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Effective Use of Non-Solicitation and Confidentiality Agreements in Oregon After S.B. 169

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Much has been written about Senate Bill 169 (S.B. 169), which established new limits on noncompetition agreements in Oregon as of 1 January 2022. Less attention has been paid to what employers can still do to protect their interests when an employee who had access to sensitive and proprietary information leaves the company for a new role with a competitor.

This article will explain the current best practices for using lawful noncompetition agreements before turning to two critically important tools: nonsolicitation agreements and confidentiality agreements, which are explicitly excluded from Oregon's ever-broadening noncompetition statute.

Noncompetition Agreements

A noncompetition agreement restricts employees' ability to work for a company's competitors after their employment ends. Oregon has had a statute governing noncompetition agreements since 1977, but Oregon lawmakers have continued to narrow the circumstances under which employers can enforce noncompetition agreements. S.B. 169, passed last year and effective on 1 January 2022, put further restrictions on noncompetition agreements, including limiting them to 12 months or less, limiting them to employees who earn US$100,533 or more per year (adjusted annually for inflation), and codifying the requirement that all noncompetition agreements be in writing.

The newest iteration of the law also makes noncompetition agreements that do not conform to the law void, as opposed to voidable. This is an important distinction, as under the prior law, the onus was on the employee to take affirmative action to render the agreement ineffective. By using "void and unenforceable" instead of "voidable" in the statute, the legislature has effectively shifted the burden to the employer to prove the agreement is enforceable.

Nonsolicitation Agreements

Given the increasingly limited parameters of noncompetition agreements, Oregon employers may shift focus to effective use of nonsolicitation and confidentiality restrictive covenants to protect their interests. When drafted correctly, they are invaluable tools to protect operations and avoid messy legal battles over the enforceability of noncompetition agreements.

The law that restricts noncompetition agreements in Oregon expressly excludes nonsolicitation agreements. A nonsolicitation agreement is "[a] covenant not to solicit employees of the employer or solicit or transact business with customers of the employer."[1] Still, when using nonsolicitation agreements, employers must take care to tailor them narrowly, or Oregon courts may treat them as unenforceable noncompetition agreements.[2] The nonsolicitation clause should reasonably protect an actual interest the employer has in the employee's customers or contacts that the employee could exploit upon leaving the company. For example, restricting an employee from soliciting other employees or customers with whom the employee had direct contact during the final 12 months of employment is likely to be reasonable.

Confidentiality Agreements and The Uniform Trade Secrets Act

Another key tool employers should use to ensure former employees do not share sensitive information with a competitor or anyone else is a nondisclosure or confidentiality agreement. If drafted and implemented correctly, a confidentiality agreement can protect both trade secrets and other proprietary information from disclosure. Oregon's noncompetition law explicitly states that it does not "restrict[] the right of any person to protect trade secrets or other proprietary information by injunction or any other lawful means under other applicable laws."[3]

Oregon has adopted the Uniform Trade Secrets Act, which defines "Trade Secret" as information, including a drawing, cost data, customer list, formula, pattern, compilation, program, device, method, technique, or process that a) derives independent economic value, actual or potential, from not being generally known and b) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.[4]

Other types of confidential information include competitively sensitive confidential business or professional information, such as product development plans, product launch plans, marketing strategy, or sales plans, that otherwise would not qualify as a trade secret.

Confidentiality agreements can be critical to bringing a successful claim. They help satisfy the requirement that the employer took reasonable steps under the circumstances to protect its trade secrets and confidential information and demonstrate that an employee owed a duty to the employer to maintain secrecy.

Practice Tip:

Employers must be careful to ensure that the confidentiality language that they use complies with Oregon's Workplace Fairness Act, which forbids employers from entering into an agreement that prevents the employee from disclosing or discussing conduct that constitutes employment discrimination, including sexual assault, except in narrow circumstances. A best practice is to reference the statute, OR. REV. STAT. § 659A.370, in any agreement and explicitly exclude allegations of discrimination or sexual assault from the confidentiality provision.

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[1] OR. REV. STAT. § 653.295(4)(b) (2022).

[2] *See* Oregon Psychiatric Partners, LLP v. Henry, 293 Or. App. 471, 429 P.3d 399 (2018).

[3] OR. REV. STAT. § 653.295(6) (2022).

[4] *See* OR. REV. STAT. §§ 646.461 et seq. (1987).

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