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by  
Pat McDonald  
HB 487

STATE OF IDAHO  
OFFICE OF THE ATTORNEY GENERAL  
LAWRENCE G. WASDEN

March 9, 2016

The Honorable Ilana Rubel  
Idaho State Representative  
Statehouse  
VIA HAND DELIVERY

Re: H. 487 – Our File No. 16-54081

Dear Representative Rubel:

Regarding H 487, you have asked whether the presumption of irreparable harm contained in the legislation, while identified as rebuttable in the legislation is, “for all practical purposes,” irrebuttable.” H 487 proposes an amendment to present law that relates to restrictions in employment contracts. The specific proposal is to add a subsection providing, in instances where a court has found a breach of an agreement or covenant “protecting legitimate business interests,” that there is a “rebuttable presumption of irreparable harm” unless the person who has breached the agreement at issue can show that he has “no ability to adversely affect the employer’s legitimate business interests.”

The only way for an employee to rebut the presumption of irreparable harm under the proposed legislation would be for the employee to prove a negative—namely that the employee has “no ability to adversely affect the employers’ legitimate business interests.” Proving negatives is a very difficult thing to do in court and here, where the negative to be proved is the absence of any “ability” to “adversely affect,” the burden necessary to overcome this presumption may be extremely difficult, if not impossible.

The “adversely affect” language in the proposed legislation is not connected to any trade secret or proprietary information that the employee possesses. This means even if the employee could prove that he has not gained any information as a result of his employment that would adversely affect his former employer, he or she may not be out of harm’s way because the proposed language appears broader than that. Specifically, the language proposed in the legislation appears to require the employee to prove that he or she has “no ability to adversely affect the employer’s legitimate business interests” unconnected to whatever proprietary or trade secret information he may have obtained as a result of working at the employer’s place of business.

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It is worth pointing out that such presumptions already exist within the Code. For example, present Idaho Code § 44-2704(5) already provides that it shall be a rebuttable presumption that an employee (or independent contractor) who is among the highest paid five percent of the employer's employees is a "key employee" (or a "key independent contractor"), and that to rebut such presumption, the employee must show that he or she has no ability to adversely affect the employer's legitimate business interests. We are not aware of any cases interpreting this section, but this section would also appear to create a rebuttable presumption equally difficult to overcome as that contained in H. 487, regarding when an employee is a key employee (or independent contractor).

I hope that you find this analysis helpful.

Sincerely,

A handwritten signature in cursive script, appearing to read "B Kane", written in black ink.

BRIAN KANE  
Assistant Chief Deputy

BK/tjn