

EMPLOYMENT LAW

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Susan Eggum reports on Oregon's erosion of the enforceability of non-compete agreements through the enactment of recent state law.

Oregon's Erosion of the Non-Compete Agreement

ABOUT THE AUTHOR



Susan Eggum is a shareholder with Cosgrave Vergeer Kester LLP in Portland, Oregon where her practice focuses on labor and employment as well as business litigation. Susan received her B.A. at the University of California at Berkeley (B.A., with highest honors, 1976; M.A. with honors, 1977), Phi Beta Kappa, and her law degree from Georgetown University Law Center in 1982. She was an Editor, 1981-1982, of the Georgetown Journal of Law & Policy in International Business. Susan was admitted to the Oregon State Bar in 1982, the United States District Court of Oregon in 1983, the Ninth Circuit Court of Appeals in 1983, and the United States Supreme Court in 1988. She has also received an AV rating by the Martindale-Hubbell National Law Directory (highest rating available). She is listed as an Oregon "Super Lawyer" both in Employment and in Business Litigation. Susan's practices in both State and Federal Courts representing entities and individuals in both employment and in business litigation.

ABOUT THE COMMITTEE

The Employment Law Committee serves members who represent employers and their insurers. Committee members publish newsletters and Journal articles and present educational seminars for the IADC membership-at-large and mini-seminars for the committee's membership at the Annual and Midyear Meetings. The Committee presents significant opportunities for networking and business referrals. The goal of the Employment Law Committee is to build an active committee with projects that will attract and energize attorneys who practice employment law on a domestic and international basis.

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Mac B. Greaves
Vice Chair of Publications
Burr & Forman, LLP
(205) 458-5172
mgreaves@burr.com

The International Association of Defense Counsel serves a distinguished, invitation-only membership of corporate and insurance defense lawyers. The IADC dedicates itself to enhancing the development of skills, professionalism and camaraderie in the practice of law in order to serve and benefit the civil justice system, the legal profession, society and our members.

Oregon is second only to California in its attempts to prohibit restrictive covenants. As of January 1, 2008, the Oregon legislature significantly broadened the requirements for these covenants to such an extent that it is very difficult to craft an enforceable non-competition agreement.

Oregon Revised Statute (ORS) 653.295 states that a noncompetition agreement “is voidable and may not be enforced by a court of this state unless” the following four criteria are met: (1) written notice is received by the employee at least two weeks prior to starting work; (2) the employee is an exempt executive, professional, or administrative employee under Oregon wage laws (which essentially mirror the Fair Labor Standards Act); (3) the employer has a protectable interest (such as trade secrets or “competitively sensitive” confidential business information); and (4) the employee’s gross annual compensation “exceeds the median family income for a four-person family,” as determined by the U.S. Census Bureau (\$72,667 in 2008). Finally, an agreement that meets all the listed criteria is enforceable for a maximum of two years.

The first and third criteria are unavoidable. A business employing an individual who doesn’t meet the second and fourth criteria may impose an enforceable agreement only if the employer pays the employee the greater of fifty percent of his or her gross compensation or the median family income, for the two year non-competition period.

There are, of course, a couple of carve-outs. For instance, no advance notice is necessary if the agreement is presented as part of an offer of “bona fide advancement” (defined in Oregon as “includ[ing] such

elements as new, more responsible duties, different reporting relationships, a change in title and higher pay.” *Nike, Inc. v. McCarthy*, 379 F.3d 576, 583 (9th Cir. 2004)).

Bonus restriction agreements (allowing a company to refuse to pay earned bonuses if the former employee competes), are exempt from all the statutory requirements. Also, in a significant nod to industry requests for some protection, the statute does not apply to non-solicitation agreements—restrictions on soliciting employees and restrictions on soliciting customers.

In addition, the statute specifically applies only to employees; independent contractors may validly be subject to a non-competition agreement. This creates a catch-22, however: ORS 670.600 establishes four criteria for independent-contractor status, one of which is that the individual must “be customarily engaged in an independently established business”; an “independently established business” is demonstrated, in turn, as demonstrating three out of five indicia—one of which is that the individual “provides contracted services for two or more different persons within a 12-month period, or . . . routinely engages in business advertising, solicitation or other marketing efforts reasonably calculated to obtain new contracts to provide similar services.” In other words, if you restrict a person’s right to offer “similar services” to competing companies, you likely destroy the possibility that the person is an independent contractor upon whom a non-competition agreement may freely be imposed.

Bonus restriction agreements, non-solicitation agreements, and independent contractor agreements must still meet the common-law test:

- (1) it must be partial or restricted in its operation in respect either to time or place;
- (2) it must be on some good consideration; and
- (3) it must be reasonable, that is, it should afford only a fair protection to the interests of the party in whose favor it is made, and must not be so large in its operation as to interfere with the interests of the public.

The Oregon legislature sent a clear message to employers that traditional non-competition agreements are “disfavored.” It remains to be seen whether or not that is code for “prohibited.”

Actuant Corp. v. Huffman, 2005 WL 396610, *5 (D. Or. 2005), *citing Nike, Inc. v. McCarthy*, 379 F.3d 576, 584 (9th Cir. 2004) (*quoting Eldrige v. Johnson*, 195 Or. 379, 245 P.2d 239, 250 (1952)).

To date, there have been no judicial determinations based on the new statute. This is pure speculation, but that may be because the statute itself is uncharacteristically specific and concise; there is little “wiggle room” for lawyers to argue one side or another. On the other hand, we in the legal profession are masters at seeing ambiguity where lawmakers do not. Because the word “customer” is not defined, for instance, we may yet see litigation over whether an employer may impose restrictions on soliciting prospective customers. And we all know the definition of an exempt administrative, professional, or executive employee is a thorny question, subject to interpretation.



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