

One Minute Memo®



Hawaii Bans Non-Compete and Non-Solicit Agreements with Technology Workers

By Robert B. Milligan

Hawaii joined the small list of states that prohibit certain non-compete agreements with employees.

On June 26, 2015, [Hawaii's governor David Ige signed Act 158](#) which voids any "noncompete clause or a nonsolicit clause in any employment contract relating to an employee of a technology business."

The Act defines "technology business" as one that "derives the majority of its gross income from sale or license of products or services resulting from its software development or information technology development, or both." It excludes any business that is part of the broadcast industry or any telecommunications carrier. "Information technology development" is defined under the Act as "the design, integration, deployment, or support services for software" and "software development" is defined as "the creation of coded computer instructions."

The Act defines a "noncompete clause" as one that "prohibits an employee from working in a specific geographic area for a specific period of time after leaving work with the employer."

"Nonsolicit clause" is defined as one that "prohibits an employee from soliciting employees of the employer after leaving employment with the employer." Curiously, there appears to be an open issue as to whether customer non-solicit provisions are covered by the new Act, though proponents of the Act may argue that customer non-solicits are covered under the "noncompete clause" language.

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

In passing the bill, the Hawaii legislature found:

[R]estrictive employment covenants impede the development of technology businesses within the State by driving skilled workers to other jurisdictions and by requiring local technology businesses to solicit skilled workers from out of the State. Eliminating restrictive covenants for employees of technology businesses will stimulate Hawaii's economy by preserving and providing jobs for employees in this sector and by providing opportunities for those technology employees to establish new technology 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 technology workers and have a chilling effect on the creation of new technology businesses within the State by innovative employees.

Hawaii has a strong public policy to promote 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.

The effective date of this law is **July 1, 2015**. It does not affect any existing noncompete or nonsolicitation clauses in employment contracts for technology businesses prior to July 1, 2015.

Non-competes with other Hawaii employees remain enforceable as long as they pass a reasonableness analysis under Hawaii law. The legislature found in the new Act "that employer trade secrets are already protected under the [sic] federal Uniform Trade Secrets Act and under section 480-4(c)(4), Hawaii Revised Statutes; therefore, the benefits to the employer from noncompete or nonsolicit agreements are duplicative and overreaching protections that may unreasonably impose undue hardship upon employees of technology businesses and the Hawaii economy." The existing Act permits non-disclosure covenants with employees. Accordingly, employers should still use those covenants, even with technology workers.

Companies conducting business in Hawaii in the technology sector should review their employment contracts to determine whether they need to revise their agreements to comply with this new law.

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