

Oregon Enacts New Modifications to Noncompete Law for 2021

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On May 21, 2021, Oregon Governor Kate Brown signed [Senate Bill \(SB\) 169](#), making substantial changes to the statute that limits noncompetition agreements with Oregon employees, Oregon Revised Statutes (ORS) 653.295. The changes apply to any employee noncompetition agreement entered into on or after the effective date of the act.

SB 169 makes four major changes to the existing law:

1. Noncompliant Covenants Not to Compete Are Void Instead of Voidable

Under the former version of ORS 653.295, a noncompetition agreement with an Oregon employee that did not satisfy the requirements of the statute was “voidable,” rather than “void.” Some courts had interpreted the term “voidable” to impose a burden on employees to take affirmative action to void a noncompetition agreement that exceeded the limits of the statute by, for example, notifying the employer of the employee’s intent to void the agreement. The amended law renders “*void and unenforceable*” any noncompetition agreement with an Oregon employee that does not satisfy all the requirements of ORS 653.295.

2. Shortened Post-Employment Restricted Period

Under the former version of the law, the maximum post-employment restricted period for a noncompetition agreement was 18 months, and any restricted period in excess of 18 months was “voidable.” The amended law *reduces the maximum post-employment restricted period to 12 months* and states that any restricted period “in excess of 12 months is void and may not be enforced by a court of this state.”

3. Revised Minimum Salary Threshold

Under the former version of the law, for a noncompetition agreement to be enforceable, the employee had to meet one of Oregon’s white-collar exemptions to the minimum wage law and, at the time of termination, earn a gross salary and commissions that exceeded “the median family income for a four-person family, as determined by the [U.S.] Census Bureau for the most recent year available at the time of the employee’s separation from service.” Under the amended law, *an employee’s gross*

salary and commissions must exceed \$100,533, calculated on an annual basis, at the time of the employee's termination from employment. The required minimum compensation amount will be "adjusted annually for inflation pursuant to the Consumer Price Index for All Urban Consumers, West Region (All Items), as published by the [U.S.] Bureau of Labor Statistics ... immediately preceding the calendar year of the employee's" separation from service. [Emphasis added.]

4. Noncompetition Agreements With Non-Qualifying Employees

Under the former version of the law, if an employer wanted to impose a noncompetition agreement on an employee who would otherwise not qualify because the employee did not meet one of Oregon's white-collar exemptions, or because the employee's compensation did not exceed the minimum salary requirements, the employer had the option of providing the employee, for the time the employee was restricted from working, the greater of compensation equal to at least 50 percent of (a) the employee's annual gross base salary and commissions at the time of the employee's termination; or (b) the median family income for a four-person family, as determined by the U.S. Census Bureau for the most recent year available at the time of the employee's termination of employment. The amended law requires that, if an employer wants to avail itself of this option, it must *"agree[] in writing to provide"* the necessary compensation, for a period not to exceed 12 months. [Emphasis added.] In addition, consistent with the change to the minimum salary requirements referenced above, for the time the employee is restricted from working, the employer must provide the greater of compensation equal to at least 50 percent of (a) *"the employee's annual gross base salary and commissions at the time of the employee's termination"*; or (b) *"\$100,533, adjusted annually for inflation pursuant to the Consumer Price Index for All Urban Consumers, West Region (All Items), as published by the [U.S.] Bureau of Labor Statistics ... immediately preceding the calendar year of the employee's termination."* [Emphasis added.]

These new amendments do not change several existing limitations on noncompetition agreements with Oregon employees in ORS 653.295. The existing limitations include among other things, the requirements to (1) inform the employee *"in a written employment offer ... at least two weeks before the first day of employment that a noncompetition agreement is required as a condition of employment"*; and (2) provide the employee with *"a signed, written copy of the terms of the noncompetition agreement"* within 30 days after the date of their discharge.

As a reminder, the limitations in ORS 653.295, including the new amendments, do not apply to all types of restrictive covenants. The law applies only to *"noncompetition agreements,"* which are defined as agreements *"under which the employee agrees that the employee, either alone or as an employee of another person, will not compete with the employer in providing products, processes or services that are similar to the employer's products, processes or services for a period of time or within a specified geographic area after termination of employment."* The law does not apply to confidentiality agreements or *"[a] covenant not to solicit employees of the employer or solicit or transact business with customers of the employer."*

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