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Nathan B. Oman: Non-compete legislation is getting worse with latest revisions

By Nathan B. Oman , For the Deseret News
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FILE - House Speaker Greg Hughes, R-Draper, left, speaks during a House Republican caucus meeting at the Capitol in Salt Lake City, Thursday, Jan. 28, 2016. (Ravell Call, Deseret News)

Something strange is happening in the Beehive State. Viewed from afar, Utah has an enviable reputation as a place with a sensible legal climate for business. The state respects private ordering and avoids unnecessary and complex regulation. Or so we thought.

The Utah House recently passed HB251, which would ban non-compete agreements. The bill is a solution in search of a problem. It will do nothing to help Utah workers or

businesses but will likely tarnish the state's reputation and harm its economy.

In non-compete agreements, employees commit not to work for their former employers' competitors if the employment relationship ends. This encourages employers to invest in their employees and share proprietary information. Everyone benefits, which is why employees and employers agree to the contracts in the first place.

In theory, such contracts could harm workers and consumers by giving monopoly power to employers. We solved this problem, however, more than a century ago. Like every other state, Utah law already requires that such contracts have reasonable limits on their geographic scope and duration. Indeed, any business that used them to monopolize a market would commit a crime under federal antitrust laws that have been in place since 1890.

HB251 began as a misguided law that at least had the virtue of being simple. Responding to the understandable dismay of Utah businesses, the sponsors of the bill, which must now go to the state Senate, have transformed it into a misguided law that is also pointlessly complicated.

The most recent version of the bill creates an arcane maze of vague definitions, exceptions and special requirements. Ostensibly, these changes allow businesses to protect their legitimate interests in proprietary information and encourage investment in employees. In practice, however, HB251 would increase legal uncertainty, decrease employer investment in employees, and generate litigation.

The sponsors of the bill insist that everyone's legitimate interests can be protected by non-disclosure agreements and complicated compensation packages. If such contracts — which are already enforced under Utah law — were sufficient, however, employees and employers wouldn't enter into non-compete agreements in the first place. The fact that such agreements are common is evidence that in many cases other strategies are less efficient.

It's simple to understand why. In a non-disclosure agreement an employee promises not to share proprietary information. Such contracts require employers to closely monitor the details of their former employees' new employment to ensure that the protected information isn't being shared. This is an expensive, intrusive and often impossible task. Businesses and employees will be forced to bear those costs. It means more money spent on lawyers and less money spent on wages and investment. The same is true of the other complicated alternatives to non-compete agreements contemplated by the revised version of HB251.

As it now stands, the bill is a classic example of the legislative process run amok. A poorly thought-out response to an imaginary problem was adopted. When the mistake became apparent, rather than correcting it, legislators doubled down on the original bad idea and created a legal Rube Goldberg machine, a complex contraption that has no real purpose.

House Speaker Greg Hughes, the moving force behind HB251, claims that states that prohibit non-compete agreements perform better than states that allow them. This is a remarkable statement in light of the fact that currently only a single state prohibits non-compete agreements outright: California, a jurisdiction known nationally for its red tape, litigiousness and hostility to commerce.

That isn't the kind of company that the Beehive State wants to keep.

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