SUPPLEMENTAL STATEMENT OF STEPHEN D. ELLIS RE: H.1 Draft 2.3 (3/12/2019)

January 16, 2019

The proposed amendment to H-1 addresses some of the concerns discussed in my initial statement (below) and my prior testimony regarding the bill as introduced in the last session.

However, I continue to agree with others who have stated their position that current law is adequate to address this issue and that legislation cannot anticipate all of the potentially infinite factual scenarios that influence a court's decision to enforce or not enforce such agreements in specific cases, and is therefore likely to have unintended consequences. The question whether restrictive covenants are or are not fair or reasonable requires a fact-specific inquiry, and is best left to the courts to address on a case-by-case basis.

Any legislative approach to this issue should attempt to identify and address limited situations where non-compete agreements *are* presumptively unreasonable and unfair, rather declaring all of them to be presumptively unreasonable and attempting to carve out exceptions.

That said, the new proposed subsection (c) does appear to adequately address the important distinction between non-compete agreements, and nondisclosure/non-solicitation agreements.

Subsection (b) is unclear as to whether "specified geographical area in which the business entity carries out its business" might include worldwide, global markets. Again, this is an issue that is best left for courts to resolve on a case-by-case basis. Under current law, courts will not enforce non-compete agreements with territorial restrictions that are determined to be unreasonably broad under the specific facts of the case at issue.

Subsection (b)(1) should be expanded to include the sale of all or substantially all of a person's close family member's interest in the business or its assets. Again, however, it would be better to presumptively permit any such agreements that are negotiated in connection with the sale of a business, and let the courts decide challenges to specific agreements in specific cases under traditional standards based on the facts at issue in specific cases.

Subsection (b)(2) is problematic with respect to the term "other similar consideration." It is unclear why the legislation would need to try to define specific types of consideration. It should be sufficient to state "new consideration" and let the courts decide challenges to the sufficiency of the consideration in specific cases.

Thank you once again for your consideration.

Stephen D. Ellis

January 16, 2020

Initial Statement of Stephen D. Ellis re: H-1

January 16, 2020

I am an attorney in private practice for over thirty years. My practice has always included representing both employers and employees in employment disputes and in drafting and negotiating employment contracts, policies and procedures. I am presently of counsel with the law firm of Paul Frank + Collins. I have been the Chair of the Labor and Employment Law Section of the Vermont Bar Association for over a decade. This statement reflects my own views, and I do not purport to speak on behalf of my firm, the Bar Association, or anyone else.

I appreciate that restrictive covenants in employment contracts are subject to abuse. However, I believe current law is sufficient to deter and redress such abuse. I also appreciate that restrictive covenants in employment contracts are often necessary to protect legitimate interests of the employer, and some employees are able to bargain for valuable consideration in exchange for such agreements. I am not convinced that a broad statutory approach to this issue is necessary and I am concerned about unintended and potentially pernicious consequences. I am also concerned that the bill is offered as a proposed amendment to the Vermont Fair Employment Practices Act, whereas its reach would encompass business transactions that are not exclusively within the province of employment law.

Under current Vermont common law, courts generally enforce restrictive covenants in employment agreements only to the extent they are reasonably related to the employer's legitimate business interests and are not simply an attempt to protect the employer against legitimate, lawful competition or to prevent a former employee from making a living. Employers who attempt to overreach presently risk having the entire agreement declared unenforceable. Further, under current law, employers who attempt to enforce unreasonable restrictive covenants do so at considerable peril under the statutory and common law relating to unfair trade practices and unfair competition.

The bill as drafted does not recognize the important distinctions between classic "non-compete" agreements, and other agreements, such as non-solicitation and nondisclosure agreements, which may "restrain an individual from engaging in a lawful profession, trade or business," but may be entirely necessary and reasonable to protect the employer's intellectual property and goodwill, regardless of whether it is protected as trade secrets under 9 V.S.A. § 4601, and to deter tortious interference, even if a blanket non-competition agreement might be unreasonable. Any legislation around this issue should clarify that it does not prohibit non-disclosure and non-solicitation agreements that are presently enforceable under the common law.

The bill as drafted also would appear to prohibit agreements between an employer and employee that recognize and define the employee's duty of loyalty to the employer that exists *during* the employment relationship, and not just post-employment covenants. Because Vermont courts look to statutory law to define the parameters of the "public policy" exception to the at-will employment doctrine, the bill as drafted may engender litigation over whether it is a violation of "public policy" to terminate an employee for engaging in activities in furtherance of a "lawful profession, trade or business," that would presently be considered to violate the employee's duty of loyalty to the employer. Any legislation around this issue should clarify that it addresses only *post-employment* restrictions.

The bill as drafted also fails to distinguish between employees who may be in a position to bargain for valuable consideration in exchange for restrictive covenants, and employees who are not. Criteria such as exempt/nonexempt, salary thresholds, and "key employee" would be necessary to limit the reach of this legislation to employees who truly need such protections.

Finally, the exception described in subsection (b) should be expanded to include the sale of all or substantially all of a person's close family member's interest in the business or its assets. I have been involved in multiple transactions relating to the sale of family businesses where it was necessary and reasonable to obtain non-compete agreements not only from the person or entity that actually owned the business or its assets, but also the other family members who worked in the business, who may or may not continue to work in the business following the change of ownership, and the sellers were able to negotiate valuable consideration in exchange for such restrictions.

Thank you for your consideration of these important issues.

Stephen D. Ellis

January 16, 2020

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