

MICROFILM DIVIDER

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SFN 2053 (2/85) 5M



ROLL NUMBER

DESCRIPTION

2355

2001 SENATE INDUSTRY, BUSINESS AND LABOR

SB 2355

2001 SENATE STANDING COMMITTEE MINUTES

BILL/RESOLUTION NO. SB 2355

Senate Industry, Business and Labor Committee

☐ Conference Committee

Hearing Date January 31, 2001.

Tape Number	Side A	Side B	Meter #
1		x	39.6 to end
2	x		0 to 21.2
3		x	25.5 to 33.8
Committee Clerk Signature <i>Don E. Pérez</i>			

Minutes:

The meeting was called to order. All committee members present. Hearing was opened on SB 2355 relating to contract provisions restraining business.

SEN. TONY GRINDBERG, Distr. 41, explained the bill. Many states have such provisions.

Allows for economic development, many companies are attracted to places that offer this kind of protection. Proposed amendment attached.

TERRY OLSON, American Wheel & Brake. Support this legislation to correct disparity with other states. South Dakota and Minnesota passed this law, was tested in court. Restrictive covenant is a mutual agreement an employee cannot be forced to sign it. The company has to offer incentives for the employee to agree, such as higher pay, better benefits, education opportunities. All these benefit employees and economy in general. Intellectual property and trade secrets need to be protected.

SENATOR EVERY: Is the restrictive covenant a condition for employment.

TERRY OLSON: Yes, with the employment situation as it is now, it is very easy for employees to say no.

JOHN ROSWICK, Midwest Motor Express, Inc., , Favor this bill. Customer list in trucking is a commodity. Usually when employees leave they take the list with them. We ask our employees to return all items and not go to work with the competition. In Burleigh county this type of contract is enforceable (not to compete), not so in other counties. The contract is not a condition of employment for all only salespeople.

Bruce Levi, ND Medical Assn. Oppose this bill. Written testimony attached. As a restraint on the medical profession we oppose this bill. Customer list are already protected in ND under the Trade Secret Law. The word "may" is objectionable because both parties may not have equal bargaining power.

JOHN RISCH, ND Legislative Director of the United Transportation Union. Opposing this bill. Written testimony attached.

DR. MICHAEL BOOTH, Heart & Lung Clinic, in opposition. Written testimony attached.

SENATOR MUTCH: Senator's Grindberg amendment would exclude your profession how do you fee about that?

DR. MICHAEL BOOTH: I would still oppose the bill as morally wrong.

SONNA ANDERSON, Atty., Oppose this bill. Relationship with client is very personal, if they choose to follow you when you leave, it's their decision.

Hearing concluded.

Committee reconvened. Discussion held. SENATOR KREBSBACH: motion to adopt amendment. SENATOR TOLLEFSON: second. Roll call vote: 7 yes 0 no.

SENATOR D. MATHERN: move do not pass as amended. SENATOR EVERY: second

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Senate Industry, Business and Labor Committee

Bill/Resolution Number SB 2355

Hearing Date January 31, 2001

Roll call vote: 7 yes. 0 no Motion carried. Floor carrier: SENATOR EVERY.

18328.0101

Title. 0260

Prepared by the Legislative Council staff for
Senator Grindberg

January 29, 2001

PROPOSED AMENDMENTS TO SENATE BILL NO. 2355

Page 1, line 17, remove "or at any time"

Page 1, line 18, remove "during employment"

Page 2, after line 2, insert:

- "4. Subsection 3 does not apply to a contract in which a physician or other health care provider is a party and in which the physician or other provider agrees to provide health care or related services under that contract."

Renumber accordingly

Date: 1/31/01
Roll Call Vote #: 1

2001 SENATE STANDING COMMITTEE ROLL CALL VOTES
BILL/RESOLUTION NO. 2355

Senate Industry, Business and Labor Committee

☐ Subcommittee on _____
or
☐ Conference Committee

Legislative Council Amendment Number _____

Action Taken Adoption of amendment

Motion Made By Sen. Krebsbach Seconded By Sen. Tollefson

Senators	Yes	No	Senators	Yes	No
Senator Mutch - Chairman	✓		Senator Every	✓	
Senator Klein - Vice Chairman	✓		Senator Mathern	✓	
Senator Espegard	✓				
Senator Krebsbach	✓				
Senator Tollefson	✓				

Total (Yes) 7 No 0

Absent 0

Floor Assignment _____

If the vote is on an amendment, briefly indicate intent:

clarify language, exclude health care providers

Date: 1-31-01
Roll Call Vote #: 2

2001 SENATE STANDING COMMITTEE ROLL CALL VOTES
BILL/RESOLUTION NO.

Senate Industry, Business and Labor Committee

☐ Subcommittee on _____
or

☐ Conference Committee

Legislative Council Amendment Number _____

Action Taken DNPA

Motion Made By Sen Mathern Seconded By Sen Every

Senators	Yes	No	Senators	Yes	No
Senator Mutch - Chairman	✓		Senator Every	✓	
Senator Klein - Vice Chairman	✓		Senator Mathern	✓	
Senator Espgaard	✓				
Senator Krebsbach	✓				
Senator Tollefson	✓				

Total (Yes) 7 No 0

Absent 0

Floor Assignment Sen. Every

If the vote is on an amendment, briefly indicate intent:

REPORT OF STANDING COMMITTEE

SB 2355: Industry, Business and Labor Committee (Sen. Mutch, Chairman) recommends **AMENDMENTS AS FOLLOWS** and when so amended, recommends **DO NOT PASS** (7 YEAS, 0 NAYS, 0 ABSENT AND NOT VOTING). SB 2355 was placed on the Sixth order on the calendar.

Page 1, line 17, remove "or at any time"

Page 1, line 18, remove "during employment"

Page 2, after line 2, insert:

- "4. Subsection 3 does not apply to a contract in which a physician or other health care provider is a party and in which the physician or other provider agrees to provide health care or related services under that contract."

Renumber accordingly

2001. TESTIMONY

SB 2355

Bruce Levi
ND Medical Association
ND Medical Group Management Association

**Testimony in Opposition to Senate Bill No. 2355
Senate Industry, Business & Labor Committee
January 31, 2001**

Senate Bill No. 2355 would amend §9-08-06 to create a number of new exceptions to the general law in our state that prohibits contract provisions that restrain the exercise of a lawful profession.

A similar bill was introduced in the 1997 Legislative Assembly, and was defeated. Two bills were also introduced in the 1999 Legislative Assembly, and were defeated. The North Dakota Medical Association opposed those bills in 1997 and 1999. Today the Association, as well as the North Dakota Medical Group Management Association, oppose SB 2355 as a restraint on the medical profession. The interests impacted by this bill are substantial. Health care facilities desire to recruit physicians and other health care providers within a community. Physicians and other health care providers want to practice their profession without restraint or interference that may impact patient care.

The freedom to compete is a part of the fabric of North Dakota. Its interesting to note that the opening clause of § 9-08-06 was enacted as § 833 of the Dakota Territory Civil Code of 1865 and later codified as § 959 of the Dakota Territory Civil Code of 1877. That freedom is reflected in the language of Article I, §7, of the North Dakota Constitution, which states:

Every citizen of this state shall be free to obtain employment wherever possible, and any person, corporation, or agent thereof, maliciously interfering or hindering in any way, any citizen from obtaining or enjoying employment already obtained, from any other corporation or person, shall be deemed guilty of a misdemeanor.

In the medical profession, covenants not to compete or "non-compete clauses" are considered unethical because they disrupt the continuity of care for patients and potentially deprive the public of medical services.

The Code of Ethics of the American Medical Association states:

E-9.02 Restrictive Covenants and the Practice of Medicine.

Covenants not to compete restrict competition, disrupt continuity of care, and potentially deprive the public of medical services. The Council on Ethical and Judicial Affairs discourages any agreement which restricts the right of a physician to practice medicine for a specified period of time or in a specified area upon termination of an employment, partnership or corporate agreement. Restrictive covenants are unethical if they are excessive in geographic scope or duration in the circumstances presented, or if they fail to make reasonable accommodation of patients' choice of physician. Issued prior to April 1977; Updated 1998. (VI, VII)

North Dakota physicians often sign contracts containing non-compete clauses with the understanding that those provisions are unenforceable. Many of the physician contracts I've seen and have reviewed as first-time employment opportunities for physicians include a covenant not to compete, as well as provisions for later becoming a stockholder or partner, or becoming involved in some other business interest contemplated by SB 2355. For example, the following provisions are included in one such contract brought to me by a resident being recruited by a North Dakota health care facility, which ties the issues of the non-compete clause and the opportunity for the physician to later obtain a stockholder interest:

"In case of termination or expiration of this Agreement for any reason, Doctor agrees, as a condition of entering into this Agreement, not to contact or solicit, etc., during the subsequent two (2) year period, any established patient of Employer who has previously received medical care from Employer."

"Doctor shall be eligible to become a stockholder on the earlier of the January 1st or July 1st of the Employer's fiscal year that follows the completion of two (2) complete years of employment (i.e., 365 days/per year) pursuant to procedures specified in Employer's By-Laws;"

The proponents of the bill might argue that an employee or potential business partner may refuse to sign such an agreement. That could be a reasonable argument if the parties had similar or equal bargaining power. However, employers and employees are seldom negotiating on a level playing field, particularly in these first-time employment opportunities.

Application of Act to Previous Contracts. We also have concerns about the application of SB 2355 to contracts that already exist and contain non-compete clauses that have to date been

considered unenforceable. Even though it appears that in North Dakota the existing law at the time of the formation of a contract becomes part of the contract [E.g., *Schue v. Jacoby*, 162 N.W.2d 377, 382 (ND 1968); *McKibben v. Grigg*, 1998 ND App 5 (ND App. Ct 1998)], it is unclear how SB 2355 might apply to a contract entered into before the effective date of SB 2355 which contains a restrictive covenant.

Trade Secrets Law. Many of the concerns expressed by the proponents of these bills in past years relate to customer base issues. To some extent, NDCC Chapter 47-25.1 applies to these situations in providing injunctive relief or damages for the misappropriation of a trade secret, which is defined as information (including a formula, pattern, *compilation*, program, device, method, technique, or process) that derives independent economic value from not being generally known to, and not being readily ascertainable by, other persons who can obtain economic value from its disclosure, and is the subject of efforts that are reasonable under the circumstances to maintain its secrecy (NDCC 47-25.1-01(4)). To the extent that customer lists are considered trade secrets, there exists an appropriate remedy.

SB 2355 could severely limit the employment opportunities of employees in every profession, trade, or occupation. Accordingly, the North Dakota Medical Association and the North Dakota Medical Group Management Association urge this committee to recommend a "DO NOT PASS" on this bill.

57th Legislative Assembly of North Dakota
Senate Industry, Business and Labor Committee

Summary of Testimony in Opposition to Senate Bill 2355

A. Michael Booth MD
Bismarck, North Dakota
January 31, 2001

1. The concept of non-compete clauses, which is what this bill seeks to legitimize, is the moral equivalent of involuntary servitude. No man, under our laws, should have the right to prevent another from pursuing his or her usual occupation without just compensation.
2. There are already ample remedies, both in contract and civil law, to protect a former employer from the actions of hostile former employees. Non-compete clauses are unnecessary.
3. The scope of this bill is overly broad, extending this section of the law well beyond its currently tightly constrained reach. It would be applicable for ANY employee, whether he or she is an accountant, sales representative, doctor, or hamburger cook.
4. There is no protection for an employee who is involuntarily terminated from his or her job.
5. There is no requirement for full disclosure of this restraint to a potential or current employee by the employer in the course of offering an employment contract, nor is there any protection for an employee who refuses to accept such a restraint.

6. The mechanism for inserting these restraints into employee contracts is not specified. Would employees have to sign specific agreements allowing such restraints, or could they just be included in a general corporate employment statement?
7. There is no protection for current employees to be "grandfathered" out of such restraints in their employment contracts who had overlooked them in the belief that these restraints were unenforceable in North Dakota.
8. It is unclear whether these restraints would be enforceable in the states surrounding North Dakota, such as Minnesota. In other words, could an employee in Fargo move across the Red River to Moorhead and resume his or her occupation? The same individual presumably would be unable to move the same distance from Bismarck to Mandan, raising a very real question of potential regional inequity.
9. As a matter of public policy, this bill would make it even more difficult to attract and retain the bright, energetic young people this state needs to remain competitive and prosperous. Had I been subjected to such a contract when I chose to move here in 1988, I would not have come. Young people need to know that there are other options open to them here if their first job doesn't work out. Likewise, if we are to keep our children here, we don't want this law on the books.

In summary, this bill is a bad idea. I strongly urge you as a committee to recommend a "DO NOT PASS" to the Senate as a whole.

Thank you for your time and attention.

united transportation union



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RISCH
Legislative Director
NORTH DAKOTA LEGISLATIVE BOARD

Testimony of John Risch Before the Senate Committee on Industry, Business and Labor In Opposition to SB 2355 January 31, 2001

Mr. Chairman and members of the committee, my name is John Risch. I am the North Dakota Legislative Director of the United Transportation Union. The UTU is the largest rail labor union in North America. Our membership includes conductors, engineers, switchmen, trainmen and yardmasters.

The UTU opposes this bill because legalizing the use of noncompete clauses in employment and business contracts would stifle the creation of new businesses and unjustly trap blue collar, white collar and professional workers in jobs they may wish to leave. A noncompete clause essentially prohibits the signer from doing the same or similar work in the same market if they part company with their employer or partner.

So if you're a salesperson, a carpenter, a printer, or any employee who is covered by a noncompete agreement and you quit or are even fired, you would be prohibited from doing similar work in the area stated in your agreement, which could be the entire state, for up to two years. The noncompete agreement would prohibit you from starting your own business or even accepting a better job from one of your employer's competitors.

Legalizing noncompete clauses would force people to leave the state to get out from under these restrictive agreements. I met a young woman on an airplane two years ago who was on her way to a job interview in Miami, Florida. She was looking to leave South Dakota because a noncompete agreement trapped her in her current job as a hairdresser and barred her from working at any other hair salon in South Dakota, a practice that is lawful in that state. If SB 2355 passes, it would add to our growing problem of outward migration.

I'm sure we agree that new businesses and the jobs they create have a positive impact on our state's economy. These entrepreneurs are usually people who did similar work for someone else and are pursuing the American dream of owning their own business. Noncompete clauses would put the kibosh to much of that by prohibiting people from starting up a business that would compete with their former employer's.

I have a friend who operates a heating and cooling business. My friend didn't start out as a business owner; he used to do heating and cooling work for someone else. Now my friend has his own business, is doing quite well, and has several employees. If he had been subject to a noncompete clause, he would never have been able to start his own business unless he moved out of state or spent two years doing some other line of work. Doing other work was not a real option for my friend and it isn't an option for many because most folks only learn one profession.

If this bill passes, noncompete clauses might become just one more piece of paper that must be signed as a condition of employment. And even if a new employee is made thoroughly aware of a noncompete clause at the time of hiring, many would just be happy to get the job and more than likely would sign it anyway.

Noncompete clauses are illegal in North Dakota for good reason. Our state's employer-employee relationships are governed by something called the Employment at Will Doctrine, which is a legal precedent that essentially means that because you can quit your job at any time, you can also be fired at any time. This bill would undermine that doctrine, allowing an employer to trap an employee in their job. Even worse, an employer could fire an employee or even go out of business and still their employees could be prohibited from practicing their only trade anywhere in our state.

This bill would allow an existing employer to keep their employees in a form of involuntary servitude. Because employees could not go to work for someone else in the same line of work, the current employer could keep their wages and fringe benefits lower than what the market would ordinarily produce.

It is difficult to overstate the problems SB 2355 would create if passed. I urge a "DO NOT PASS" recommendation from this committee.