Some key reminders for noncompetition agreements in Oregon

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COMMENTARY

Oregon noncompetition laws have changed through multiple rounds of legislation. As Oregon employers are navigating the contours of a challenging labor market, it is a good time to consider key reminders for noncompetition compliance, as well as evaluation of the positions for which such agreements remain valuable.

History of change

Over the last few years, Oregon legislators have limited employers' ability to restrict employee mobility between competitors, in particular through revisions to noncompetition laws. The maximum length of a noncompetition agreement was earlier reduced from 24 months to 18 (and then reduced again more recently). Then they were prohibited for home care workers, and employers were obligated to provide the employee a written copy of the agreement at issue within 30 days of the end of employment. Most recently, as of Jan. 1, 2022, the maximum duration of the noncompetition agreement was further reduced to 12 months, and the salary minimum was raised to $100,533 (a figure to be adjusted annually for inflation).

Requirements

Changes aside, consider these primary requirements and parameters around usage of noncompetition agreements.

The employer must:

- inform the employee, in writing, that the noncompetition agreement will be required at least two weeks before the first day of employment, or entered into upon a bona fide advancement for an existing employee;
- put the agreement itself in writing;
- limit the duration of the restriction period (during which an employer can restrict a departing employee's ability to work for a competitor) to 12 months;
- have a protectable interest, such as when it entrusts the employee with trade secrets or competitively sensitive confidential business information; and
- provide a signed copy of the agreement to the employee within 30 days of the separation of employment.

To qualify, any given individual employee must:

- fall within a white-collar exemption, and be paid on a salary basis;
- have access to trade secrets or competitively sensitive confidential business information; and
- earn a minimum of $100,533 in salary and commissions.

In circumstances where an employee has access to sensitive information but does not meet the other requirements, a noncompetition agreement can still be enforced if the employer has agreed in writing to continue to pay the employee after separation of employment, while the employee rides out the noncompetition period. The amount of pay must be 50 percent of the employee's annual gross base salary and commissions at the time of termination, or 50 percent of $100,533, whichever is greater.

Other options

At its core, a noncompetition agreement holds that the employee will not depart from employment with one organization only to go immediately work for a competitor within a relevant geographic area and provide products or services or processes similar to those of the organization they just left. It restricts the employee's ability to take another job. The agreement's duration is intended in part to create some separation between the employment with two competitors.

There are other tools available to employers to restrict employees from engaging in certain behaviors that are potentially harmful to their current or former organization that do not result in outright restricting the employee's ability to take a certain job. These include confidentiality agreements (agreeing to keep employer information confidential during and after employment, regardless of where they work), and non-solicitation agreements (agreeing not to solicit customers or employees of the organization, which might otherwise divert business and talent away from their current or former organization).

The restrictions outlined here do not apply to confidentiality and non-solicitation agreements. Employers are free to evaluate their use either in parallel to, or in place of, a noncompetition agreement.

Analysis

In considering the potential utility of a noncompetition agreement, employers must assess the role or occupation of the individual employee, their access level to sensitive information, and their income level. But what else should the employer assess? When and how the employee is being hired, or whether the existing employee is entering into a more sensitive role that will qualify as a bona fide advancement, will further determine whether a noncompetition agreement can be feasibly considered. In an even deeper dive, employers may want to consider whether a typical employee who would meet the parameters of the position would be willing to agree to a yearlong restriction on their future employment, and whether the actual candidate the organization has in mind or would really like to entice may be unwilling to accept the role in such circumstances.

The applicant pool itself may be more limited – where potentially ideal candidates may self-select out of applying for the role if they know a noncompetition agreement may be required. Even when accepting the position, the candidate may be more demanding in negotiating salary and other benefits when they know that a substantial limitation will be required of them. While these considerations have always been present, the contours of a tight labor market may make existing challenges to hiring even more difficult when a substantial restriction like a noncompetition agreement may dissuade candidates. Employers may wish to consider whether such agreements are useful in more limited circumstances, and/or whether confidentiality and non-solicitation agreements might otherwise achieve most or all their goals.

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