SFA BILL ANALYSIS

Senate Fiscal Agency • Lansing, Michigan 48909 • (517) 373-5383

House Bill 4072 (Substitute S-2 as reported)
Sponsor: Representative Claude Trim
House Committee: Judiciary
Senate Committee: Judiciary

Date Completed: 12-8-87

RATIONALE

Among the statutes repealed by the Michigan Antitrust Reform Act (Public Act 274 of 1984) was Public Act 329 of 1905, which among other things generally prohibited the enforcement of employment covenants whereby an employee agrees not to compete with the employer after leaving the firm. Such covenants generally were permitted if necessary to prevent the "theft" of customers and if they did not extend beyond 90 days after employment terminated. According to at least one antitrust expert, Michigan courts tended to uphold post-employment restraints that appeared to conflict with the statute, if necessary to protect an employer's legitimate interest, and the judicial reluctance to apply the old law was a factor in its repeal. Some, however, feel that the repeal of the old law left a gap in statute: are post-employment covenants legal or not and under what conditions? Some feel that the State has an interest in ensuring that the permissable uses of a restrictive covenant for an employee who leaves employment from a business need to be clarified to fill the statutory void.

CONTENT

The bill would amend the Michigan Antitrust Reform Act to allow certain agreements not to compete. The bill provides that an employer could obtain from an employee an agreement or covenant which protected the employer's "reasonable competitive business interests" and expressly prohibited the employee from engaging in a competitive employment or line of business after termination of employment. The agreement could be made only if it were reasonable as to its duration, geographical area, and type of employment or line of business. If the agreement were found by a court to be unreasonable in any respect, the court could limit the agreement to render it reasonable in light of the circumstances in which it was made and specifically enforce the agreement as limited.

The bill would apply to agreements entered into on or after March 29, 1985.

MCL 445.771 to 445.788

SENATE COMMITTEE ACTION

The Senate Committee on Judiciary substituted House Bill 4072 which, as passed by the House, would have allowed a noncompete agreement between an employer and employee only if the purpose was to prohibit the disclosure of trade secrets, or prohibit the employee from soliciting clients of the employer for up to 90 days after termination, or if the agreement pertained to employee services which were "special, unique, or extraordinary". The Senate Substitute S-2 removed those criteria for a noncompete agreement and instead would allow noncompete agreements or covenants that protected the employer's "reasonable competitive business interests", and which, if in the opinion of a court were judged unreasonable, could be limited by that court.

FISCAL IMPACT

The bill would have no fiscal impact on State or local government.

ARGUMENTS

Supporting Argument

The bill would enact reasonable restrictions on the use of employee post-termination covenants, and would fill a statutory void created when the Michigan Antitrust Reform Act repealed earlier restrictions. The covenants would be permitted to the degree necessary to protect an employer's legitimate interests in trade secrets, client lists, and corporate planning or confidential employment materials.

Opposing Argument

The bill is not necessary. The public interest and rights of employees and employers would be sufficiently well served, as they are in many other states, by the common law test of reasonableness, which courts would employ in the absence of a specific statute on post-employment covenants. This test would weigh the various interests of employer, employee, and the public on a case-by-case basis. As articulated in a dissenting opinion filed with a 1976 Michigan Supreme Court decision, "a non-competition forfeiture clause is a reasonable restraint of trade only if it 1) is no greater than necessary for the protection of the legitimate interests of the employer; 2) does not impose undue hardship on the employee; and 3) is not injurious to the interests of the public". By attempting to cover specific situations, the bill would risk the sorts of complications that can arise when the unforeseen occurs.

Response: The bill would offer employees, employers, and the courts clear, specific statutory guidelines. The "rules of the game" would be evident to all.

Legislative Analyst: B. Baker
Fiscal Analyst: B. Bowerman

H.B. 4072 (12-8-87)