HB 1090 HD1

RELATING TO EMPLOYMENT AGREEMENTS

KEN HIRAKI
VICE PRESIDENT – GOVERNMENT & COMMUNITY AFFAIRS
HAWAIIAN TELCOM

February 25, 2015

Chair McKelvey and members of the Committee:

I am Ken Hiraki, testifying on behalf of Hawaiian Telcom on HB 1090 HD1 - Relating to Employment Agreements.

Hawaiian Telcom is requesting an exemption from the measure because of what we believe is an overly broad definition of "technology business."

Our company does not derive a majority of its revenue from the sale or license of products or services resulting from its own software or information technology development yet we would be covered under this measure by the fact that we provide the infrastructure and lines which are used to transmit voice and data information. We believe this measure should be clarified to distinguish between a technology business primarily focused on the development of software and information technology as opposed to a primary service provider like Hawaiian Telcom.

Hawaiian Telcom respectfully requests that this measure be amended as follows:

Page 7, Section 2, subsection (d), lines 9-10:
"…A "technology business" shall not include **an incumbent local exchange carrier and** any entity that uses software or information technology…"

Thank you for the opportunity to testify.

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 CONSUMER PROTECTION AND COMMERCE

Wednesday, Feb 25, 2015, 02:25 PM
State Capitol Conference Room 325

Greetings Chair McKelvey, Vice Chair Woodson, and Members of the Committee on Consumer Protection and Commerce:

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 HB 1090, as a means for Hawaii to retain its top talent.

2014 marked 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 HB 1090 would promote the retention of top talent in Hawaii.

References

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Robert “Sam” Martindale
Architecting Innovation, LLC
Honolulu, HI, 96813

HOUSE COMMITTEE ON CONSUMER PROTECTION & COMMERCE

Wednesday, Feb 25, 2015, 02:25 PM
State Capitol Conference Room 325

Aloha Chair McKelvey, Vice Chair Woodson, and Members of the Committee:

As the Chief Technology Officer of a software company doing business locally in Hawaii, I strongly support HB 1090. 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 costing jobs and productivity in Hawaii's business community. Furthermore, I have been the victim of noncompetition agreements in the past and in other states, which at one point in my career actually forced me to uproot my family and relocate elsewhere.

In my personal experience, enforcement of these agreements does much more than simply endanger the livelihood of the individual; they directly hinder the growth of the local economy of this beautiful state, discouraging both talented individuals and growing businesses from investing in our economy. I can personally testify that were it not for these restrictions, my own company would be much more willing to shift an increasing amount of resources and business to this state, helping to further grow the economy and talent pool here in Hawaii.

- Encourages broad and indiscriminate use of non-competes across many industries. This causes individuals to leave the State if they want to remain employed in their field.
- 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 locally.
- Discourages the formation of a critical mass of technology professionals in Hawaii
    - Discourages technology professionals from moving to a place of limited employment mobility.
    - Encourages our best local talent 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.

I thank you for the opportunity to testify. Please support this bill and encourage Hawaii’s technology community to grow.

Mahalo,

Robert “Sam” Martindale
Chief Technology Officer
Architecting Innovation, LLC

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 CONSUMER PROTECTION & COMMERCE
Wednesday, February 25, 2015
2:30 p.m.
State Capitol, Conference Room 325
In consideration of

HB1090 HD1 RELATING TO EMPLOYMENT AGREEMENTS.

Chair McKelvey, Vice Chair Woodson, and Members of the Committee on Consumer Protection & Commerce.

The High Technology Development Corporation (HTDC) **respectfully offers comments** on HB1090 HD1 relating to employment agreements**.**

HTDC comments that the bill favors employee mobility which can provide benefits of retaining spin-off companies and entrepreneurial employees within the state. HTDC comments that eliminating all non-compete agreements also reduces a small business's ability to protect its corporate knowledge, business strategy, and customers. HTDC suggests that companies should have the right to protect their client base and intellectual property.

Thank you for the opportunity to offer these comments.

Edward Pileggi
Lunasoft LLC
Honolulu, HI 96815

February 25, 2015

HOUSE COMMITTEE ON ECONOMIC DEVELOPMENT & BUSINESS

Friday, Feb 25, 2015, 02:25 PM
State Capitol Conference Room 322

Aloha Chair McKelvey, Vice Chair Woodson, and Members of the Committee on Consumer Protection and Commerce

As a technology professional with over 15 years of experience, I'm strongly in favor of HB 1090 HD1 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 HB 1090 HD1 will help alleviate the need for technology professionals to seek employment opportunities outside of Hawaii.

Mahalo,

Edward Pileggi
Owner & Founder
Lunasoft LLC

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

Before the House Economic Development & Business Committee
February 24, 2015

RELATING TO EMPLOYMENT AGREEMENTS

Good afternoon Chairman McKelvey 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 providing my testimony in opposition to House Bill 1090.

There is no legitimate public policy reason to insert the State of Hawaii into the negotiation of an employment contracts. Businesses in general and broadcasters specifically 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. HB1090 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 23 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 HB1090. 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 of this issue.

February 24, 2015

HOUSE COMMITTEE ON CONSUMER PROTECTION & COMMERCE
Wednesday, Feb 25, 2015, 02:25 PM
State Capitol Conference Room 325

Chair McKelvey, Vice Chair Woodson, and Members of the Committee on Consumer Protection and Commerce

I am writing in strong support of HB1090 HD1 – 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.

Jim Takatsuka | 520 Lunalilo Home Road #230 | Honolulu, HI 96813 | 808-371-0200

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

February 23, 2015

Colton Kekoa Neves
Technology Business Development Professional
Philadelphia, PA 19146

Chair McKelvey, Vice Chair Woodson, and Members of the Committee on Consumer Protection and Commerce:

I am a hopeful, future leader in the Hawaii business community and am writing to you in strong support of **House Draft 1 - HB 1090 HD1**.

Upon graduating from Kamehameha in 2004, I left for the mainland and subsequently returned home with a renewed focus on contributing to the local community. However, my interest in the burgeoning technology sector on the mainland combined with the tepid growth in my home state of Hawaii were key factors in my decision to move away again.

As I complete my MBA at the Wharton School and look towards my career, three fundamental elements comprise my search for the ideal work environment: the existence of diverse industries, substantive policy support for entrepreneurs and a culture of innovation in the community.

All three are lacking in Hawaii, but coincidentally, all three are directly addressed by House Draft 1 – HB 1090 HD1. By increasing employee mobility and signaling to the broader tech community that the legislature supports innovation and worker creativity, you have an opportunity to be catalysts of positive change for the business community.

Like many of Hawaii's best and brightest who have left the islands for brighter opportunities, I too am excited for a day to return a home state as vibrant, innovative and supportive as those in California and on the East Coast. You are uniquely positioned to enact change and I strongly urge your support in this bill.

Sincerely,

Colton K. Neves
Kamehameha Schools '04
MBA, The Wharton School '15

Testimony of Andrew Jackson
President and General Manager KITV
Officer of the Hawaii Association of Broadcasters

Before the House Committee on Consumer Protection and Commerce
February 25th, 2015

RELATING TO EMPLOYMENT AGREEMENTS

My name is Andrew Jackson and I am the President and General Manager of KITV. We are Hawaii's local ABC affiliate but more importantly KITV provides a vital service to local communities through our newsgathering operations for both television and our digital outlets. The news services we provide are of particular importance during times of crisis here in the islands such as major weather events and other natural disasters. I serve on the boards of the American Red Cross, the Cathedral of St. Andrew, the Hawaii Pops and Manoa Valley Theatre. I am also an officer of the Hawaii Association of Broadcasters that represents 55 television and radio stations serving our state. I am here to testify in opposition to House Bill 1090.

Even though it is meant to specifically address the technology business sector, HB 1090 is of particular concern to the broadcast industry because the vague language contained in the bill could unintentionally harm Hawaii broadcasters. When one considers the definition of "Information Technology" contained in the bill – "any equipment or interconnected system or subsystem of equipment that is used in the automatic acquisition, storage, manipulation management, movement, control, display, switching, interchange, transmission or reception of data or information…" one could easily ascribe this definition to broadcasters – or for that matter any and all businesses involved in the acquisition and distribution of digital information.

Clearly, a broadcaster's main responsibility to our community involves utilizing equipment to acquire and distribute information. We utilize computers and interconnected systems to accomplish this important work. As we understand it, the intent of the bill is to specifically address industries involved in the development, creation and manufacture of technology products, not businesses that are end users of those technology products.

There are several reasons why non-competition agreements are of vital importance to our industry. Broadcasters make a tremendous investment in station infrastructure and are subject to a vigorous a public service requirement from the FCC. Only when that responsibility has been met, at great effort and expense to the station can our signal be distributed across the state. Upon this platform of investment stand our on-air employees. Without it their broadcast jobs and their public profiles as on-air talent would not exist.

Hawaii broadcasters also invest large sums in the training and promotion of our on-air personalities. The public profile of these employees – in the context of their broadcasting jobs – would not be possible

without the significant investment we make in their training and in marketing them. Broadcasters who utilize non-competition agreements are simply protecting the investment we make in our employees and our businesses.

The simple adage 'if it ain't broke – don't fix it' applies to non-competition agreements in the Hawaii broadcast industry. The current 'reasonable analysis' requirement employed in enforcing non-competition agreements gives the courts the ability to find a fair resolution in evaluating each case that comes before them.

Since first becoming involved in Hawaii broadcasting in 1989 it has been my own experience that with employer protection in place the employment covenant has not been overly restrictive. In fact, if one watches Hawaii television with any interest at all one can note the movement of on-air employees from station to station over their careers. A reasonable period of time between appearing on-air when transitioning from one station to another is fair to both broadcasters and employees.

Mr. Chairman and committee members Hawaii broadcasters are opposed to HB 1090. We ask that you consider the important business and community interests that we seek to protect. Thank you.

DAVID Y. IGE
GOVERNOR

LATE

KATHRYN S. MATAYOSHI
SUPERINTENDENT

STATE OF HAWAI`I
DEPARTMENT OF EDUCATION
P.O. BOX 2360
HONOLULU, HAWAI`I 96804

Date: 02/25/2015
Time: 02:30 PM
Location: 325
Committee: House Consumer Protection and Commerce

Department: Education

Person Testifying: Kathryn S. Matayoshi, Superintendent of Education

Title of Bill: HB 1090, HD 1 RELATING TO EMPLOYMENT AGREEMENTS.

Purpose of Bill: Prohibits noncompete agreements and restrictive covenants that forbid post-employment competition for employees of a technology business. (HB1090 HD1)

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 candidates either qualified or available to work in this state.

On occasion, we have had extremely qualified consultants/applicants express the interest in positions at the Department. However, because their noncompete agreements prevent them from seeking subsequent employment at organizations their current employer does business with, they must effectively eliminate themselves from consideration. Some of these individuals work for large mainland technology companies and have very specialized skills, or might possibly be here on assignment, but have a strong desire to either remain as Hawaii residents or become Hawaii residents.

Most noncompete agreements effectively prevent an individual from working in any technology capacity at an organization which their employer competes or does business with. For employees of large consumer oriented companies which do business with nearly everyone, a noncompete agreement tends to effectively eliminate nearly all viable options for employment within the state. This encourages 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.

LATE

Jeffrey D. Hong
TechMana LLC
Honolulu, HI, 96813

HOUSE COMMITTEE ON CONSUMER PROTECTION & COMMERCE

Wednesday, Feb 25, 2015, 02:30 PM
State Capitol Conference Room 325

Aloha Chair McKelvey, Vice Chair Woodson, and Members of the Committee:

As the Chief Technology Officer of a local software company I strongly support HB 1090HD1. The bill provides better opportunities for technology professionals and our brightest keiki to call Hawaii home.

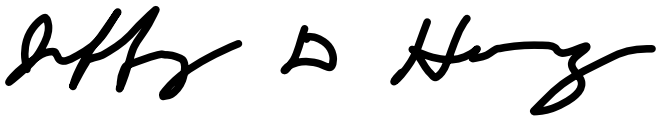
For over 100 years, California has had a policy of generally barring non-competes with limited reasonable exceptions. Academic studies have concluded California's employee mobility policy has helped create Silicon Valley by providing a ready pool of qualified talent. This bill puts Hawaii 's technology industry on equal footing with California in supporting employee mobility as a means of supporting the technology industry.

Hawaii's technology sector remains at the bottom of most rankings in the US. The bill provides targeted support to the industry. We have worked with the Hawaii Association of Broadcasters to address their concerns that the bill could unintentionally include their businesses. We recommend one clarification to the scope of the definition of a "Technology business":

> "Technology business" means a trade or business that derives the majority of its revenue from the sale or license of products or services resulting from its development**, integration, or servicing** of software or information technology, or both.

I have attached a facts sheet to assist with your analysis of the bill. I appreciate the opportunity to testify.

Mahalo,



Jeffrey D. Hong
Chief Technology Officer
TechMana LLC

TechMana LLC

Facts About HB 1090

"Prohibits noncompete agreements and restrictive covenants that forbid post-employment competition of employees of a technology business."

If passed, HB 1090 will:

- Allow IT professionals to utilize their skills without having to leave the state of Hawai'i to find gainful employment.
- Grow jobs, competition, and skills within the IT industry in Hawai'i.

Who Supports HB 1090

- Local businesses
- Technology Integrators and Startups
- Technology employees
- Department of Education
- Economists

Why Support HB 1090?

- Current noncompete agreements prohibit technology professionals from working in any capacity at another organization in Hawaii. Therefore organizations seeking to contract individuals or hire skilled professionals have a **limited pool of local talent**.
- Because technology professionals typically have a specific set of skills, noncompete agreements force them to seek work outside of Hawai'i leading to a **"brain drain" of our best and most talented individuals**.
- Current laws around noncompetes **encourages outsourcing technology resources** – funneling money outside of the state -- because local residents are restricted from working for competitors.

Frequently Asked Questions of HB 1090

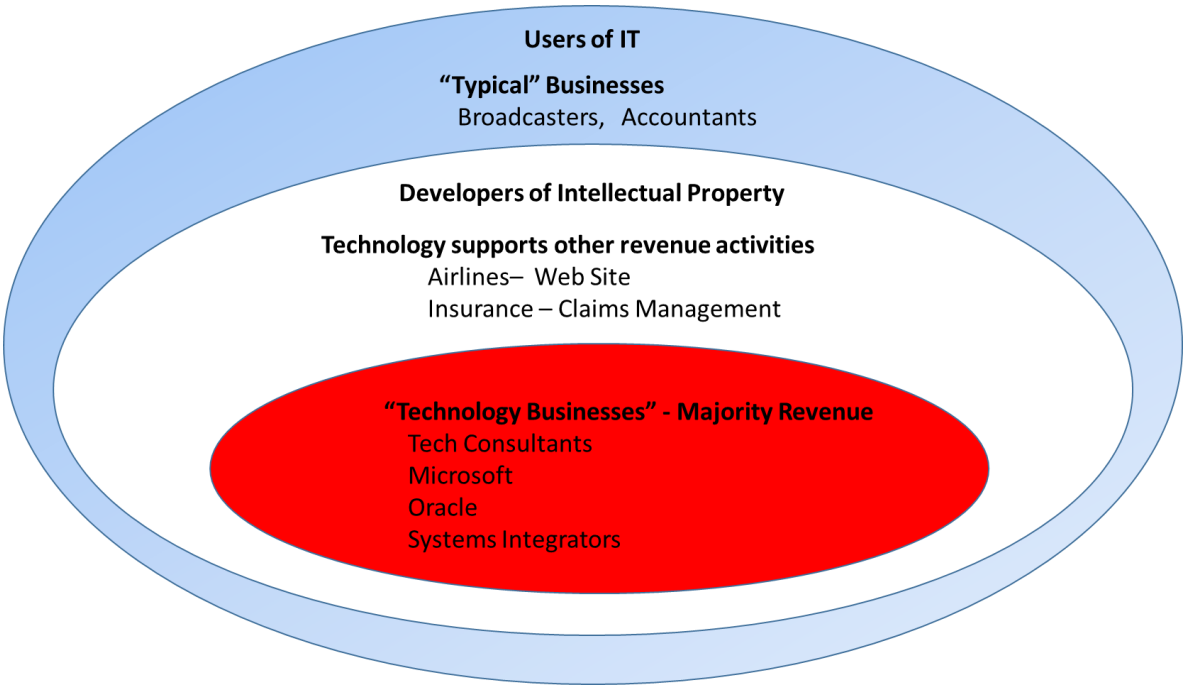
Question: How do I protect my intellectual property and trade secrets if HB 1090 passes?
Answer: The bill allows for non-disclosure agreements and embraces the Uniform Trade Secrets Act **HRS §§ 482B-1 through 482B-9 (2011).** This approach has provided the right balance between protection of a company's confidential information, and the ability of employees to use their skills with another employer.

Question: Does Hawaii's technology industry need help?
Answer: Hawaii ranks last in a Brookings Institute study on employment in advanced industries. A Harvard Business Review study on the "Most Innovation Friendly" states found a common thread for Minnesota and California was restrictions on non-compete enforcement. . Hawaii tied for last in this study on innovation friendly states. California

already has huge advantages, this is an easy change to policy that will **give Hawaii's technology community a more level playing field.**

Question: Everyone uses technology. Is my business included?
Answer: The bill is narrow in scope to only affect "technology businesses". The bill separates businesses into 3 categories with only one in scope for the bill:

- **Users of IT**: Businesses that do not produce software or IT-related intellectual property are exempted.
- **Developers of Intellectual Property:** Businesses that develop, integrate, or service software or information technology
    - **Technology Supported Businesses** - Businesses that develop information technology but do not generate a majority of their revenue from the sale or licensing of these products are exempted. These would include software intensive businesses like an airline supporting its web site or an insurance company supporting claims processing. These business earn the majority of their revenue from selling airline travel, or selling insurance.
    - **"Technology Businesses"**- Businesses that generate the majority of their revenue from the development, integration, or servicing of software or information technology. This would include traditional software companies like Microsoft and Oracle. It would also include systems integrators that design and service the implementation of software developed by other companies.



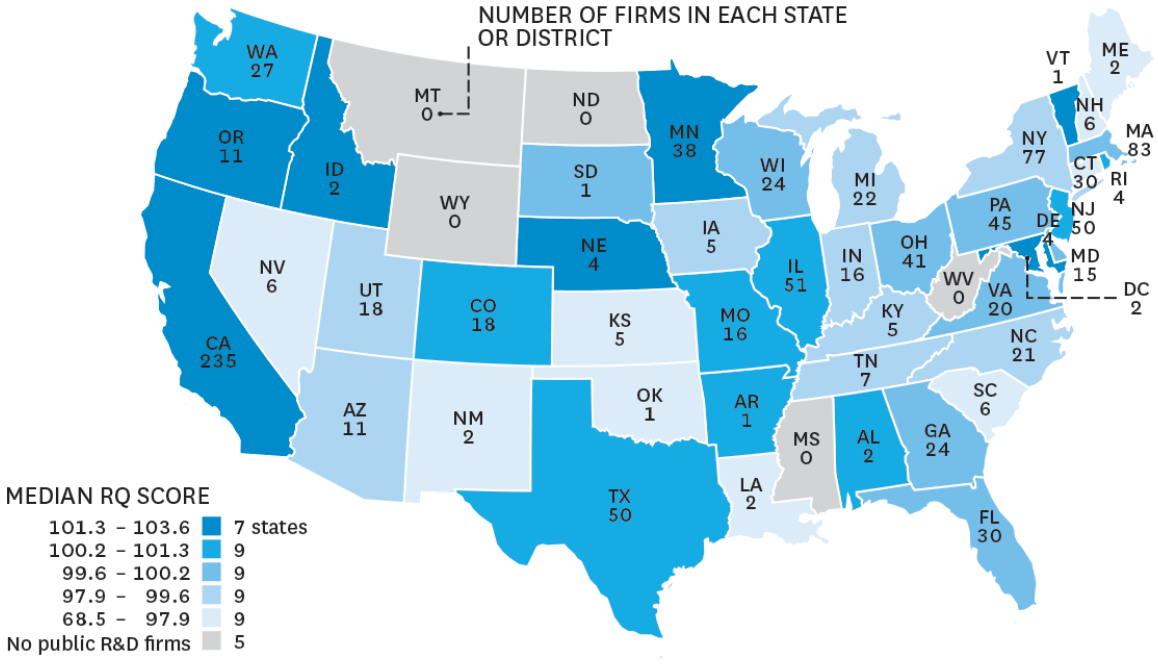
Harvard Business Review

What the Two Most Innovation-Friendly States Have in Common

"But there is one important institutional feature shared by **California** and **Minnesota** that is consistent with the Klepper story: both states **restrict the enforcement of non-compete agreements**."

https://hbr.org/2014/12/what-the-two-most-innovation-friendly-states-have-in-common

WHICH STATES ARE THE MOST INNOVATION FRIENDLY?
Mapping the number of public firms conducting R&D and each state's median RQ score, which measures the effectiveness of R&D investment.



NOTE EXCLUDES AK AND HI, BOTH WITH NO PUBLIC R&D FIRMS.
SOURCE ANNE MARIE KNOTT AND SHEEWON PARK

HBR.ORG

California and Minnesota place first. They restrict non-competes.
Hawaii tied for last place with 5 other states.

Strong Support HB 1090

Welcoming Technology Businesses

Hawai‘i courts have enforced statewide, multi-year employment covenants not to compete. These provisions force our citizens to leave Hawai’i 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 professionals merits 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.

Advocating for HB 1090 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 HB 1090.

Mahalo,

Jeffrey Hong
Chief Technology Officer
Techmana LLC

HB 1090 Supporters

Technology Industry:

Jacob Buckley-Fortin – CEO, eHana LLC
Matthew Douglass – Co-Founder, VP Platform, Practice Fusion
Jay Fidell – Founder, ThinkTech
Cort Fritz – Principle Program Manager, Microsoft
Jeffrey Hong – Chief Technology Officer, Techmana LLC
Kiyoshi Kusachi – Senior Manager – Hawaiian Airlines
William Kirby – President – Radical Synergy LLC
Chris Lee – Motion Picture Producer, Founder and Director, ACM System
Burt Lum – Executive Director – Hawaii Open Data
Sam Martindale – Managing Partner – Architecting Innovation
Cinthia Miller – Owner – O&A Consulting
Phillip Moore – VP IT – Hawaiian Airlines
Jim Takatsuka – Hawaii Account Executive - Microsoft
Spencer Toyama – Founder – Sudokrew LLC
Edward Pileggi – Owner – Lunasoft LLC
William Richardson – General Partner, HMS Hawaii Management Partners
Aaron Schnieder – Founder, Church Office Online
John Vavricka – Program Director, RTI International
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Academic Faculty:

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Professor Matt Marx – MIT, Sloan School of Management

Government:

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

Attorneys:

Stanley Chang
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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.*

Ryan K. Hew
Helping small and medium-sized businesses with their compliance and transactional needs.
Attorney at Law, LLLC

LATE

Testimony to House Committee on Consumer Protection & Commerce

WEDNESDAY, FEBRUARY 25, 2015, 2:30PM
Conference Room 312, State Capitol

RE: HB1090 RELATING TO EMPLOYMENT AGREEMENTS; IN SUPPORT

To Chair McKelvey, Vice Chair Woodson, and Members of the Committee:

My name is **Ryan K. Hew**, an attorney that provides transactional and compliance services for small and medium-sized businesses here in Hawaii. I write in **SUPPORT** of HB1090 and provide information and address certain concerns regarding the subject matter as an attorney that assists technology clients in drafting and reviewing their agreements.

I. Overview of Noncompete Law in Hawaii

While, normally restraints in trade are illegal HRS 480-4(c)(4) provides the exception, and is stated as follows:

> A covenant or agreement by an employee or agent not to use the trade secrets of the employer or principal in competition with the employee's or agent's employer or principal, during the term of the agency or thereafter, or after the termination of employment, within such time as may be reasonably necessary for the protection of the employer or principal, *without imposing undue hardship* on the employee or agent.

(emphasis added).

While, the language provides that such an agreement is enforceable "without imposing undue hardship on the employee" at this time due to the Hawaii Supreme Court rulings from *Technicolor, Inc. v. Traeger*, 57 Haw. 113, 551 P.2d 163 (1976) and 7's Enterprises v. Del Rosario, 111 Hawaii 484, 143 P.3d 23 (2006) we have been left in a situation that under the factors of reasonableness, as adopted in *Traeger*, (which includes "geographical scope, length of time, and breadth of the restriction placed on a given activity") that **state-wide, 3 year restrictions** in noncompete agreements will be enforced.

Basically, the result of upholding these broad noncompete provisions is it puts the leaving employee in the position of having to choose to change their career or profession or to leave the state in order to utilize their skills.

II. Different Types of Restrictive Covenants

For my own part, when educating clients, that are the employing organization, many times the employer does not realize that there are several types of restrictive covenants in employment agreements. We go through this conversation, as there is a tendency to conflate legal concepts and be broad in the rights desired by the employer. Therefore, when a layperson may refer to a "noncompete" they actually may be referring to some of or all of the following:

a. **noncompete** – is a blanket prohibit on a specified conduct, which basically attempts to prohibit the employee from working for a competitor, and this will be enforced so long as it meets the reasonableness factors I cited above;

b. **nonsolicitation** – is a provision aimed at preventing the employee from soliciting the customers of the employing organization post-employment and prevents the employee taking the customer base as they leave;

c. **nonsolicitation (employee non-hire)** – this variation of the above provision basically prevents the leaving employee from bringing co-workers from the employing organization to form or go over to a competing business; AND

d. **nondisclosure/confidentiality** – this provision is specifically designed to prevent a leaving employee from taking confidential or proprietary information with them and making use of it for the benefit of a competitor.

Usually, accompanying these provisions are some type of court-modification covenant, that would allow a court to modify the employment agreement if any of these restrictive covenants were held too broad or problematic. Further, it is also standard to ask for attorneys' fees for the prevailing party and the ability of the employer to seek out injunctive relief as a possible remedy. For most business owners, they tend to default to wanting everything in their employment agreements to maximize their rights, without

regard to protecting just the valuable information that a well-drafted non-disclosure provision would serve to protect. However, this is not the end of the problem.

III. Practical Effects of Allowing Noncompetes

While many business owners should rightly want to protect their confidential and proprietary information, including marketing plans, customer lists, inventions, designs, and other trade secrets, the question remains is when given broad authority to restrict an employee from using their skillset and not just the knowledge what happens to the availability of workers if employers will always automatically default to a noncompete rather than a narrowly tailored nondisclosure?

Several of my technology-based clients have lamented that they are unable to find talented workers with the right skillset and that is not just anecdotal evidence. The Brookings Institution found that Hawaii in hosting "advanced industries", which includes energy generation, computer software and biotech, that the state had 23,600 directly employed people in these industries, and that accounted for only 3.4% percent of toal employment. This made Hawaii rank 51 as compared to the rest of the nation and D.C. metropolitan area. (See http://www.brookings.edu/research/reports2/2015/02/03-advanced-industries#/M10420)

While, it is true that no other state has carved exceptions for technology workers, it seems clear that the prevalence of exceptions for physicians is a desire by certain states to allow employment mobility for this type of worker. Further, California, which is known for its Silicon Valley, a center of technological innovative companies has banned the enforcement of noncompetes. The passage of HB1090 will is unlikely to be a panacea to the dearth of skilled workers, but would definitely take one deterrent off the table of a technology worker considering the move to Hawaii from the mainland.

Lastly, I would say from personal knowledge and experience, Hawaii employers ask for noncompetes when they have no intention of enforcing the provisions. However, for an employee that does not know this they would not rather gamble a lawsuit; so they either opt to leave the state or change professions, but that of course is no benefit to the state, as it still leaves the State of Hawaii without a pool of valuable technology workers. This in turn makes it hard for my technology business clients from recurring these skilled workers.

Mahalo for your consideration of this bill and my testimony,

Ryan K. Hew, Esq.

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