1999 HOUSE JUDICIARY

HB 1267

1999 HOUSE STANDING COMMITTEE MINUTES

BILL/RESOLUTION NO. 1267

House Judiciary Committee

❑ Conference Committee

Hearing Date January 26, 1999

Tape Number	Side A	Side B	Meter #
2	X		6.7
Committee Clerk Signature			

Minutes:

REP. KEISER: Presented written testimony a copy of which is attached. He also suggested some amendments may be needed.

PAUL WINETKA: (Eide/Baily Co.) Presented an overview of the bill, a copy of which is attached.. I have had employees leave and take their client base with them and later offer to sell it back to us or sell it to another firm.

BONNIE LARSON STAIGER: (AIA) Architects would like to have the language that excludes them from this bill removed so they are among those covered.

JOHN GRABAR (Communications Unlimited) Spoke for the bill. The customers in the electronic industries have strong loyalties to the sales and technical staff that service them. If that staff goes to a competitor or goes out on its own, they follow.

DAVID KEMNITZ (AFL/CIO) Employers and employees do not play on a level playing field now, and this will make it worse. Also, employees aren't covered under 50 mile radius so it could exclude them from employment throughout the state.

BRUCE LEVI: (ND Medical Assoc.) Presented written testimony in opposition, a copy of which is attached.

SANDI TABOR: (SBAND) SBAND is not really against this bill, but you have to take a hard look at it. Take an engineer employed by a firm in Dickinson and moves to a firm in Bismarck. Most engineering firms solicit clients and do work statewide. I understand the concerns expressed here and I believe this bill goes way beyond that.

COMMITTEE WORK: February 3, 1999

REP. KLEMIN presented some suggested amendments. REP. DELMORE moved to adopt the amendments presented. Rep. Klemin seconded and the motion passed on a unanimous voice vote.

REP DISRUD moved that the committee recommend that the bill DO NOT PASS AS AMENDED. Rep. Sveen seconded and the motion was passed on a roll call vote with 9 ayes, 6 nays and 0 absent. Rep. Klemin was assigned to handle the bill on the floor.

Prepared by Rep. Klemin
February 2, 1999

PROPOSED AMENDMENTS TO HOUSE BILL NO. 1267

Page 1, line 16, remove "or redeems"

Page 2, line 3, remove "or redeems"

Page 2, line 13, remove "or redeems"

Page 2, remove lines 18 through 30

Renumber accordingly

Date: 2/3
Roll Call Vote #: 1

1999 HOUSE STANDING COMMITTEE ROLL CALL VOTES
BILL/RESOLUTION NO. 1267

House JUDICIARY Committee

☐ Subcommittee on

or

☐ Conference Committee

Legislative Council Amendment Number Do Pass as Amended

Action Taken

Motion Made By Disrud Seconded By Sveen

Representatives	Yes	No	Representatives	Yes	No
REP. DEKREY	✓		REP. KELSH		✓
REP. CLEARY		✓	REP. KLEMIN	✓	
REP. DELMORE		✓	REP. KOPPELMAN	✓	
REP. DISRUD	✓		REP. MAHONEY	✓	✓
REP. FAIRFIELD		✓	REP. MARAGOS	✓	
REP. GORDER	✓		REP. MEYER		✓
REP. GUNTER	✓		REP. SVEEN	✓	
REP. HAWKEN	✓				

Total Yes 9 No 6

Absent 0

Floor Assignment Klemin

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

REPORT OF STANDING COMMITTEE

HB 1267: Judiciary Committee (Rep. DeKrey, Chairman) recommends **AMENDMENTS AS FOLLOWS** and when so amended, recommends **DO PASS** (9 YEAS, 6 NAYS, 0 ABSENT AND NOT VOTING). HB 1267 was placed on the Sixth order on the calendar.

Page 1, line 7, remove "1."

Page 1, line 10, remove the overstrike over "~~1.~~" and remove "a."

Page 1, line 16, replace "b" with "2" and remove "or redeems"

Page 1, line 22, replace "c" with "3"

Page 2, line 3, replace "d" with "4" and remove "or redeems"

Page 2, line 8, replace "e" with "5"

Page 2, line 13, replace "f" with "6" and remove "or redeems"

Page 2, remove lines 18 through 30

Renumber accordingly

1999 SENATE JUDICIARY

HB 1267

1999 SENATE STANDING COMMITTEE MINUTES

BILL/RESOLUTION NO. HB1267

Senate Judiciary Committee

❑ Conference Committee

Hearing Date March 9, 1999

Tape Number	Side A	Side B	Meter #
1		x	2223 - end
Committee Clerk Signature	Jackie Follmann		

Minutes:

HB1267 relates to contract provisions restraining business.

SENATOR STENEHJEM opened the hearing on HB1267 at 10:40 A.M.

All were present.

REPRESENTATIVE KEISER, District 47, testified in support of HB1267. This bill adds to our Century Code the new categories which we have created during the past sessions. The limited liability of partnerships and added those options. This also changes a very important element of the old law which was structured on a county by county basis. We changed it from a county basis to a fifty mile radius for a noncompete agreement.

SENATOR TRAYNOR asked if this will pass the Constitutional restraint of trade.

REPRESENTATIVE KEISER stated that I don't know.

SENATOR STENEHJEM asked if this is modeled after another state.

REPRESENTATIVE KEISER stated that he did not think so.

PAUL WINNETKA, IBALI, testified in support of HB1267. This is to expand the entities and adding the 50 mile radius.. This will give more flexibility to the buyers.

AL WOLF, North Dakota Trial Lawyers, testified as neutral on HB1267. The statute says buying good will. We would suggest changing the language to avoid lawsuits.

SENATOR NELSON asked what is good will.

AL WOLF stated that good will is reliability and dependability of the business. Good will is over and above physical assets.

A. MICHAEL BOOTH, The Heart and Lung Clinic, testified in opposition to HB1267. Testimony attached.

BRUCE LEVI, North Dakota Medical Association, testified in opposition to HB1267. Testimony attached.

JOHN RISCH, North Dakota Railroad Association, testified in opposition to HB1267.

SENATOR STENEHJEM CLOSED the hearing on HB1267.

SENATOR WATNE made a motion for DO NOT PASS, SENATOR NELSON seconded. Discussion. Motion carried. 6 - 0 - 0

SENATOR TRAYNOR will carry this bill.

North Dakota Medical Association
North Dakota Medical Group Management Association

March 9, 1999

PROPOSED AMENDMENTS TO ENGROSSED HOUSE BILL NO. 1267

Page 2, after line 17, insert:

"7. Subsections 2 through 6 do not apply to a written contract in which a physician is a party and in which the physician agrees to provide health care or related services under that contract.

APPLICATION OF ACT. This section, as it existed prior to the effective date of this Act, applies to contracts entered into on or before July 31, 1999."

Renumber accordingly

Date 3-9-99
Roll Call Vote #: 1

1999 SENATE STANDING COMMITTEE ROLL CALL VOTES
BILL/RESOLUTION NO. HB 1267

Senate Judiciary Committee

☐ Subcommittee on

or

☐ Conference Committee

Legislative Council Amendment Number

Action Taken Do Not Pass

Motion Made By Senator Wayne Seconded By Senator Nelson

Senators	Yes	No	Senators	Yes	No
Senator Wayne Stenehjem	X				
Senator Darlene Watne	X				
Senator Stanley Lyson	X				
Senator John Traynor	X				
Senator Dennis Bercier	X				
Senator Caroloyn Nelson	X				

Total (Yes) 6 No 0

Absent 0

Floor Assignment Senator Traynor

REPORT OF STANDING COMMITTEE

HB 1267, as engrossed: Judiciary Committee (Sen. W. Stenehjem, Chairman) recommends **DO NOT PASS** (6 YEAS, 0 NAYS, 0 ABSENT AND NOT VOTING). Engrossed HB 1267 was placed on the Fourteenth order on the calendar.

1999 TESTIMONY

HB 1267

HOUSE BILL 1267
REASONS FOR THE CHANGE IN NDCC 09-08-06

The changes that apply to business owners is to update the statutes for the current business society and to provide for the same results, regardless of what type of entity the business uses. Currently, written contracts are being entered into that don't fit within the statute with the parties hoping that the other will honor the written agreement based on their character. Business owners should be allowed to agree on provisions relative to their ownership in businesses.

The addition of employment agreements is also to update the law. Currently, there are restrictive covenants in effect in several states. South Dakota has more restrictive provision regarding employees than what this legislation is proposing.

On one hand, it can be argued that not allowing covenants in employment contracts is good for competition and employees should not have any restrictions placed on them.

There are a number of substantive arguments for enacting the proposed provisions. They include:

1. The provisions do not restrict an employee from earning a living in their field of expertise. It only limits former employees, for up to two years, from using the insider information and the customer contacts obtained by being entrusted with a business's customers to take customers from the former employer.

2. In most all cases, the business base that an employee has the potential of taking are customers that the employer had prior to the employee being hired. These existing customers are entrusted to the employee for servicing. Other customers that could be taken by an employee are customers that came to the business because of the business's reputation or because of a recommendation from other customers. Again, these customers are entrusted to the employee to service them.

3. Sometimes business comes to an employer because of efforts of the employee. Helping bring in business is frequently part of the expectations of the employment arrangement for which employees are compensated.

4. When an employee leaves and takes a customer base that was entrusted to them, it has a negative effect on the loyal employees who stay with the business. It hurts the remaining employees' opportunity for advancement and even jeopardizes their current employment due to the lost revenues. Servicing customers takes more than the primary contact. Other people participate in the production and delivery of the products or services. The loss of business revenue results in the need for fewer employees and less opportunity for those who remain.

5. The taking of a business base entrusted to an employee, if severe enough, can jeopardize creditors of the business in obtaining payment on items purchased or the repayment of loans.

6. When a person takes cash from an employer, takes merchandise of the employer or takes a secrete formula, that is viewed as wrong. A business's intangible value of its customer base is no less of an asset. Most intangible value of a business's customer has been purchased from others or involved expending company resources to obtain the customer base. The following are a few examples of expenditures relating to a customer base:
   A. The purchase of an entire business (the customer base is part of the value)
   B. Buying out retiring owners (the customer base is part of the value)
   C. Buying into an existing business (the customer base is part of the value)
   D. Salaries to employees, as part of their job responsibilities, to retain and obtain customers.
   E. Advertising, promotions and investment of owner's time and expenses to obtain new customers.

7. With the increasing use of computers and technology, employees have access to much more information than in the past, i.e., confidential client lists and account information (historical and current).

BUSINESS COVENANTS NOT TO COMPETE AND EMPLOYMENT CONTRACTS HB 1267 AN OVERVIEW

HB 1267 changes the wording of NDCC 09-08-06 regarding business covenant not to compete agreements and adds a new section relating to employment contracts. The proposed legislation would make these changes:

1. It makes the geographical area consistent for corporations and partnerships and adds an optional 50-mile radius.

2. Adds that the provisions also apply to shares of stock in corporations. This is currently provided for in case law.

3. Adds partners in a partnership as having the same rules as owners of corporations.

4. Adds members of an LLC as having the same rules as owners of corporations.

5. Adds a new provision relating to agreements with employees. There may be some that will suggest this provision be the same as South Dakota's. South Dakota's law provides employees can't compete with an employer. It is felt that the South Dakota law (attached) is too restrictive and employees should not be prohibited from earning a living in their occupation. It is, however, felt that employees, in certain situations, should be temporarily restricted from using insider information and employer provided contacts to take the business's clients/customers that were entrusted to the employee. Those situations are for specific services and for certain sales personnel. In order for the temporary restriction to apply, it must fall within the statute and there must be a written employment agreement that provides for the temporary restriction.

6. Adds remedies for breach of agreements.

7. Provides for effective date of the change.

WHAT IS NOT RESTRICTED REGARDING EMPLOYMENT CONTRACTS

While HB 1267 provides a temporary restriction on the use of insider information relating to certain types of businesses, the proposed legislation regarding employment contracts does not provide any restrictions in these areas:

1. Professional services not specifically listed in proposed NDCC 9-08-06 Section 1.h.
2. Sales personnel, other than those who primarily sell to businesses, governments and organizations.
3. Employment contracts entered into prior to August 1, 1999.
4. Employment where there is not a written employment agreement covering any of the three items listed in proposed NDCC 9-08-06 Section 1.g.
5. Former customers of the employer who stopped doing business with the employer at least one year prior to the employee's termination of employment.
6. Services or products that the former employer did not provide.
7. What employers an employee can go to work for.
8. What business a person wants to have their work performed by. The limitation is on the former employee soliciting the former employer's customers and on the former employee providing certain services and products to the former employer's customers. Anyone else at the new employer's business can service the former employer's customers for the same services and products of the former employer during the maximum of two years provided in proposed NDCC 9-08-06 Section 1.g.

Citation
SD ST s 53-9-11
SDCL § 53-9-11

Docs in Sequence

Rank 1 of 0

Database
SD-ST-ANN

Page 1

TEXT

SOUTH DAKOTA CODIFIED LAWS
~~TITLE~~ 53. CONTRACTS
CHAPTER 53-9. UNLAWFUL CONTRACTS

Current through End of 1998 Reg. Sess.

53-9-11 Employment contract -- Covenants not to compete.

An employee may agree with an employer at the time of employment or at any time during his employment not to engage directly or indirectly in the same business or profession as that of his employer for any period not exceeding two years from the date of termination of the agreement and not to solicit existing customers of the employer within a specified county, first or second class municipality or other specified area for any period not exceeding two years from the date of termination of the agreement, if the employer continues to carry on a like business therein.
CREDIT

Source: SDC 1939, § 10.0706 (3); SL 1984, ch 318; 1992, ch 60, § 2.

Bruce Levi
North Dakota Medical Association
North Dakota Medical Group Management Association

January 26, 1999

Testimony in Opposition to House Bill No. 1267

House Bill No. 1267 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. We call contract provisions like these "covenants not to compete," which essentially require an employee to purchase the freedom to compete with the employer after employment is terminated.

A similar bill was introduced in the 1995 Legislative Assembly, and was defeated. The North Dakota Medical Association opposed the 1995 bill and today we oppose HB No. 1267.

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. In the medical profession, covenants not to compete 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 June 1997. (VI, VII)

It also appears that this legislation violates the spirit 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.

This bill would severely curtail an employee's opportunities. For example:

1. Assume that a Bismarck lawyer was employed as an associate in a competing law firm, that the lawyer had signed such an agreement, and that the lawyer was unhappy with the employer's ethics. Another law firm could not employ that lawyer — or even offer a partnership to that lawyer — unless the lawyer quit the competing law firm and remained idle for up to two years or moved away for up to two years (or paid substantial damages).

2. Assume that a physician, who signed such an agreement, was employed at a local hospital and received a much better offer from a competing hospital. The physician could not accept the offer (or pay substantial damages), nor could the hospital recruit that physician.

3. Assume that a nurse, who signed such an agreement, was employed at a local hospital and received a much better offer from a competing hospital. The nurse would also be discouraged from accepting the offer.

4. Assume that your son or daughter finishes college and returns to Bismarck to live—to be close to family and friends. That son or daughter must choose the first job carefully because he or she would not be able to change jobs in the same profession, occupation, or trade and continue to live in Bismarck.

The examples could go on and on. But, whether we are discussing lawyers, doctors, nurses, or any other profession, occupation, or trade, the result is the same: this bill could severely limit the employment opportunities of employees in every profession, trade, or occupation.

A North Dakota Supreme Court decision, *Spectrum Emergency Care, Inc. v. St. Joseph's Hospital and Health Center*, 479 N.W.2d 848 (N.D. 1992), accompanies this testimony and illustrates what might occur if "covenants not to compete" are enforceable. If this bill would

have become law prior to this case, the defendant physicians would have been forced to continue working for Spectrum Emergency Care, Inc., or would have been forced to leave Dickinson to find employment elsewhere.

The proponents of the bill may respond that an employee 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.

Accordingly, the North Dakota Medical Association and the North Dakota Medical Group Management Association urge this committee to submit a "do not pass" recommendation on this bill.

479 N.W.2d 848 SPECTRUM EMERGENCY CARE, INC. V. ST. JOSEPH'S HOSP (S. Ct. 1992)

Spectrum Emergency Care, Inc., a Missouri Corporation, Plaintiff and Appellant

vs.

St. Joseph's Hospital and Health Center, f/k/a St. Joseph's Hospital, and Robert L. Cusic, M.D., Sheldon Swenson, M.D., Defendants and Appellees

Civil No. 910030
SUPREME COURT OF NORTH DAKOTA
479 N.W.2d 848
January 14, 1992; As Corrected January 21, 1992

Appeal from the District Court of Stark County, Southwest Judicial District, the Honorable Maurice R. Hunke, Judge.

COUNSEL

Pringle & Herigstad, PC, P.O. Box 1000, Minot, ND 58702-1000, for plaintiff and appellant; argued by Carol K. Larson.

Howe, Hardy, Galloway & Maus, PC, P.O. Box 370, Dickinson, ND 58602, for defendant and appellee St. Joseph's Hospital and Health Center, f/k/a St. Joseph's Hospital; argued by Michael J. Maus.

Anderson & Anderson, P.O. Box 2574, Bismarck, ND 58502, for defendants and appellees Robert L. Cusic, M.D., and Sheldon Swenson, M.D.; argued by Sonna M. Anderson.

JUDGES

Ralph J. Erickstad, C.J., Vernon R. Pederson, S.J., Douglas Heen, S.J.

OPINION

ERICKSTAD, Chief Justice, on reassignment.

Spectrum Emergency Care, Inc., (Spectrum) appeals from a judgment of the District Court for Stark County which held that the restrictive covenants of its contracts with St. Joseph's Hospital and Health Center (Hospital) and certain physicians were void under section 9-08-06, N.D.C.C. We affirm.

Spectrum supplies emergency room physicians to hospitals to provide emergency medical care. Since 1979 and until January 1, 1990, Spectrum had a contract with the Hospital to provide emergency room physicians. Originally, the contract was for weekend emergency room coverage; however, sometime during 1986 the contract was modified so that full-time emergency coverage was provided by Spectrum. The agreement between Spectrum and the Hospital was self-renewing and provided for a 90-day notice period prior to termination. This agreement contained the following clause:

"During the term of this Agreement, any renewals or extensions thereof, and for a period of one year (12) months thereafter, Hospital agrees it will not directly or indirectly enter into any agreement covering the same or similar services as are provided for herein with any person with whom it came into a business or professional relationship as a result of this Agreement."

Spectrum also had separate Independent Contractor Physician Agreements with Robert L. Cusic, M.D., Sheldon Swenson, M.D., and Paul Swisher, M.D.[1] These agreements stated:

"8. Corporation and Physician recognize that during Physician's association with Corporation, Physician has been and will continue to be brought into contact with Corporation's confidential methods of operation and trade secrets, including know-how, data and other information about Corporation's operations and business of a confidential nature; that such information gives to the relationship a special and unique value. Therefore, Physician agrees that during the term of this contractual relationship with Corporation and for a period of one (1) year thereafter, Physician will not in any manner, directly or indirectly: (a) disclose or divulge to any person, entity, firm or company whatsoever, or use for his own benefit or the benefit of any other person, entity, firm or company, directly or indirectly in competition with Corporation any knowledge, information, business methods, techniques or data of Corporation; (b) solicit, divert, take away or interfere with any of the accounts, trade, business patronage, employees or contractual arrangements of Corporation; (c) compete with Corporation at Hospital or enter into any contractual arrangements for the provision of emergency department physician coverage with any hospital where Physician has been scheduled by Corporation. As used herein, the term 'Corporation' shall include Spectrum Emergency Care, Inc. and its affiliates.

"Notwithstanding the above, if the agreement between Corporation and Hospital is terminated through no fault of Physician's, and through no direct or indirect negotiation with Hospital Board, Administration, or Medical Staff, then the terms and provisions of this paragraph '8' shall be null and void.

"Physician shall, upon termination of the contractual relationship between Physician and Corporation, return to Corporation all books, records and notes and all other information and documents applicable to Corporation, its accounts and the manner of conducting its business

"It is the intention of the parties to restrict the activities of the Physician only to the

extent necessary for the protection of the legitimate business interests of Corporation and nothing herein shall be such as to prevent Physician from earning a livelihood."

In order to fulfill its contract with the Hospital, Spectrum entered Employment Agreements with Robert L. Cusic to serve as Medical Director, and Sheldon Swenson to serve as Assistant Medical Director at the Hospital. These agreements did not vary in any significant manner from the previously quoted agreements.

The undisputed facts are that on September 2, 1989, physicians Cusic and Swenson met with the CEO of the Hospital, John Studsrud. During this meeting, they informed Studsrud that they would not renew their contracts with Spectrum as they were unhappy with Spectrum and were seeking other employment. On September 11, 1989, these persons held another meeting at which a change in format of the emergency room was discussed. On September 13, 1989, the Hospital notified Spectrum that it would not renew its contract with Spectrum. Cusic and Swenson negotiated and signed new employment agreements with the Hospital prior to the termination of their agreements with Spectrum. The new agreements between the Hospital and the physicians were to take effect at the end of the Spectrum contracts and were to be effective for four years.

Spectrum claims that the Hospital, Cusic, and Swenson breached their agreements with it when they entered into new agreements while still under contract with it. Spectrum's complaint asserted that the physicians and the Hospital violated their respective agreements with it by making agreements with each other. Spectrum requested injunctive relief and monetary damages.

Spectrum apparently concedes that the provision for a one-year restriction on the physicians activities after the termination of the contract is not valid. However, Spectrum asserts the interim restraint in the contracts is valid and binding upon both the Hospital and the physicians.

Although the trial court determined that neither the physicians nor the Hospital breached any of their respective contractual obligations to Spectrum, we, for purposes of this opinion, assume that a technical breach occurred. We, nevertheless, affirm the judgment for the reasons hereinafter explained.

The physicians and the Hospital rely on section 9-08-06 of the North Dakota Century Code to defend their actions. It reads: "Every contract by which anyone is restrained from exercising a lawful profession, trade, or business of any kind **is to that extent void**. . . . [Emphasis added.]" Thus, our inquiry must focus on what specific actions the defendants have engaged in and whether or not such conduct is protected under the statute.

As previously stated, on September 2, 1989, the physicians informed the Hospital of their intention of leaving the Spectrum program. This precipitated negotiations between the physicians and the Hospital for employment contracts, with employment by the Hospital of the physicians to begin at the end of the Spectrum contracts. In this sense, the parties were preparing for the time when they would no longer be under contract with Spectrum.

First, we consider whether or not section 9-08-06, N.D.C.C., protects the actions of the

physicians. There can be no doubt that section 9-08-06, N.D.C.C., makes void the provision which attempts to prohibit the physicians from being employed by the Hospital at the end of the contract period with Spectrum. Spectrum concedes this point. Thus, the issue narrows to whether or not section 9-08-06, N.D.C.C., protects a person's ability to negotiate and contract for future employment while under a contract which attempts to prohibit such conduct. We conclude that it provides such protection. The ability to negotiate and contract for future employment is central to one's ability to exercise a lawful profession, trade, or business.

We note that there was no evidence that the physicians engaged in conduct prohibited by their contract other than that which was necessary in seeking prospective employment. The trial court as a matter of fact found that "there was no evidence that the Hospital solicited or encouraged Drs. Cusic and Swenson to decide not to renew their agreement with Spectrum, and there was no evidence that the physicians solicited or encouraged the Hospital to decide not to renew its agreement with Spectrum." That finding is interesting, but it is not crucial to our disposition of this case. It is important to note that Spectrum was notified of the parties' intentions and given the opportunity to try to change the minds of the physicians and the Hospital CEO in a meeting which took place in early November, approximately one month before the physicians signed the contract with the Hospital.

Spectrum erroneously relies upon **Igoe v. Atlas Ready-Mix, Inc.,** 134 N.W.2d 511 (N.D. 1965), and **Hawkins Chemical, Inc. v. McNea,** 321 N.W.2d 918 (N.D. 1982). Both of these cases involve sales of businesses. These decisions are distinguishable as they involve restrictions imposed on one who had sold a business and thus are decided under the exceptions contained under section 9-08-06, N.D.C.C., rather than the part of that section which makes contracts which restrain a lawful profession void. The conduct herein attempted to be restrained does not come within the exceptions.[2]

Spectrum places great reliance on our ruling in **Biever, Drees & Nordell v. Coutts,** 305 N.W.2d 33 (N.D. 1981). In **Coutts**, we upheld a temporary injunction restraining the defendant from performing accounting services for certain clients of his former employer when the defendant had solicited his former employer's clients while still employed by them in contemplation of leaving and starting his own business. **Coutts** is distinguishable even without considering section 9-08-06, N.D.C.C.

Initially, we note that **Coutts** did not involve a restrictive covenant and the application of section 9-08-06, N.D.C.C.[3] **Coutts** is more properly characterized as involving equitable protection against unfair competition. In **Coutts**, the conduct in question went well beyond that which is central or necessary to one's ability to exercise a profession, trade, or business. In **Coutts**, the employee, without the knowledge of his employer, solicited for himself **the business** of his employer's clients. In this case, Spectrum was made aware of the parties' intent not to renew their respective contracts months in advance of the end of their contracts, and in fact, Spectrum made an effort to have the physicians reconsider their decisions. Thus, unlike the plaintiff in **Coutts**, Spectrum was not placed on unequal footing, nor unfairly disadvantaged. In this case, the physicians did not negotiate or contract to be the "equivalent" of Spectrum. They merely

contracted to engage in their "lawful profession."

In fact, in **Coutts** our Court relied on **Sanitary Farm Dairies, Inc. v. Wolf,** 261 Minn. 166, 112 N.W.2d 42 (Minn. 1961), a decision of the Minnesota Supreme Court. There is no indication in **Sanitary Farm Dairies** that Minnesota had a statute equivalent to section 9-08-06, N.D.C.C.; at least there is no reference to such a statute in **Sanitary Farm Dairies.** Our limited research does not indicate that there is such a statute in Minnesota today or that there was one when **Sanitary Farm Dairies** was decided. As **Sanitary Farm Dairies** does not involve the issue of the application of a statute equivalent to section 9-08-06, N.D.C.C., that opinion is of little aid to us in this case. Therefore, **Coutts** cannot be controlling in this case.

We thus conclude that the contracts between the physicians and Spectrum to the extent they restrain the physicians from negotiating for and securing future employment, are void under section 9-08-06, N.D.C.C.

Next we consider whether or not section 9-08-06, N.D.C.C., protects the actions of the Hospital. Spectrum cites **Dickinson County Memorial Hospital v. Northern Professional Emergency Physicians,** 141 Mich. App. 552, 367 N.W.2d 833 (Mich.App. 1984), for the proposition that a statute similar to section 9-08-06, N.D.C.C., is not applicable to restrictive covenants which restrain one as an employer as distinguished from an employee. We do not agree that there should be any distinction.

Initially, we note that to enforce the contract's restrictions against the Hospital would permit Spectrum to accomplish indirectly what it would be illegal to do directly. Statutes should not be interpreted to allow persons to do indirectly something that the statute directly prohibits. **See Resolution Trust v. Dickinson Econo-Storage,** 474 N.W.2d 50, 52 (N.D. 1991).

The policies of restraint against contracts which restrict the free exercise of a lawful profession or business behind section 9-08-06, N.D.C.C., would be frustrated by such an interpretation.

Statutes must be interpreted in furtherance of their purposes. **See Aanenson v. Bastien,** 438 N.W.2d 151, 153 (N.D. 1989); **Larson v. Wells County Water Resource Board,** 385 N.W.2d 480 (N.D. 1986). Parties to a contract cannot waive rights which are protected by statutes that promote public policies. **See Borsheim v. Owan**, 467 N.W.2d 95, 98 (N.D. 1991). (Vendees under anti-deficiency statutes could not waive their procedural rights because it would be against the public policy advanced by the statute.)[4] Thus, we conclude that section 9-08-06, N.D.C.C., contemplates prohibiting restraints on a person's exercise of a lawful profession, trade, or business as an employer as well as an employee.

The issue is whether or not the Hospital's actions were protected under section 9-08-06, N.D.C.C. As noted earlier, there was no evidence that the Hospital did any more than negotiate with prospective employees and thereafter reach employment agreements to be effective at the end of the contract with Spectrum. There was no evidence that the Hospital and Spectrum were on unequal footing. There was no evidence that the Hospital would be acquiring any "trade

secret" of Spectrum's or any other such advantage.[5] As with the case of the physicians, the attempted restraint against the Hospital does not come within any exception of section 9-08-06, N.D.C.C. We thus conclude that, to the extent the contract between the Hospital and Spectrum restrains the action taken by the Hospital in this case, it is void.

For the aforementioned reasons, the judgment of the district court is affirmed.

/s/ Ralph J. Erickstad, C.J.

/s/ Vernon R. Pederson, S.J.

/s/ Douglas Heen, S.J.

HEEN, S.J., and PEDERSON, S.J., sitting in place of LEVINE, J., and MESCHKE, J., disqualified.

Justice H.F. Gierke, a member of the Court when this case was heard, resigned effective November 20, 1991, to accept appointment to the United States Court of Military Appeals and did not participate in this decision.

DISPOSITION

AFFIRMED.

CONCURRENCE

VANDEWALLE, Justice, concurring specially.

The trial court found "there was no evidence that the Hospital solicited or encouraged Drs. Cusic and Swenson to decide not to renew their agreement with Spectrum, and there was no evidence that the physicians solicited or encouraged the Hospital to decide not to renew its agreement with Spectrum." Notwithstanding the majority's dismissal of that finding as "interesting, but . . . not crucial to our disposition of this case," that finding is the basis upon which I concur in the result reached by the majority opinion.

I am concerned that the majority opinion may be construed to hold that section 9-08-06, NDCC, absolves employees of any loyalty to their employer. There are other provisions which are of equal import in the employer-employee relationship. Chapter 34-02, NDCC, sets forth the obligations of employer and employee. Employers assume certain obligations as a result of the relationship. So do employees. For example, section 34-02-07 requires that one who is employed at his own request to do that which is more for his own advantage than for that of his employer must use great care and diligence to protect the interests of the employer; and section 34-02-14 requires that an employee who has any business to transact on his own account similar to that entrusted to him by his employer must always give the employer the preference. I construe those sections to require loyalty to the employer and to require that the employee not impair the employer's business for the benefit of the employee.

I agree that this court's decision in **Biever, Drees & Nordell v. Coutts,** 305 N.W.2d 33 (N.D. 1981) is distinguishable, not because section 9-08-06 was not discussed in that opinion as footnote 3 of the majority appears to hold,[1] but because the facts and the issue framed from those facts was substantially different than with which we are here faced. As the majority opinion notes **Coutts** was a case "involving equitable protection against unfair competition." Thus, in **Coutts**, we framed the issue as "Did Coutts owe any obligation to the firm not to solicit its clients while he was employed by the firm and did he, in violation of that obligation, attempt to gain something, i.e., the clients of the firm?" **Coutts, supra**, at 35. Relying in part on section 3-04-05-01[2] of the North Dakota Administrative Code, the accountants Code of Professional Ethics, we concluded that the accounting firm "had a right to expect that [Coutts] would not solicit clients of the firm for himself while he was employed by the firm." **Coutts, supra**, at 36.

Here the trial court found there was no solicitation to not renew the contract with Spectrum by either the physicians or the hospital and no contract negotiations between the hospital and the physicians until after the physicians determined to leave Spectrum's employment at the end of their contract period.

Insofar as the contract prohibits negotiations for future employment after the physicians determined not to renew the contract, I agree it violates section 9-08-06, NDCC. We need not and should not decide any issues other then those found by the findings of the trial court.

/S/Gerald W. VandeWalle

OPINION FOOTNOTES

1 Summary judgment of dismissal of the complaint was granted as to Dr. Paul Swisher by consent of counsel. He was dismissed from this action on December 17, 1990.

2 "**9-08-06. In restraint of business void -- Exceptions.** Every contract by which anyone is restrained from exercising a lawful profession, trade, or business of any kind is to that extent void, except:

1. One who sells the goodwill of a business may agree with the buyer to refrain from carrying on a similar business within a specified county, city, or a part of either, so long as the buyer or any person deriving title to the goodwill from him carries on a like business therein.

2. Partners, upon or in anticipation of a dissolution of the partnership, may agree that all or any number of them will not carry on a similar business within the same city where the partnership business has been transacted, or within a specified part thereof."

3 In **Coutts**, neither of the parties raised section 9-08-06, N.D.C.C., as an issue in their briefs, it was not discussed in our opinion and it was not raised in the petition for rehearing. Under such circumstances, **Coutts** cannot be said to be controlling in this case.

4 **See Szabo Food Service, Inc. v. Cook County,** 160 Ill. App. 3d 845, 513 N.E.2d 875 (Ill.App. 1 Dist. 1987, 112 Ill. Dec. 266). A restrictive covenant will only be enforced if its impact on the public is reasonable. **Id.** at 877.

5 **See Hospital Consultants, Inc. v. Potyka**, 531 S.W.2d 657 (Tex.Civ.App. 1975). Case involved no statute but refused to enforce a restrictive covenant between doctors and a placement corporation which

protected no interests and would only serve to prevent competition and was, therefore, not reasonable. **Id.** at 663.

CONCURRENCE FOOTNOTES

1 I do not believe the lack of reference to a given statute or judicial decision in an opinion requires a conclusion that such an opinion lacks precedent in a future case in which such a statute or decision is raised or discussed. To conclude otherwise makes judicial precedent unduly fragile.

2 Chapter 3-04-05, North Dakota Administrative Code, was repealed effective November 1, 1982.

STAFFING PROPOSALS BY DISTRICT

County	Criminal	Civil & Formal Juvenile	Total Crim/Civil Filings	1997 Filings/600 population	FTE's	Support Staff	Proposed Staff	
EC								
Cass *	5295	7228	12,523	20.87	21.4	1	22.4	
Steele	171	73	244	0.41	0.4	0	0.4	
Traill	474	267	741	1.24	1.2	0	1.2	
Totals			**13,508**	**22.51**	**23.0**	**1**	**24.0**	
NEC								
Grand Forks **	4270	3912	8,182	13.64	14.6	1	15.6	
Griggs	76	45	121	0.20	0.2	0	0.2	
Nelson	164	70	234	0.39	0.4	0	0.4	
Totals			**8,182**	**14.23**	**15.2**	**1**	**16.2**	
NE								
Benson	268	242	510	0.85	0.9	0	1.0	+
Bottineau	389	378	767	1.28	1.3	0	1.3	
Cavalier	185	266	451	0.75	0.8	0	0.8	
McHenry	255	135	390	0.65	0.7	0	0.7	
Pembina	497	436	933	1.56	1.6	0	1.6	
Pierce	471	254	725	1.21	1.2	0	1.2	
Ramsey	979	920	1,899	3.17	3.2	1	4.2	
Renville	48	103	151	0.25	0.3	0	0.3	
Rolette	474	557	1,031	1.72	1.7	0	1.7	
Towner	155	223	378	0.63	0.6	0	0.6	
Walsh	1238	852	2,090	3.48	3.5	0	3.5	
Totals			**9,325**	**15.54**	**15.5**	**1**	**16.7**	
NW								
Burke	105	98	203	0.34	0.3	0	0.3	
Divide	70	135	205	0.34	0.3	0	0.3	
McKenzie	305	266	571	0.95	1.0	0	1.0	
Mountrail	292	264	556	0.93	0.9	0	1.0	+
Ward	1795	4151	5,946	9.91	9.9	2	11.9	
Williams	1440	1105	2,545	4.24	4.2	0	4.2	
Totals			**10,026**	**16.71**	**16.7**	**2**	**18.8**	
SC								
Burleigh	2448	4357	6,805	11.34	11.3	2	13.3	
Emmons	183	196	379	0.63	0.6	0	0.6	
Grant	71	87	158	0.26	0.3	0	0.3	
Kidder	96	152	248	0.41	0.4	0	0.4	
Logan	32	78	110	0.18	0.2	0	0.2	
McIntosh	86	115	201	0.34	0.3	0	0.3	
McLean	466	361	827	1.38	1.4	0	1.4	
Mercer	355	301	656	1.09	1.1	0	1.1	
Morton	1331	1355	2,686	4.48	4.5	0	4.5	
Oliver	27	63	90	0.15	0.2	0	0.2	
Sheridan	17	68	85	0.14	0.1	0	0.1	
Sioux	26	45	71	0.12	0.1	0	0.1	
Totals			**12,070**	**20.53**	**20.5**	**2**	**22.5**	
SE								
Barnes	657	1032	1,689	2.82	2.8	0	2.8	
Dickey	209	242	451	0.75	0.8	0	0.8	
Eddy	131	102	233	0.39	0.4	0	0.4	
Foster	219	146	365	0.61	0.6	0	0.6	
Lamoure	128	140	268	0.45	0.4	0	0.4	
Ransom	261	267	528	0.88	0.9	0	1.0	+
Richland	829	1024	1,853	3.09	3.1	0	3.1	
Sargent	303	171	474	0.79	0.8	0	0.8	
Stutsman	1270	1578	2,848	4.75	4.7	1	5.7	
Wells	114	176	290	0.48	0.5	0	0.5	
Totals			**8,709**	**15.00**	**15.0**	**1**	**16.1**	
SW								
Adams	161	190	351	0.59	0.6	0	0.6	
Billings	60	37	97	0.16	0.2	0	0.2	
Bowman	184	186	370	0.62	0.6	0	0.6	
Dunn	229	143	372	0.62	0.6	0	0.6	
Golden Valley	154	76	230	0.38	0.4	0	0.4	
Hettinger	84	91	175	0.29	0.3	0	0.3	
Slope	32	29	61	0.10	0.1	0	0.1	
Stark	1475	1204	2,679	4.47	4.5	2	6.5	
Totals			**4,335**	**7.23**	**7.2**	**2**	**9.2**	
UNALLOCATED								
Supervisory/Floaters	0	0	0	0.0	4.0	0	4.0	
Support Staff					4.0	0	4.0	
Totals			**0**	**0**	**8.0**	**0**	**8.0**	
GRAND TOTALS			**66,155**	**111.74**	**121.2**	**10.0**	**131.6**	

* Includes .5 additional FTE due to heavy administrative traffic caseload.

** Includes 1 additional FTE based on 1996 filings.

\+ Includes small office credit. FTE increased from .9 to 1.0

Line 16 of page 1 CHANGE: b. A party who sells or redeems shares of stock in a business may agree with
TO
b. A party who sells shares of stock, or who's shares of stock are redeemed, in a business may agree with
The change is because the party who "redeems" is the purchaser. The term is to relate to the seller.

Line 3 of page 2 CHANGE: d. A partner who sells or redeems a partnership interest in a business may
TO
d. A partner who sells a partnership interest, or who's partnership interest is redeemed, in a business may
The change is because the party who "redeems" is the purchaser. The term is to relate to the seller.

Line 13 of page 2 CHANGE: f. A member who sells or redeems a limited liability company interest in a
TO
f. A member who sells a limited liability company interest, or who's limited liability company interest is redeemed, in a
The change is because the party who "redeems" is the purchaser. The term is to relate to the seller.

Line 18 page 2 CHANGE: g. An employee may agree with an employer at the time of initial employment or
TO
g. An employee may enter into a written agreement with an employer at the time of initial employment or

Line 20 page 2 DELETE the word “and” at the beginning of the line

Line 22 page 2 CHANGE: provide these services or products, if the agreement applies to:
TO
provide these services or products, in which case the written employment agreement will be allowed to the extent the written agreement is limited to:

After the above changes, existing lines 18 through 22 of page two would read as follows:

g. An employee may enter into a written agreement with an employer at the time of initial employment or at any time during employment to refrain from soliciting, attempting to solicit, rendering services or selling products to or for any person who was a client or customer of the employer, so long as the employer continues to provide these services or products, in which case the written employment agreement will be allowed to the extent the written agreement is limited to:

Add new paragraph 1. h.

Paragraph g. of this section shall only apply to employers and employees regarding the following services for which the employer charges a fee for the service

(1) Engineering
(2) Architecture
(3) Accounting & auditing
(4) Tax return preparation
(5) Business consulting
(6) Computer technology consulting
(7) Lobbying, except by law firms and trade associations

and to sales personnel where the sales of products or services are primarily to businesses, governments and institutions.

Add paragraph 3. to the end of the bill

3. Contracts entered into prior to August 1, 1999 shall continue to be governed by the laws that were in effect at that time.

ND State Senate
Judiciary Committee
Testimony in OPPOSITION to HB 1267

Prepared by A. Michael Booth MD
The Heart and Lung Clinic
PrimeCare Health Group
Bismarck ND
March 9, 1999

Mr. Chairman and Members of the Committee:

Earlier this session, this body chose to kill SB 2402, a measure similar to this bill that would have allowed employers enforce contracts containing non-compete clauses. These would have restricted the ability of their employees to move to competitor businesses.

HB 1267 originally contained similar language to SB2402, which was amended out in the House. The surviving bill, however, allows non-compete clauses to be inserted in contracts involving partnerships, limited liability corporations, and stock companies. As a medical professional who would be subject to the changes proposed in this bill, I strongly urge its defeat.

Non-compete clauses are nasty little bits of contractural fine print that should have no standing in our state's law. While one may argue that these clauses are strictly voluntary, in point of fact, they are easily overlooked when one signs a contract.

How many couples marry planning to divorce? (50% ultimately do divorce!) How many doctors join a practice planning to leave within 2 years? (40% do leave!) Should that practice have the right to force that doctor, or other professional, to leave town? Is that truly in the public's best interest?

Who is this law going to protect? Clearly, it would appear to me that it serves to protect the established special interests of professional corporations and partnerships who seek to limit their competition. In so doing, this law will limit the public's access to competitive professional services in our state.

As legislators, I believe the choice for you should be obvious. There is no public good to be served by passage of this legislation. I therefore urge each of you to recommend "DO NOT PASS" to the Senate as a whole on HB 1267, and ask you as well to vote against this bill when it is acted upon.

Bruce Levi
North Dakota Medical Association
North Dakota Medical Group Management Association

Testimony in Opposition to Engrossed House Bill No. 1267
Senate Judiciary Committee
March 9, 1999

House Bill No. 1267 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 1995 Legislative Assembly, and was defeated. SB 2402, introduced in this session, was defeated by the Senate. The North Dakota Medical Association opposed the 1995 bill and SB 2402. Today the Association, as well as the North Dakota Medical Group Management Association, oppose HB 1267 as a restraint on the medical profession. The interests effected in 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 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 June 1997. (VI, VII)

North Dakota physicians often sign contracts containing restrictive covenants 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 HB 1267. 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 restrictive covenant 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 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 HB 1267 to contracts that already exist and contain restrictive covenants 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 HB 1267 might apply to a contract entered into before the effective date of HB 1267 which contains a restrictive covenant.

Trade Secrets Law. Many of the concerns expressed by the proponents in describing the need for this legislation and SB 2402 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.

HB 1267 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 submit a "do not pass" recommendation on this bill.

OUR VIEW

Just a way to 'non-compete' in marketplace

Sunday, January 31, 1999

The Bismarck Tribune

OPINION

Pulitzer Prize: Meritorious Public Service

The flip side of attracting employers to North Dakota is the necessity of attracting, or retaining, the workers to make their businesses go. The first does not happen without the second, which is implicit in the complaint — frequently heard — that economic development in North Dakota would be proceeding even faster but for a shortage of qualified workers.

So, what can the state do to encourage natives to stick around and out-of-staters to give us a try in spite of downsides like our long winters and lower-than-average wages?

First, it can avoid doing the kind of active harm represented by House Bill 1267, the "non-compete" bill.

A better name would be "abandon all hope." This dilly, cooked up by business interests that can't see further than the end of their noses, would give the force of law to those dubious clauses in employment agreements that bar a departing worker from doing business with clients of his former employer.

At present, these clauses amount to a gentlemen's agreement that cannot be enforced in court. HB1267 would change that, and cast a wide net, permitting the binding agreements for most sales and service personnel (except for retail sales clerks) and workers in businesses involved in engineering, architecture, accounting and auditing, tax-return preparation, business consultation and computer-technology consultation, among others.

Dragging this ball and chain — especially in a small city like Bismarck and in a small state like North Dakota — many workers would be practically worthless to a new employer in their line of expertise and effectively barred from starting their own busin[illegible]. For two years, the bill says.

This might be a good deal for a certain kind of employer — the kind that, perhaps, has helped keep North Dakota small — but it beggars employees, many of whom would have their choice of staying in an unhappy job situation, eating beans for two years, changing occupations or getting the heck out of Dodge. None sounds like a formula for a welcoming community or state, or for economic dynamism, including competition in the marketplace.

This bill misappropriates the idea of "non-compete" purchase agreements, by which the seller of a certain kind of business — a grocery store, maybe, or a tack shop — agrees not to set up in competition with the buyer. The necessity of these agreements, where the real purchase is of an old customer base, is clear.

An employer, on the other hand, buys nothing but the honest labor of his employees, usually a week or month at a time. Most workers in the private sector are "at will," which means they can be let go at any time, for any reason that does not involve illegal discrimination. Many of these would be very happy to stay put for two years — and two more, and two more after that — in exchange for getting paid two years in advance.

This is what, by rights, an employer should have to do to exert the control over his help envisioned by HB1267. Doing it, he doesn't need HB1267. Failing to do it, he isn't entitled.

□ □ □

(Tribune editorials are proposed, discussed and generally written by members of the Tribune Editorial Board. In addition to the publisher, the board is composed of Tim Fought, editor, and Frederic Smith, opinion editor.)

'Noncompete bill' may limit rights

NIKKI LAINE SERHIENKO
Bismarck Tribune

Job hunters beware. The position you choose today could lock you out of better job opportunities down the road. Or at least that's what some business owners want, and they're lining up in support of HB1267, dubbed the "noncompete bill."

Sponsored by Rep. George Keiser, R-Bismarck, the measure would allow employers to prohibit employees from leaving a job and later doing business with clients of the former employer. The prohibition could stay in effect for up to two years.

"A noncompete clause is a nasty bit of fine print inserted into an employment or business contract," said John Risch, state legislative director for the United Transportation Union. "Noncompete clauses would put the kibosh to much (entrepreneurship) by prohibiting people from starting up a competing business with their former employer."

Advocates say the bill would provide much-needed protections for companies' current assets.

Under current law, workers can quit, take up a new job or start another company and steal their former employer's client base using information gleaned while still on the job.

"One could say this isn't very good for an employee," said Paul Winoutka, who testified Tuesday in favor of the bill on behalf of CPA firm Eide Bailley. "We think about somebody taking money from a company, we think about somebody loading up a van with valuable merchandise and taking it out the back and we think that's wrong. A business' intangible value of its customer base is no less of an asset."

And when employees move on to bigger and better things, they should not be able to take any form of that business with them, Winoutka argued.

'99 Session

Keiser's measure and its supporting amendments, if approved, would regulate employees of these types of businesses: engineering, architecture, accounting and auditing, tax return preparation, business consultation, computer technology consultation, lobbying (except by law firms and trade associations), and most sales or service personnel (except retail sales clerks).

But both employee and employer would have to first put their signatures to such a restriction.

"An employer has to formally enter into a written agreement prior to entering into any of the restrictions in this bill," said Winoutka.

Bruce Levi, legal counsel to the North Dakota Medical Association, argued against the bill, saying that an employee's refusal to sign such an agreement "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."

Risch agreed.

Says Risch: "Union members will be protected if the law passes because we have trained representatives to negotiate legitimate labor agreements free of noncompete clauses. That's not the case for most employees. ... Even if new employees are made thoroughly aware of the noncompete clause at the time of hiring, most new employees are just happy to get the job and are likely to sign most anything."

Some businesses already require written noncompete contracts, but those agreements wouldn't hold up in court under current law. Instead, "the parties hope that the other will honor the written agreement based on their character," Winoutka told Judiciary Committee members.

Levi questioned whether the bill would be constitutional, noting that the state's Constitution guarantees that workers are free to seek any employment without interference.

Still, Keiser said, something must be done.

"I have had employees come to me and say I want more money and I'm leaving. No ifs, ands or buts about it. What's that? They're renegotiating their agreement without my permission," Keiser said. "What if I can't afford that? You're going to destroy business relationships that are well-earned simply because you want to leave?"

A similar bill was defeated during the 1995 Legislative session.

That time, Dr. Michael Booth, a Bismarck cardiac surgeon, summed up the opposition: "Who would the law protect? Bad employers who treat their employees poorly, employers who won't pay their employees what they're worth and corporate losers who can't stand up to good competition. Who would this law hurt? The little guy who wants a better paying job or the chance to start his own business."