Protection
Committee on Technology and the Arts

Dear Senators Baker, Wakai, Taniguchi, and Nishihara and Committee Members:

This testimony is submitted in strong support of SB 3612.

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 3612 wisely prohibits non-competition agreements between employer and employees in high tech industries. My personal belief is that non-competition clauses should be prohibited in all classes of employment contracts. This Bill represents a modest first step.

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.

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 both 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 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,

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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 law adequately protects 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,

Hazel Beh
Co-Director
Health Law Policy Center

Edward Pileggi
Lunasoft LLC
Honolulu, HI 96815

February 5, 2014

Chair Wakai, Chair Baker, Members of the Commerce & Consumer Protection Committee, and Members of the Technology & the Arts Committee:

As a technology professional with over 15 years of experience, I'm strongly in favor of SB3126 because it would help create employment opportunities in the technology sector and ultimately encourage technology professionals to remain in Hawaii.

I have first-hand experience with the negative impacts of non-compete agreements. The most recent incident is one that I'm currently going through as a software consultant with Hawaiian Airlines. While I do enjoy working for Hawaiian Airlines, there is a staffing agency between myself and Hawaiian Airlines that has not been treating me fairly. Most importantly, they have not been paying me on time. 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.

I believe that Hawaii does an excellent job of attracting talented technology professionals from all over the world, but it has a difficult time retaining these individuals due in large part to non-compete agreements. Supportng SB3126 will help alleviate the need for technology professionals to seek employment opportunities outside of Hawaii.

Mahalo,

Edward Pileggi
Owner & Founder
Lunasoft LLC

LAW OFFICE OF DAVID F. SIMONS

Subject: Testimony in Support of SB3126, Hearing 2/6/13, 1:30 p.m. Room 414

I am an attorney who represents employees who are stuck having to sign contracts with non-compete language in them in order to keep their jobs. I have had several clients over the years lose their jobs because they refused to give up their freedom to compete, and even more who, given a choice between refusing to give up their right to switch jobs in the future, or paying their mortgage now, sign the non-compete.

It is routine in Hawaii's Circuit Courts for non-compete agreements to be enforced. I have seen them enforced against home inspectors, escrow workers, timeshare salesmen, doctors, hairstylists, adminsitrators, tour operator. I asked one judge who retired after serving 25 years on the bench how often she knew of Circuit Court judges not enforcing a non-compete, she told she was unaware of any cases in which they were not enforced.

Current law allowa employers to enforce nom-competes – **even if the employer fires the employee or lays them off.**

Enforcing non-competes allows an abuse of economic power of the 1 percent (the employers) against the 99 percent (the employees). It allows a serious restraint of trade. Allowance of and routine judicial enforcement of mandatory non-compete required to be signed as a condition of employment– which is the current state of the law in Hawaii - is unnecessary to protect any legitimate interests of the employer, and makes it impossible for employees forced to sign them to compete fairly in the future in the labor market.

To the extent an employer actually pays money to send an employee to a training, it is perfectly legal for the employer to require that, if the employee quits soon after the training is provided, that the employee reimburse the employer for the cost of the training. So to the extent the employer has a legitimate interest in recovering the costs of recent education it provides a worker, a contract to do that can be easily drawn up and enforced, but that contract should be limited to reimbursement, It does not need to restrain competition, which is the engine that cause the free enterprised system to be successful for our society.

We also have law which is uniform throughout the country to prohibit an employee from stealing an emplyer's "trade secret" and using them to compete or assist other in competing angainst the former employer. Non-competes are not needed to do that – our trade secret actalready protects employers from having employees steal trade secrets.

It's not unusual for hairdressers to have to sign non-competes. The legislature should be concerned with the rights not only of the workers but also of customers. If your barber wants to

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open up at a new location, why should the Courts stop you from being able to get a haircut from the barber of your choice. But it is not just the public's right to choose their barber that is at stake –is their right to have the doctor of their choice that is lost because of non-competes, also.

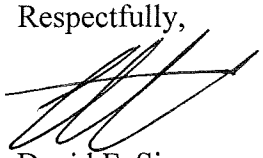
Another reason the non-competes should be nullified in the State of Hawaii is that the economic power between the employer and employee makes it an unfair contest legally. If an employee comes to me with a non-compete agreement – even if I think it is completely unfair and would not be upheld in court, I have to tell the employee that he better have at least $10,000.00 available to fight the lawsuit. Further, the non-compete, even if it legally unenforceable, has a chilling effect because a new employer is not going to hire someone, even if they agree the non-compete is illegal, because they don't want to buy a lawsuit. Thus the employer who usually vastly more economic resources than a former employee, can enforce even an unreasonable non-compete because few former employees, or future employer are willing or can afford to get in a risky expensive legal fight on the issue.

A final reason the non-competes should not be allowed in the State of Hawaii is because of our geographic isolation. It's one thing if a worker in Kansas has a non-compete agreement but can go to Nebraska or Oklahoma. They can still drive home for the holidays and see their families, they can still help their elderly parents is they need some support. It does not totally disrupt a family. Also our geographic isolation and relatively small population often result in having very few specialists available. I had a non-compete involving a man trained prior to moving to Hawaii to repair of sophisticated medical devices. He moved here and took a job with an employer who had a virtual monopoly position for repair of such devices in the state, which it enforced by keeping all qualified repairmen subject to non-competes, so the only way a hospital could get local service was to use this one company.

There is real harm that is done to workers and Hawaii's economy because we allow and enforce noncompete agreement. Conversely, and there is very little benefit of any kind to our society of allowing this exception to our general laws prohibiting contracts which restrain economic competition.

The bill should be amended to adopt California law and prohibit enforcement of non-compete unless entered into in connection with the sale of a business, such as the 10 year non-compete Nick Nicholas signed when he sold Nick's Fish Market. That was a legitimate business interest in which a fair price is paid for a non-compete as part of a larger business transaction. But the usual non-compete in which a worker loses the ability to take a better paying job because Hawaii law allow a legal exception to the general prohibition again restraints on economic competition, allowing their employers to restain competition in the labor market by reuiring employees sign non-competes, should not be permitted to continue in Hawaii.

Respectfully,



David F. Simons
Law Office of David Simons

Cinthia Miller
Owner

O&A Consulting LLC
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2/5/2014

Aloha Chair Wakai, Chair Baker, Members of the Committees on Commerce & Consumer Protection Committee and Technology & the Arts

I strongly support SB3126 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 SB3126 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

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