



Oregon Noncompete Law is Changing (Again): What Employers Need To Know

Insights

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Oregon lawmakers recently passed legislation that will create additional hurdles for employers who are seeking to protect their interests through noncompete agreements. Senate Bill 169, one of the three noncompete bills introduced during this legislative session, will significantly modify Oregon's noncompete statute by (1) reducing the maximum length of a restricted period from 18 months to 12 months and (2) with limited exception, requiring that the employee subject to the noncompete be earning a six-figure income. Importantly, however, these requirements do not apply to covenants that restrict the solicitation of clients or employees. The new law was signed into effect on May 21 and will govern agreements that are executed on or after January 1, 2022. What do employers need to know about this development?

What Is Changing?

The Oregon noncompete statute, ORS 653.295, currently provides that a noncompete 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 noncompete is required, or the noncompete 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;
- With limited exception, 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 noncompete agreement to the employee within 30 days after the termination of employment.

The new law modifies the statute in the following ways:

- The "voidable and may not be enforced by a court of this state" language is replaced by the more restrictive "void and unenforceable";

- The maximum length of a restricted period is reduced to 12 months; and
- With limited exception, an employee must earn at least \$100,533 (which will be adjusted annually for inflation) instead of using the Census Bureau's data as an income basis.

The new law also tightens the definition of a noncompete agreement. The statute currently defines a noncompete as an agreement that is "written or oral, express or implied." However, the definition will become limited to written agreements, with the "oral, express or implied" language being eliminated from the statute.

What Prompted This?

The new amendments are consistent with Oregon's continued efforts to tighten the leash on noncompete agreements. In 2015, the legislature reduced the maximum length of a noncompete period from 24 months to 18 months; in 2017, it banned noncompete agreements for home care workers; and in 2019, it passed a bill that required an employer to provide the employee with a copy of the agreement within 30 days after the termination of employment.

What Should Employers Be Doing?

Employers in Oregon, and throughout the United States, should remain proactive in order to ensure that their noncompete agreements remain enforceable. You should consider taking the following steps:

- Stay abreast of the developments in noncompete 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 noncompete 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 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 noncompete agreements are now or later become unenforceable, determine whether the law permits you to have 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 noncompete agreements for the specific jurisdictions in which they are being used.

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