

PERFORMANCE NONDISCLOSURE CLAUSES

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House Bill 4588 as introduced
Sponsor: Rep. Annette Glenn
Committee: Oversight
Complete to 3-25-21

Analysis available at
<http://www.legislature.mi.gov>

SUMMARY:

House Bill 4588 would create a new act to prohibit certain terms in certain state employment contracts and create a civil fine for a violation. The new act would apply to an employment contract entered into, amended, extended, or renewed on or after the bill's effective date.

Under the new act, the state could not enter into an employment contract with a *state officer* that includes a provision prohibiting the officer from disclosing information regarding the performance of his or her official duties unless one of the following conditions is met:

- The provision is required by law.
- The provision is included in an agreement or covenant that complies with section 4a of the Michigan Antitrust Reform Act.¹ (That section addresses what are commonly called non-compete clauses.)
- The provision is included in an agreement or covenant regarding a *trade secret*.

State officer would mean either of the following:

- A head of a principal department of the executive branch of state government.
- A head of an agency within a principal department of the executive branch of state government.

Trade secret would mean information, including a formula, pattern, compilation, program, device, method, technique, or process, to which both of the following apply:

- It derives independent economic value (actual or potential) from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use.
- It is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

Penalty for a violation

A state employee or officer who authorized a contract provision in violation of the new act would be responsible for a civil fine of up to \$2,500 if the employee or officer knew, at the time of the authorization, that the provision was a violation of the new act. In addition, the attorney general could bring an action in circuit court in Ingham County for a violation. A civil fine collected for a violation or in a civil action brought by the attorney general would have to be submitted to the state treasurer for deposit in the state's general fund.

¹ <https://www.legislature.mi.gov/documents/mcl/pdf/mcl-445-774a.pdf>

FISCAL IMPACT:

House Bill 4588 would have an indeterminate fiscal impact on the state and on Ingham County. The bill would add a civil fine of not more than \$2,500 for any state employee or state officer that authorizes an employment contract provision that prohibits disclosing information regarding the performance of state employee's/officer's official duties unless certain criteria are met. Revenue collected from payment of civil fines ordered under the bill would be required to be deposited into the state's general fund. Because there is no practical way to determine the number of violations that will occur under provisions of the bill, an estimate of the amount of additional revenue the state would collect cannot be made. The fiscal impact to Ingham County would depend on how provisions of the bill affected court caseloads and associated administrative costs.

The bill could result in annual savings for state departments and agencies by prohibiting confidentiality or nondisclosure agreements for state officers that may include severance payments. Severance payments to state officers have been made infrequently and irregularly in the past and can vary significantly in amount. Severance payments, in some circumstances, can cover almost a year's worth of salary, or over \$150,000, and are supported through General Fund/General Purpose revenue.

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■ This analysis was prepared by nonpartisan House Fiscal Agency staff for use by House members in their deliberations, and does not constitute an official statement of legislative intent.