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OREGON'S NONCOMPETE DEVELOPMENTS HIGHLIGHT KEY REMINDERS FOR EMPLOYERS IN ALL JURISDICTIONS

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Oregon's state motto, "She flies with her own wings," symbolizes the state's well-known independent spirit. Over the past few years, its legislature has been applying this tenet to employee mobility and independence through its continued efforts to restrict the use and enforceability of noncompetition agreements. In just the past six years, employers have seen changes to Oregon noncompete law that include (1) reducing the maximum length of a noncompetition period from 24 months to 18 months; (2) requiring an employer to provide the employee with a copy of the agreement within 30 days after the termination of employment; and (3) banning noncompetition agreements for home care workers.

Oregon lawmakers are now considering three new bills that could further chip away at an employer's ability to protect its interests through noncompetition agreements. The proposed changes include further reducing the maximum length of the noncompetition period from 18 months to 12 months and tightening the scope of enforceable agreements.

But while Oregon may typically fly with her own wings, the momentum in the state is consistent with the recent efforts taken by legislatures across the United States, forcing employers to navigate the patchwork of evolving and contrasting state laws. Between 2019 and 2020, states such as Maine, Maryland, New Hampshire, Rhode Island, Virginia, and Washington all passed or modified legislation that restricts an employer's ability to enforce noncompetition

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agreements. In 2021, the national trend has continued with Washington D.C. recently passing legislation that prohibits covered employers from requiring or asking employees to sign a noncompetition agreement. Meanwhile, New Jersey is currently considering noncompete legislation that would require an employer to pay 100% of the compensation that the employee would have received for work that would have been performed during the noncompetition period.

What can your business learn from the recent developments in Oregon, and what might you expect to see in states where you operate?

What Is The Current Noncompete Law In Oregon?

Under the current statute, ORS 653.295, a noncompetition agreement is "voidable and may not be enforced by a court of this state" unless:

- The employer advises the employee in a written employment offer at least two weeks before the first day of employment that a noncompetition agreement is required, or the noncompetition agreement is executed upon a bona fide advancement;
- The employee is exempt from Oregon minimum wage and overtime laws;
- The employer has a protectable interest, such as when an employee has access to trade secrets or competitively sensitive confidential information;
- The employee makes more than the median family income for a family of four as determined by the U.S. Census Bureau;
- The duration of the noncompetition does not exceed 18 months; and
- The employer provides a signed, written copy of the noncompetition agreement to the employee within 30 days after the termination of employment.

What Are The Proposed Changes?

As noted above, Oregon lawmakers have introduced three separate legislative proposals that would further restrict noncompetes in the state. The pending House Bill 2325 proposes significant changes to ORS 653.295, including:

- Reducing the duration for a permissible restraint from 18 months to 12 months;
- Requiring that an employee have a minimum salary of $100,533 (which would be adjusted annually for inflation) in order to be bound by the agreement, instead of using the Census Bureau data as the basis; and
- Changing the "voidable and may not be enforced by a court of this state" language to the more restrictive "void and unenforceable."

Senate Bill 169 mostly mirrors the language of HB 2325. One notable exception is that SB 169 proposes a slightly lower minimum salary limit of $97,311.

The third piece of legislation, Senate Bill 13, would make all noncompetition agreements void and unenforceable except for those limited to:

- The protection of trade secrets;
- A covenant not to contact former customers or clients to provide similar products, processes or services after the employee has separated from employment; or
- The protection of proprietary information.

What Should Employers Be Doing?

Given the frequent developments in noncompetition legislation, employers in Oregon – and throughout the United States – need to be proactive in order to ensure that your noncompetition agreements remain enforceable. In this endeavor, you should consider taking the following steps:

- Stay abreast of the developments in noncompetition legislation in the jurisdictions where you operate and assess the legislation's impact on your business. Consideration should be given to issues such as:
- Whether a noncompetition agreement can be enforced against specific employees, based on factors such as income level and occupation;
- Whether the temporal scope of your noncompetition period is permissible; and

- Whether you are required to take any additional steps in order to preserve the enforceability of the agreement, such as providing advance notice of the noncompetition agreement to a new employee, or providing the agreement to a departing employee within a specified time period following the termination of employment.
- If your noncompetition agreements are now or later become unenforceable, determine whether you can have your existing employees enter into new agreements. For example, some states require employers to provide something more than continued employment in exchange for a new agreement from an existing employee.
- Avoid uniform contracts and tailor your noncompetition agreements for the specific jurisdictions in which they are being used.