



C.L. "BUTCH" OTTER

GOVERNOR

March 28, 2018

The Honorable Brad Little
President of the Senate
State Capitol
Boise, ID 83702

Dear Mr. President,

I hereby advise you that I have transmitted to you today the following Senate Bill, which was allowed to become law without my signature:

S 1287a

as prescribed by the Constitution.

There is no consensus within the business community, or even within the community of technology-driven businesses, for this second change within two years to Idaho Code regarding non-compete agreements between employers and key employees or key independent contractors. As was the case with the 2016 changes to the law that are reversed by this bill, the importance placed on S1287 varies with the nature of each company's business plan, and whether management considers a "dynamic" workforce featuring regular turnover of high-level employees to be energizing or detrimental.

This bill essentially restores Idaho Code to the pre-2016 standard of proof for whether a key employee or key independent contractor has violated the terms of a non-compete agreement. The 2016 change put the onus on employees and contractors to prove in court that they have "no ability to adversely affect the employer's legitimate business interests." S1287 strikes that language, ostensibly shifting the burden back to employers to show that their business interests were harmed by the employee's competitive actions.

I would suggest that when the Legislature returns in 2019 it consider another alternative to resolving the issue – restoring the language of Idaho Code 44-2704, Subsection (6) that was added in 2016 but changing the standard for key employees and key contractors from having "no ability to adversely affect" to "has adversely affected" the employer's business.

In the meantime, since it my understanding that the 2016 language has never been tested in court, there seems to be little risk in removing it until consensus is reached on a better solution.

As Always – Idaho, "Esto Perpetua"

A handwritten signature in black ink that reads "C.L. Butch Otter".

C.L. "Butch" Otter
Governor of Idaho