HOUSE OF REPRESENTATIVES
TWENTY-EIGHTH LEGISLATURE, 2015
STATE OF HAWAII

H.B. NO. 1090

A BILL FOR AN ACT

RELATING TO EMPLOYMENT AGREEMENTS.

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

SECTION 1. The legislature finds that postemployment restrictive covenants impede the development of businesses within the State by driving skilled workers to other jurisdictions and by requiring local businesses to solicit skilled workers from out of the State. Eliminating restrictive covenants for employees of the technology business sector will stimulate Hawaii's economy by preserving and providing jobs for employees in this sector and by providing opportunities for those employees to establish new companies and new job opportunities in the State.

A restrictive covenant not to compete with a former employer imposes a special hardship on employees of technology businesses as these highly specialized professionals are trained to perform specific jobs in the industry. Because the geographic area of Hawaii is unique and limited, noncompete agreements unduly restrict future employment opportunities for

these workers and have a chilling effect on the creation of new businesses within the State by innovative employees.

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

In *Technicolor, Inc v. Traeger*, 57 Haw. 113, 551 P. 2d 163 (1976), the Hawaii supreme court ruled that noncompete covenants and agreements that are not per se violations under section 480-4(b), Hawaii Revised Statutes, may be enforced in Hawaii as long as they pass a reasonableness analysis. Employers' trade secrets are already protected under the federal Uniform Trade Secrets Act and under section 480-4(c)(4), Hawaii Revised Statutes, therefore, the benefits to the employer of noncompete or nonsolicit agreements are unnecessary and overreaching protections that unreasonably impose undue hardship upon employees of technology businesses and the Hawaii economy.

The purpose of this Act is to stimulate Hawaii's economy by prohibiting noncompete agreements and restrictive covenants that forbid post-employment competition for employees of a technology business.

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

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

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

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

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

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

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

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

(1) A covenant or agreement by the transferor of a business not to compete within a reasonable area and

within a reasonable period of time in connection with the sale of the business;

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

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

(4) 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.

(d) Except as provided in subsection (c)(4), any employment contract, post-employment contract, or separation agreement containing a noncompete or nonsolicit clause relating to an employee of a technology business is prohibited. Such agreement shall be void and of no force and effect.

As used in this subsection:

"Information technology" means 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. The term includes computers, ancillary equipment, software, firmware and similar procedures, services, and support services, and related resources.

"Noncompete clause" means a clause in an employment contract, post-employment contract, or separation agreement that prohibits an employee from working in a specific geographic area for a specific period of time after leaving employment with the employer.

"Nonsolicit clause" means a clause in an employment contract, post-employment contract, or separation agreement that prohibits an employee from soliciting employees of the employer after leaving employment with the employer.

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

"Technology business" means a trade or business that derives the majority of its revenue from software development, information technology, or both.

This subsection shall apply to all written, binding noncompete and nonsolicit clauses entered into after June 30, 2015, and to all amendments adding or amending noncompete and nonsolicit clauses in existing written agreements created prior to July 1, 2015."

SECTION 3. Statutory material to be repealed is bracketed and stricken. New statutory material is underscored.

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

INTRODUCED BY: Cindy Evans

JAN 27 2015

H.B. NO. 1090

Report Title:
Technology; Employment Covenants or Agreements

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

The summary description of legislation appearing on this page is for informational purposes only and is not legislation or evidence of legislative intent.

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

ON THE FOLLOWING MEASURE:
H.B. NO. 1090, RELATING TO EMPLOYMENT AGREEMENTS.

BEFORE THE:
HOUSE COMMITTEES ON ECONOMIC DEVELOPMENT AND BUSINESS AND ON TOURISM

DATE: Friday, February 13, 2015 **TIME:** 9:00 a.m.

LOCATION: State Capitol, Room 312

TESTIFIER(S): Russell A. Suzuki, Attorney General, or
Rodney I. Kimura, Deputy Attorney General

Chairs Kawakami and Brower and Members of the Committees:

The Attorney General submits comments to alert the committees that the new subsection proposed by the bill could foment a legal challenge.

This bill proposes to add a new subsection (d) to section 480-4, Haw. Rev. Stat., to prohibit restrictive covenants in employment agreements that forbid post-employment competition by employees of a technology business. We have concerns with the wording in the new subsection stating that it will apply to "all amendments adding or amending noncompete and nonsolicit clauses in existing written agreements created prior to July 1, 2015."

By virtue of the quoted wording in the new subsection (d), any noncompete or nonsolicit clause in an existing employment agreement will be prohibited. This prohibition raises the issue of whether the new subsection could be challenged and thereby determined to violate the federal constitutional prohibition against impairment of contracts set forth in Article I, section 10, clause 1, of the U.S. Constitution.

Though the key phrase in clause 1 states "No State shall . . . pass any . . . Law impairing the Obligation of Contracts. . . ." the phrase is not absolute in its application. The United States Supreme Court has articulated a stepped analysis with which to assess whether a state law unconstitutionally impairs an existing contract.

The threshold inquiry is whether the state law has, in fact, operated as to cause a substantial impairment of a contractual relationship.

If the state law does effect a substantial impairment, the State, in justification, must advance a significant and legitimate public purpose behind the state law.

Once such a purpose has been identified, the statutory adjustment of the contracting parties' rights and responsibilities must be assessed to determine if it is based upon reasonable conditions and of a character appropriate to the public purpose justifying the legislation's adoption. *Energy Reserves Group, Inc. v. Kansas Power and Light Co*., 459 U.S. 400, 411-413 (1983).

Courts typically defer to legislative judgment as regards the necessity and reasonableness of the statute. For this reason, a legislative record articulating and supporting the existence of a significant and legitimate public purpose behind the law is important.

At this time, we are not in a position to opine on whether such a challenge might be successful since we do not have information on a myriad of factors needed to assess whether and to what extent the subsection substantially impairs existing contracts including, for example, the extent to which noncompete or nonsolicit clauses are in use, the provisions in such clauses, the intent of the contracting parties, the employment relationship and the significance of such clauses to the relationship, the extent of the impairment of the contractual relationship caused by the new subsection, etc.

We reiterate that the legislative history of this measure setting forth the public purpose to be served will be considered by a reviewing court and weighed against any assessment of the significance of the impact on existing contractual relationships. The Legislature should therefore clearly and thoroughly document its conclusions regarding the need for the application of this bill to all amendments adding or amending noncompete and nonsolicit clauses in existing written agreements created prior to July 1, 2015.

Thank you for the opportunity to testify on this measure.

DAVID Y. IGE
GOVERNOR

KATHRYN S. MATAYOSHI
SUPERINTENDENT

LATE

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

Date: 02/13/2015
Time: 09:00 AM
Location: 312
Committee: House Economic Development & Business

Department: Education

Person Testifying: Kathryn S. Matayoshi, Superintendent of Education

Title of Bill: HB 1090 RELATING TO EMPLOYMENT AGREEMENTS.

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

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.

HB 1090

RELATING TO EMPLOYMENT AGREEMENTS

KEN HIRAKI
VICE PRESIDENT – GOVERNMENT & COMMUNITY AFFAIRS
HAWAIIAN TELCOM

February 13, 2015

Chair Kawakami and members of the Committee:

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

Hawaiian Telcom opposes HB 1090 which prohibits the use of noncompete and nonsolicit clauses in any employment contract, post-employment contract, or separation agreement relating to an employee of a technology business.

The use of such clauses are designed to protect employers by prohibiting former employees from freely sharing with competitors confidential information about a former employer's operations, customer/client lists, business practices, upcoming products, and/or marketing plans.

Inclusion of such clauses encourage companies to hire more employees because employers are provided some protection to hire, contract and otherwise operate a business without the fear that confidential business knowledge will be passed on to a competitor without any limits or consequences. Imagine a scenario where an employee joins the company for several months and has access to confidential information, then immediately leaves to work for a direct competitor in the same capacity and is allowed to freely share such information with his new employer. This type of scenario can be devastating to a company and may lead to greater instability in the already competitive field of technology.

Finally, we believe that HB 1090 is discriminatory in effect because it only applies to employees of a technology business. There is no evidence to show that the technology business is particularly unique requiring discriminatory treatment not afforded to other job specialties such as insurance, banking, education, engineering, electric etc.

Based on the aforementioned, Hawaiian Telcom respectfully requests that this measure be held. Thank you for the opportunity to testify.

Support HB1090

HOUSE COMMITTEE ON ECONOMIC DEVELOPMENT & BUSINESS

Friday, Feb 13, 2015, 09:00 AM

State Capitol Conference Room 312

Aloha Chair Kawakami, Vice Chair Kong, and Members of the Committee on Economic Development and Business,

I am writing in strong support of House Bill 1090 that would eliminate restrictive post-employment non-compete agreements on employees of technology businesses.

Having worked in Hawaii as an IT consultant on several projects, I have both witnessed events and have heard stories of how these agreements have forced other professionals in my industry to shy away from doing business on the islands. Honest working people with talents in this industry are fortunate to have many options for contracting and permanent employment positions all over the globe. These types of covenants certainly make the choice of working in Hawaii a less desirable one. Certainly, people in the technology industry are expected to provide outstanding deliverables for an agreed upon salary. However, expecting those same people to not be able to continue to provide for their families after that engagement is complete goes against every basic hard working principle this country was founded upon. Hawaii is a uniquely beautiful place full of rich heritage and strong principles that should not be shroud in the negative light of these types of intimidating corporate practices. Open competition and fair trade practices has always provided a solid foundation for growing an economy and harvesting talent. I sincerely hope you will support this bill to provide that type of foundation allowing for Hawaii's continued growth in the technology industry.

Mahalo,

William Kirby
President
Radical Synergies LLC

HOUSE COMMITTEE ON ECONOMIC DEVELOPMENT & BUSINESS

Friday, Feb 13, 2015, 09:00 AM

State Capitol Conference Room 312

Aloha Chair Kawakami, Vice Chair Kong, and Members of the Committee on Economic Development and Business

I am writing in support of HB1090– a bill to invalidate restrictive employment covenants or agreements. Hawaii should promote growth of local IT skills in our limited pool of resources by attracting more mainland talent and small businesses.

Originally from the mainland, I have over the past 10 years been working in Hawaii locally building software for local companies. In all of my years here I have dealt with the challenge of keeping software engineering talent in Hawaii and have spent more than enough time finding new ways of bringing engineers with family ties back to Hawaii. There is a strong pool of talented mainland engineers with Hawaii ties that have the missing skillset that our local companies need. We should be encouraging this pool of talent to establish new small businesses in Hawaii, but instead non-competes have been discouraging the growth of innovation mobility.

We have to continue down the path of removing these barriers for local Hawaii IT that are resulting in Hawaii businesses investing elsewhere to find help. With an increasing dependency on a rapidly-changing breadth of technology in our everyday lives, local companies will need more and more engineering support. This window of opportunity for technology is something Hawaii should embrace to prepare our local businesses for the future.

Mahalo,

Kiyoshi Kusachi

Senior Manager, Commercial Applications, IT

Hawaiian Airlines

HOUSE COMMITTEE ON ECONOMIC DEVELOPMENT & BUSINESS

Friday, Feb 13, 2015, 09:00 AM
State Capitol Conference Room 312

Chair Kawakami, Vice Chair Kong, and Members of the Committee on Economic Development and Business:

My name is Philip Moore. Last year I moved from Arizona to Hawaii to take the position of Vice President, Information Technology for Hawaiian Airlines. I am testifying in a personal capacity.

I was surprised at the difficulty in finding and hiring qualified technology professionals in Hawaii. Open technology positions on our employment web site have gone unfulfilled for months. I have met many of Hawaii's CIOs and all of us share this basic resourcing problem for executing on IT strategies to support our businesses.

Like other large Hawaii employers, Hawaiian Airlines has resorted to engaging hundreds of contract technology employees locally and at remote sites to fill this need. Almost all of them are subject to non-compete agreements. We have long, difficult, and oftentimes unsuccessful negotiations with their employers to try to retain the staff in Hawaii.

This bill will help Hawaii's businesses to keep technology professionals in Hawaii and to hire locally.

Thank you for the opportunity to testify.

Jeffrey D. Hong
TechMana LLC
Honolulu, HI, 96813

HOUSE COMMITTEE ON ECONOMIC DEVELOPMENT & BUSINESS

Friday, Feb 13, 2015, 09:00 AM
State Capitol Conference Room 312

Aloha Chair Kawakami, Vice Chair Kong, and Members of the Committee on Economic Development and Business:

As the Chief Technology Officer of a local software company 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. I wrote an OpEd piece in Civil Beat on the topic.

http://www.civilbeat.com/2015/02/people-in-hawaii-need-job-mobility-especially-in-tech/

Academic studies have concluded that public policy supporting employee mobility encourages the innovation economy. For over 100 years, California has had a policy of generally barring non-competes with limited reasonable exceptions. Academic studies have concluded California's policy has helped sharpened the cutting edge of her business regions by providing a ready pool of qualified talent.

A legitimate concern for owners of innovation businesses is protecting their 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 in Hawaii drives behavior that inhibits our technology and other technology supported industries:

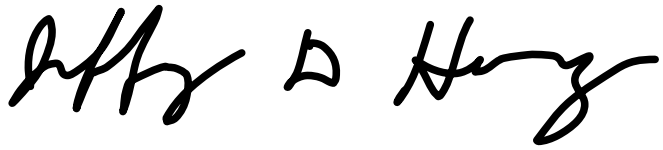
- Encourages broad and indiscriminate use of non-competes across many industries. This causes kama'aina to leave the State if they want to remain employed in their field. The alternative is to work a "penalty box" job for up to 3 years with underutilized skills.
    - Our supreme court has upheld barring 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 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.

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

Mahalo,



Jeffrey D. Hong
Chief Technology Officer
TechMana LLC

References

- **Testimony: Massachusetts Governor's Office 2013** – Statement of support for eliminating the enforceability of noncompetition agreements in Massachusetts.
    - *http://www.boston.com/business/technology/innoeco/9-10-2103Testimony.pdf*
- **Article: WSJ Noncompete Employees -** Comments on studies indicating the best employees will emigrate from noncompete jurisdictions. Remaining employees may not be the ones an employer wants to keep.
    - *http://blogs.wsj.com/accelerators/2014/01/22/orly-lobel-why-non-competes-may-give-you-the-least-desirable-employees/*
- **Article: Non-compete provisions in California: -** Describes a recent US District Court ruling invalidating an Illinois company's non-compete from enforcement in California.
    - *http://www.dorsey.com/eU_LE_noncompete_california_072612/*
- **Study: University of Minnesota –** Proposes the Uniform Trade Secrets Act as a modern way of protecting trades secrets and decoupling non-competition agreements. "The Evolving Law of Employee Noncompete Agreements: Recent Trends and an Alternative Policy Approach"
    - *http://papers.ssrn.com/sol3/papers.cfm?abstract_id=124508*
- **Study: Stanford Law School** – Compares the legal framework of covenants not to compete in California and Massachusetts. It describes the effect of enforcement on the rise of high technology industrial districts in California over Massachusetts. "The Legal Infrastructure of High Technology Industrial Districts: Silicon Valley, Route 128, and Covenants Not to Compete"
    - *http://papers.ssrn.com/sol3/papers.cfm?abstract_id=124508*

HONOLULU
CIVIL BEAT

People in Hawaii Need Job Mobility — Especially in Tech

Non-Compete agreements allow employers to bar their employees from working for other employers. Employers are increasingly abusing non-compete agreements under the guise of protecting trade secrets to control their employees and stifle competition. In a recent national case, a sandwich company had employees sign an agreement prohibiting them from working for a business that "derived more than 10% of its revenue from selling submarine, hero-type…sandwiches". It remains to be seen if this broad agreement is enforceable. An employee threatened by a large company for violating a non-compete will rarely challenge it. The agreement typically does its damage in secret; the employee is intimidated and leaves.

It is misguided to believe this does not happen in Hawaii.

The Hawaii State Supreme Court has never struck down a non-compete agreement. Its most recent ruling upheld an employer barring a woman for three years to work as "briefer" selling trinkets and tour packages to the Japanese. She had to drive a bus to support her family.

The legislature has 3 bills seeking to curtail the power of these agreements in Hawaii.

SB 355 - Prohibits forcing employees to sign a non-compete agreement after they are employed.
SB 232 / HB 390 - Prohibits non-competes for physicians.
SB 1279 /HB 1090 - Prohibits non-competes in the technology sector.

I invite others to write on the merits of the first two bills. I would like to address why technology is a unique industry that requires elimination of these types of agreements to build a globally competitive industry.

The center of an innovation economy is the production of intellectual property by highly skilled creative people. California has barred non-compete agreements for over 100 years. A Stanford University Law School study concluded employee mobility was key to California's success and Massachusetts's decline as the center of the technology world. Cross-pollination of knowledge in Silicon Valley could take place because the legal structure supported employee mobility. Highly skilled employees were assured they could build a life in California with unfettered access to employment possibilities. We can see this virtuous cycle with Google and many other California companies.

Google provides computing services from a virtual cloud that could be anywhere in the world. They moved to the Silicon Valley to join the technology community and find creative talent. The best talent moved to the valley because they knew they could sell their best ideas to the highest bidder. Google pays well for these ideas which attracts more talent.

Hawaii non-competes successfully reverse this virtuous cycle. A company in Hawaii will try to staff from our limited pool of creative talent. After refining their skills with the company, the talent may want to start a new company or move to another Hawaii company. Only the best talent are threatened with non-compete enforcement and are forced to leave. Hawaii's technology community is stripped of talent and another opportunity moves to feed California's virtuous cycle.

In a recent Brookings Institute study, Hawaii ranked 51 in the US (we also lost to Washington DC), for the share of employees in advanced industry jobs. Our approaches to developing high technology in the State have not been successful, we must change or remain behind. People no longer work for the same company for life; we need to embrace rather than suppress this reality of the modern economy. Highly skilled creative employees will not to be bound to intellectual plantations. They will simply leave the State. When Michigan changed its laws from prohibiting non-compete agreements to enforcing them, they saw a migration of innovation economy talent from their State.

In a hearing on SB 1270, the main arguments angiant the bill were that non-competes provide a means of protecting confidential business information and increases global competitiveness.

Protecting legitimate company trade secrets is vital to the information economy. SB 1279 allows binding non-disclosure agreements and embraces the Uniform Trade Secrets Act to protect a company's confidential information. These protections have proven more than adequate to provide for a thriving Silicon Valley. Larry Ellison famously posted this ad in the San Francisco Chronical after an Oregon based company called Informix accused Oracle of "stealing" 11 programmers:

> **Advice to Informix:** ***Hire programmers not lawyers***
> **Advice to Informix Programmers:** ***Negotiate your legal fees upfront***
> **Advice to Informix Customers:** ***Call Oracle***

Informix filed suit to enforce an Oregon non-compete and keep "their" employees. The lawsuit settled out of court and the employees remained at Oracle. Larry Ellison's message was clear. Technology companies should concentrate on creative rather than legal talent. Technology talent should be wary of working for companies with non-competes.

California is a magnet for people escaping odious non-compete agreements. Much of our talent moves to California when faced with a Hawaii non-compete. On a practical basis, if an idea is so small that a statewide ban in Hawaii is sufficient to protect it, how valuable is it in the global economy? We should draw the brightest talent to Hawaii to escape their non-competes rather than California. We can make Hawaii another "**City of Refuge**" for ideas and innovation. Protecting local "**Manini Monopolies**" by exiling our technology talent from Hawaii is not worth the price to our technology community in a globally competitive environment.

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

Academic Faculty:

Professor Hazel Beh - University of Hawaii, Richardson School of Law
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
Nathan Kinney
Rock Tang
Ryan Hew
David Simons

** 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.*

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HOUSE COMMITTEE ON ECONOMIC DEVELOPMENT & BUSINESS

Friday, February 13, 2015

9:00 a.m.

State Capitol, Conference Room 312

Greetings Chair Kawakami, Vice Chair Kong, 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 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.

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HOUSE COMMITTEE ON ECONOMIC DEVELOPMENT & BUSINESS

February 11, 2015

Chair Kawakami, Vice Chair Kong, and Members of the Committee on Economic Development and Business

I am writing in strong support of HB1090 – 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

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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

Chamber of Commerce HAWAII
The Voice of Business

Testimony to the House Committee on Economic Development & Business and Committee on Tourism
Friday, February 13, 2015 at 9:00 A.M.
Conference Room 312, State Capitol

RE: HOUSE BILL 1090 RELATING TO EMPLOYMENT AGREEMENTS

Chairs Kawakami and Brower, Vice Chairs Kong and Ohno, and Members of the Committees:

The Chamber of Commerce of Hawaii ("The Chamber") **opposes** HB 1090, which prohibits noncompete agreements and restrictive covenants that forbid post-employment competition of employees of a technology business.

The Chamber is the largest business organization in Hawaii, representing over 1,000 businesses. Approximately 80% of our members are small businesses with less than 20 employees. As the "Voice of Business" in Hawaii, the organization works on behalf of members and the entire business community to improve the state's economic climate and to foster positive action on issues of common concern.

The Chamber believes that HB 1090 is unnecessary and would undermine the development and growth of the technology sector in Hawaii. This bill removes the competitiveness in the technology sector, which relies heavily on information technology. Noncompete agreements are essential for technology companies to build and develop a business to compete globally.

Thank you for the opportunity to testify.

1132 Bishop Street, Suite 2105 • Honolulu, Hawaii 96813 • Phone: (808) 545-4300 • Facsimile: (808) 545-4369

Edward Pileggi
Lunasoft LLC
Honolulu, HI 96815

February 10, 2015

HOUSE COMMITTEE ON ECONOMIC DEVELOPMENT & BUSINESS

Friday, Feb 13, 2015, 09:00 AM
State Capitol Conference Room 312

Aloha Chair Kawakami, Vice Chair Kong, and Members of the Committee on Economic Development and Business

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

Mahalo,

Edward Pileggi
Owner & Founder
Lunasoft LLC

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LATE

February 12, 2015

Chairman Kawakami
House Economic Development and Business Committee
415 South Beretania Street
Honolulu, HI 96814

RE: Testimony related to Employment Agreements and House Bill 1090

Dear Chairman Kawakami:

My name is Kristina Lockwood, and I am the General Manager of KHON2, and an active board member of the Hawaii Association of Broadcasters. My Station is owned by Media General, and we manage both the Fox Affiliate and the CW Affiliate here in the state of Hawaii. In 2013, I returned to Hawaii to manage our stations. We are making massive investments in research, training, new local programming, and people. Hawaii's common law acceptance of reasonable non-compete agreements helps justify those expenditures.

To explain, our news product relies on the knowledge and the brand development of our talent. Unfortunately, the training, advertising, and research that goes into our on-air talent is all upfront cost that can be quickly lost if talent takes that information and goodwill to a competitor, especially if the competitor uses that information and goodwill without any expensive investments of their own.

I urge you to allow the common law, which was carefully crafted to specific situations, to continue in force, or at the least, exempt on-air talent so that such individuals could continue to serve, learn, and grow with non-compete agreements in place.

Thank you for your time and consideration.

Sincerely,

Kristina Lockwood
President and General Manager

LATE

Testimony of Chuck Cotton
Vice President / General Manager – iHeartMEDIA Hawaii
Secretary/Treasurer – Hawaii Association of Broadcasters

Before the House Economic Development & Business Committee
February 11, 2015

RELATING TO EMPLOYMENT AGREEMENTS

Good morning Chairman Kawakami and members of the Committee. For the record, my name is Chuck Cotton. I am the Vice President and General Manager of iHeartMEDIA Hawaii. We own and operate seven radio stations on Oahu. I am also the Secretary/Treasurer 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 House Bill 1090.

HB 1090 , by description indicates that it is targeted at the technology business sector. We have concerns that the definitions of these sectors contained in the bill are very vague. The bill defines "Information Technology" as "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. The term includes computers, ancillary equipment, software, firmware and similar procedures, services, and support services and related resources..." 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. 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 and would be happy to answer any questions that you may have.

Ryan K. Hew

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

Testimony to House Committee on Economic Development & Business

FRIDAY, 13, 2015, 9:00am
Conference Room 312, State Capitol

RE: HB1090 RELATING TO EMPLOYMENT AGREEMENTS; IN SUPPORT

To Chair Kawakami, Vice Chair Kong, 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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kong3

From: mailinglist@capitol.hawaii.gov
Sent: Thursday, February 12, 2015 4:58 PM
To: edbtestimony
Cc: jeffhong@techmanahawaii.com
Subject: Submitted testimony for HB1090 on Feb 13, 2015 09:00AM

HB1090
Submitted on: 2/12/2015
Testimony for EDB on Feb 13, 2015 09:00AM in Conference Room 312

Submitted By	Organization	Testifier Position	Present at Hearing
Jeffrey Hong	Individual	Support	Yes

Comments: Please accept this language as a friendly amendment to 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 the development of software or information technology, or both."

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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Cinthia Miller
Owner

O&A Consulting LLC
Honolulu, HI 96816

2/10/2015

Aloha Chair Kawakami, Vice Chair Kong, and Members of the Committee on Economic Development and Business,

I strongly support HB1090 Technology Employment Covenants or Agreements. As an IT consultant with more than 14 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". 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 HB1090 bill will support local businesses and employees in Hawaii and solidifying 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

- Team sport - all employees
- Functional Expectation
- Pro-business

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

Before the House Economic Development and Business Committee
February 11th, 2015

RELATING TO EMPLOYMENT AGREEMENTS

LATE

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.