

MINUTES
SENATE COMMERCE & HUMAN RESOURCES COMMITTEE

DATE: Thursday, March 17, 2016

TIME: 1:00 P.M.

PLACE: Room WW54

MEMBERS PRESENT: Chairman Patrick, Vice Chairman Martin, Senators Lakey, Guthrie, Heider, Rice, Thayn, Schmidt and Ward-Engelking

ABSENT/ EXCUSED: None

NOTE: The sign-in sheet, testimonies and other related materials will be retained with the minutes in the committee's office until the end of the session and will then be located on file with the minutes in the Legislative Services Library.

CONVENED: **Chairman Patrick** called the meeting of the Senate Commerce and Human Resources Committee (Committee) to order at 1:00 p.m.

MINUTES APPROVAL: **Senator Guthrie** moved to approve the Minutes of March 8, 2016. **Vice Chairman Martin** seconded the motion. The motion carried by **voice vote**.

HONORING OF PAGE: **Chairman Patrick** honored page Kennedy Jones. **Kennedy Jones** shared what she learned while being a Senate page and gave a brief summary. She said she learned how to address the Committee and thanked them for having her as a Page. She loved organizing and spent a lot of time at the copying machine. She mentioned she learned how to read bills and that it is always all right to ask questions. There are many ways to earn respect and there is a balance of professionalism at the Senate. She likes working behind the scenes. **Ms. Jones** said she is interested in musical theatre and will be attending college in the fall either at the University of Utah or Southern Utah University. **Chairman Patrick** thanked her for her service and wished her the best of luck in the future.

H 538 **State Procurement Act.** **Vice Chairman Martin** said this legislation is unanimously recommended by the members of the Purchasing Laws Interim Committee (PLIC), which met from August 2015 to January 2016 to study the State purchasing laws and make recommendations for revisions. In proposing this legislation, the PLIC had two goals: to modernize and clarify the laws and to address specific issues that were identified in the PLIC's study.

Vice Chairman Martin said he would yield his time to Elizabeth Bowen, Legislative Research Analyst, Legislative Services Office. **Ms. Bowen** said this legislation recodifies the existing laws into a new chapter of the Idaho Code. Recodification will enable the laws to be found in one place dedicated specifically to State procurement. The term "procurement" will replace the term "purchasing" in code, as "procurement" more accurately describes the activities addressed by the laws. While the recodified laws are substantially similar in content to the existing laws, some language has been revised to reflect modern practices, to include updated terminology and to provide clarity where the language of the existing laws is confusing or unclear.

Ms. Bowen explained new language is also incorporated in the recodified laws to resolve issues with the current system as identified in the PLIC's Final Report. Training will now be required for all State officers and employees with procurement-related duties. Contract oversight will be required as well. The Administrator of the Division of Purchasing (DOP) will be given more flexibility to

grant exemptions from open contracts, which will enable state agencies to buy property elsewhere when the property available under an open contract is for some reason insufficient. State institutions of higher education will likewise be afforded more flexibility when choosing whether to buy property under an open contract.

She said finally, a new ethics statute is included to clearly state the ethical standards expected of everyone involved in the State procurement process, including members of the private sector, such as vendors or their representatives. The ethics statute defines breaches of ethical conduct and provides penalties for the breaches.

Ms. Bowen explained the exact fiscal impact of this legislation depends on how the DOP at the Department of Administration (DOA) promulgates rules based on its statutory authority. The requirement to formulate rules for delegated authority and contract monitoring may take additional time and effort, and the extra reporting for statewide exemptions will have some impact on staff time at the DOP, but that cost will be absorbed by existing dedicated fund sources.

Ms. Bowen stated contract oversight, management and monitoring may have some fiscal impact on the State agencies should the DOP require third-party subject matter experts to oversee large-value or high-risk contracts. If such rules are promulgated, the cost estimate is approximately \$250,000 for the life of such contracts. The State estimates there may be approximately five new large-value or high-risk contracts issued annually, but the vast majority of contract management, monitoring and oversight is overseen by existing State employees within existing agency budgets and will continue to operate this way.

Ms. Bowen emphasized that additionally, there will be a cost for enhanced training for all State employees. In Fiscal Year (FY) 2016, the DOA estimated a cost of \$136,000 in ongoing personnel costs to fill two vacant full-time positions (FTP) and \$30,000 in ongoing operating expenditures. These FTPs will expand the procurement training program for all State purchasing personnel. The employees will develop, maintain, deliver and manage a statewide procurement training program through the Internet, in addition to on-site training throughout the State. The estimate also includes a learning management system to contain course content delivery, personnel registration/administration, training event management, curriculum and certification management, skills and competence management and training for record management and reporting. The ongoing cost of the learning management system will be absorbed through existing DOP dedicated fund sources. The entire State will benefit from the addition of enhanced procurement training. Approximately 300 people will receive ongoing training, which will increase the competencies of all State employees involved in property acquisitions. It will provide consistency in how purchasing is performed throughout the State and reduce the need for employees to utilize national purchasing certification programs. Training programs will be centered on Idaho's statutorily prescribed procurement processes, as well as general public procurement processes.

Vice Chairman Martin said the enhanced training, oversight and unified codification of purchasing statutes will modernize purchasing standards with the intent of reducing governmental errors, encouraging local participation and competition and providing cost savings to the State. The quantification of the benefits of these improvements will become apparent over time.

MOTION:

Senator Heider moved to send **H 538** to the floor of the Senate with a **do pass** recommendation. **Senator Lakey** seconded the motion. The motion carried by **voice vote**. Vice Chairman Martin will carry the bill on the floor.

H 541 **Relating to Purchasing Exclusion.** **Senator Winder** stated that Idaho Code allows political subdivisions to piggyback onto contracts that were competitively bid by the State of Idaho. This proposed change would outline that any contract awarded by the DOP, competitively bid or not, would be available for use by the political subdivision. There is no fiscal impact. This addition to the statute could lead to savings for all cities and counties during their procurement process.

MOTION: **Senator Guthrie** moved to send **H 541** to the floor of the Senate with a **do pass** recommendation. **Senator Ward-Engelking** seconded the motion. The motion carried by **voice vote**. Senator Winder will carry the bill on the floor.

H 487 **Relating to Agreements and Covenants Protecting Legitimate Business Interests.** **Representative Patrick McDonald** said that in the event of a civil action by an employer, this amendment identifies the court as having the authority to determine if a key employee or independent contractor has breached an agreement or covenant resulting in harm to the employer. There is no fiscal impact to the General Fund. He said this bill is needed because Idaho businesses have to be protected from competitors relating to customer lists and special processes.

TESTIMONY: **Codi Galloway**, representing herself, testified in support of this bill. She stated she and her husband started a computer school called LeapFox Learning ten years ago. She said her company became successful and they invested a majority of their money back into the business. She talked about a valuable key employee who was very knowledgeable about all of the inner-workings of the company. This employee worked for LeapFox for six years and had signed a non-compete agreement. The key employee was enticed by a competitor and she began working for them. **Mrs. Galloway** discovered the key employee made copies of all customer lists and all other paperwork related to the company before she left. The competitor used the customer list and other relevant paperwork in an effort to put LeapFox out of business.

Mrs. Galloway reported that she hired an attorney who waged a battle against the competitor. The competitor ignored all requests to cease-and-desist. Her business was devastated. even though it now has been two years and she has not had her day in court. She and her husband have spent over \$200,000 on attorney fees. She stated that in the end, she is confident they will win at trial. She said the current law does not work. She said the amount of time and money puts a win out of the reach for most small businesses. If this law had been in place and there been irreparable loss, the court could have issued an injunction. She is hoping someone else benefits when there is a proven breach of a contract.

Senator Ward-Engelking wanted to know if Mrs. Galloway suffered actual damages since her case is pending. **Mrs. Galloway** deferred to her attorney. **Ron Coulter**, Attorney, said actual damages have been established and the case has been in the discovery phase for one year. There was a special discovery manager appointed to the case. **Senator Ward-Engelking** stated she heard that Mrs. Galloway could ask for irreparable harm. **Mr. Coulter** said not in the way of damages. **Senator Ward-Engelking** said she had read the Attorney General's opinion (attachment 1) and the letter said it was difficult to prove damages and the burden to overcome this presumption is almost impossible. **Mr. Coulter** remarked he does not take stock in this opinion from the Attorney General's office. He said one could prove a rebuttal of presumption as one can show evidence whether or not there was harm.

William Mauk, Attorney, representing himself, testified in opposition to this bill. He said the issue of non-compete agreements are difficult and in constant flux. This proposal does not provide any greater or additional protection as there is protection already in law. This bill addresses an issue of evidence having to do with

injunctions. He said with this bill the suing party will not have to show damages and puts the burden on the party who is being sued. He suggested to the Committee that writing a law to address a case that has not been fully adjudicated is not the best way to approach legislation.

Senator Lakey asked Mr. Mauk to briefly touch on what it takes to get a temporary restraining order (TRO) and how it affects a case and a defendant. **Mr. Mauk** said that with a TRO, the burden is on the party bringing suit. They have to show they have been damaged and suffered irreparable damage. In the future there will not be a damage recovery.

Senator Rice remarked that being damaged is not sufficient to get an injunction. The damage has to be irreparable. **Mr. Mauk** quoted Federal Rules of Civil Procedure Rule 65 relating to injunctions and TROs and said that in order to get an injunction one has to show they have been damaged or prove they have been irreparably damaged.

Alex LaBeau, representing the Idaho Association of Commerce and Industry, testified in support of the bill. He stated the employer needed some sort of protection. Standards are appropriate and the Legislature has a legitimate interest. A court battle has to take place to enforce a contract.

Jocelyn Plass, representing herself, testified in opposition to the bill. She said she owns a restaurant in Stanley. She said many companies are leaving the State, and by voting for this bill the Committee is making it hard to do business in the State. She stated we need solutions and this bill is placing the burden of proof on the employee.

Jeremy Chou, Attorney, representing himself, testified in support of the bill. He remarked this is a good policy to protect the sanctity of contracts. These agreements have to be reasonable. This bill says that if it is a valid contract and there is a breach, and if the damaged party can prove damage, they can get a rebuttable presumption. He said attorneys prove a negative all of the time. Businesses will want to relocate here knowing their interests will be protected.

Senator Schmidt asked Mr. Chou how he would know which customers belong to whom? **Mr. Chou** said that through proof of evidence. An affidavit would have to be signed by the individual client. **Senator Schmidt** remarked that customers always have the option of going somewhere else. **Mr. Chou** stated that if an affidavit is signed, the key employee cannot do something with the customer list. Through an affidavit signed by the customer, it can prove the customer was being solicited by the former employee.

Senator Ward-Engelking said this bill appears to be a change in statute. Does this hurt potential employers or just employees? **Mr. Chou** said the contracts must be reasonable and stated that a key employee could still work in the industry, but could not solicit former customers of the employer.

Guy Hallam, representing Idaho Trial Lawyers Association, spoke in opposition to this bill. He said this was an unnecessary addition to code. The code is working as drafted.

Jayson Ronk, representing Micron Technology, Inc., testified in support of the bill. He said he has reviewed this issue with the Micron attorneys. He said they do not have a tremendous amount of non-compete agreements.

Representative McDonald summarized and said this bill levels the playing field.

This gives the person who is accused of a violation a chance to defend themselves. This bill is fair and protects the people who need protection.

Senator Rice commented that his initial reaction to the language was this is an almost irrebuttable presumption, but he started looking beyond that. If you look at existing code, non-competes are only allowed up to 18 months. The law does not allow for a two- or five-year non-competes. The length is less than the average length of these types of lawsuits. The standard is that if a plaintiff receives a damages judgment, that would cover whatever is lost, but the problem is one cannot get a judgement. He stated there are provisions for non-competes in the law and then there is a hurdle the employer cannot get over. The non-compete time was contracted, but essential damages are not mitigated by stopping breaching activity. This law puts what was actually contracted for into balance.

MOTION: **Senator Rice** moved to send **H 487** to the floor of the Senate with a **do pass** recommendation. **Vice Chairman Martin** seconded the motion.

DISCUSSION: **Senator Lakey** said he was against the motion. He said one thing he has learned is that there are two sides to a story. He said there was a large red flag because of pending litigation. These types of non-competes are more strictly scrutinized. A non-compete limits the ability for a person to work where they choose. He said the last sentence in the bill is the problem. He said the language says to rebut a presumption of irreparable harm has to be established. To rebut such presumption, the key employee or key independent contractor must show that the key employee or key independent contractor has no ability to adversely affect the employer's legitimate business interests. He said this is next to impossible to prove. He said the bill should be held and reworked.

SUBSTITUTE MOTION: **Senator Lakey** moved that **H 487** be held in Committee and reworked. **Senator Thayn** seconded the motion.

Vice Chairman Martin remarked that the court would have to be involved in the findings. **Senator Guthrie** said he supported the original motion. **Senator Ward-Engelking** stated that since there was an equal number of people who supported and opposed the bill, there is a problem with the bill and it needs to be reworded.

Senator Rice asked for a roll call vote. **Chairman Patrick** asked for a vote on the substitute motion.

ROLL CALL VOTE ON SUBSTITUTE MOTION: **Senators Lakey, Thayn, Schmidt** and **Ward-Engelking** voted aye. **Vice Chairman Martin** and **Senators Guthrie, Heider, Rice** and **Chairman Patrick** voted nay. The motion failed.

Chairman Patrick asked for a vote on the original motion.

ROLL CALL VOTE ON ORIGINAL MOTION : **Vice Chairman Martin, Senators Guthrie, Heider, Rice** and **Chairman Patrick** voted aye. **Senators Lakey, Thayn, Schmidt** and **Ward-Engelking** voted nay. The motion carried. Senator Rice will carry the bill on the floor.

ADJOURNED: There being no further business, **Chairman Patrick** adjourned the meeting at 2:16 p.m.

Senator Patrick
Chair

Linda Kambeitz
Secretary