

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

7797958_1:00001-00187