Comments

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Read the Fine Print: A Critical Look at Oregon's Noncompete and Nonsolicitation Agreement Laws

On August 6, 2007, Oregon Governor Ted Kulongoski signed into law substantial revisions to Oregon's statute governing noncompete agreements between employers and employees, significantly limiting the enforceability of these agreements.[1] The statutory revisions were drafted through Oregon Senate Bill 248 during the 2007 Oregon legislative session[2] by the Oregon Bureau of Labor and Industries (BOLI).[3] Dan Gardner, the Oregon Labor Commissioner in 2007, brought this bill to the legislature to protect Oregon workers from the unfair and inappropriate use of noncompete

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1 OR. REV. STAT. § 653.295 (2009); Or. State Legislature, 2007 Senate Measure History: Senate Bill 248, http://www.leg.state.or.us/07reg/pubs/senmh.html (last visited Nov. 17, 2009).

2 S. 248, 74th Legis. Assem., Reg. Sess. (Or. 2007), *available at* http://www.leg.state.or.us/07reg/measures/sb0200.dir/sb0248.intro.html.

3 BOLI filed Senate Bill 248 prior to the start of the legislative session. State agencies often draft and submit legislation to be considered during the regular legislative session prior to the start of that session if the agency has been researching and working on the bill during the interim. This is referred to as a "pre-session" filing of a bill.

agreements by employers.[4] This bill was a priority for BOLI and the Commissioner because the Agency received reports and complaints that employers were enforcing noncompete agreements against low-wage workers and employees that were laid off in company downsizing.[5] With this impetus, BOLI then conducted research and found a study reporting both that Oregon had the fifth highest enforceability rate of noncompete agreements in the country and that noncompete agreement disputes in Oregon were on the rise.[6] After much committee testimony, and after several amendments, the bill passed both chambers of the legislature and became law.[7]

The purpose of enacting Senate Bill 248 was to protect Oregon workers from a "'dangerous expansion in the use of non-competition agreements in Oregon and . . . being unfairly prevented from working in their chosen fields of expertise.'"[8] But passage of this bill was not a straightforward victory for Oregon employees. After hard lobbying from the Professional Insurance Agents of Oregon/Idaho, the legislation was amended to exclude nonsolicitation agreements from the statutory restrictions.[9] This exclusion may undercut much of the bill's intended purpose.

During the course of the legislative process, proponents of a bill often have to make compromises in order to both ensure that the legislation will face as little opposition as possible and ensure its passage into law. Such compromises can come in many forms, including a minor word change in the statute, a sunset clause,[10] or a statutory exemption. Often, a compromise will have little effect on

[4] *Hearing on S. 248 Before the H. Judiciary Comm.*, 74th Legis. Assem., Reg. Sess., Exhibit L, at 1–3 (Or. 2007) [hereinafter *Hearing*] (written testimony of Dan Gardner, Comm'r, Bureau of Labor and Industries). All legislative materials cited in this Comment are located in the Oregon State Archives, Salem, Oregon.

[5] *See id.* at 1.

[6] *Id.* at 2.

[7] Or. State Legislature, *supra* note 1.

[8] Press Release, Bureau of Labor & Indus., Majority of Oregon Workers Now Protected from Noncompete Agreements Thanks to Passage of Labor Commissioner's SB 248 (June 28, 2007) (quoting Oregon Labor Commissioner Dan Gardner), *available at* www.oregon.gov/BOLI/SB248_Noncompetes_final.pdf.

[9] OR. REV. STAT. § 653.295(4) (2009); *see also Hearing*, *supra* note 4, Exhibit I, at 1 (written testimony of Lana Butterfield, Oregon Lobbyist, Professional Insurance Agents of Oregon/Idaho); *id.* at Exhibit L, at 2–3 (written testimony of Dan Gardner, Comm'r, Bureau of Labor and Industries); Letter from Randy Sutton, Attorney, Prof'l Ins. Agents of Oregon/Idaho, to Oregon House Judiciary Committee (May 24, 2007) (on file with author).

[10] A sunset clause inserts a time limit into the terms of the statute.

the overall impact or intent of the statute. However, on some occasions, a compromise made during the legislative process can stealthily, and sometimes unwittingly, undo the original intent of a bill. Senate Bill 248 and the resulting noncompete agreement statute contain an example of a compromise, in the form of a statutory exemption, that significantly undermines the purpose of the bill.

On its face, the recent Oregon noncompete agreement law looks like it accomplished much of what BOLI and the Commissioner intended. Generally, the statute makes noncompete agreements more difficult for employers to enforce against employees. The bill clearly states that employers may only enforce a noncompete agreement if an employee fits certain criteria, including a minimum salary and a specific, high-level job description.[11] The statute also contains many other very specific provisions addressing when a noncompete agreement may be voidable, including a requirement that such an agreement be signed at least two weeks prior to the start of employment and only be enforceable for two years after employment.[12] As written, Oregon Revised Statute (ORS) 653.295 is one of the most narrowly defined noncompete agreement statutes in the country.[13]

However, like many narrowly defined statutes, it contains a self-defeating loophole. The statute exempts nonsolicitation agreements from all statutory regulations governing noncompete agreements.[14] Prior to the enactment of the statutory changes to ORS 653.295, both noncompete agreements and nonsolicitation agreements were subject to the same restrictions under Oregon statutory law and Oregon common law.[15] Now it appears that the statute applies only to noncompete agreements and does not apply at all to nonsolicitation

[11] § 653.295(1)(b) (referring to employees excluded from protection against noncompetition agreements as defined by OR. REV. STAT. § 653.020(3) (2009)).

[12] § 653.295(1)(a), (6).

[13] Most statutes governing restrictive covenants do not have as many specific terms as the Oregon statute. *See* CAL. BUS. & PROF. CODE § 16600 (West 2008); DEL. CODE ANN. tit. 6, § 2707 (2005); FLA. STAT. § 542.335 (2007); HAW. REV. STAT. § 480-4(c)(4) (2008); LA. REV. STAT. ANN. § 23:921 (Supp. 2008); ME. REV. STAT. ANN. tit. 26, § 599 (2007); MICH. COMP. LAWS § 445.772 (2008); N.D. CENT. CODE § 9-08-06 (2006); OKLA. STAT. tit. 15, §§ 217–219 (Supp. 2007); TEX. BUS. & COM. CODE ANN. § 15.50 (Vernon 2002); WIS. STAT. § 103.465 (2002).

[14] OR. REV. STAT. § 653.295(4) (2009).

[15] *See* First Allmerica Fin. Life Ins. Co. v. Sumner, 212 F. Supp. 2d 1235, 1238–39 (D. Or. 2002); Dymock v. Norwest Safety Protective Equip. for Or. Indus., Inc., 334 Or. 55, 58–59, 45 P.3d 114, 115 (2002).

agreements, leaving nonsolicitation agreements free from any statutory restrictions. This is an odd policy decision because noncompete agreements and nonsolicitation agreements are such similar instruments and, in many instances, both are integrated into the same restrictive covenant. It is perplexing that a legislature would tightly regulate one and completely free the other.

Because these restrictions governing noncompete agreements and the distinction between noncompete and nonsolicitation agreements have both been in effect for only a short period of time, the legal fallout, including interpretation by the courts, is uncertain. Many business law firms in Oregon have posted notices on their websites alerting clients to the statutory changes and advising them to adjust all future noncompete agreements to fit the recent law.[16] These firms warn employers that noncompete agreements are enforceable in very limited circumstances. Very few of these websites mention the nonsolicitation exclusion. The Oregon State Bar published a brief article summarizing the legislation.[17] The article focuses on the potential impact of the strict noncompete agreement regulations and suggests that the harsh regulatory provisions may deter businesses from operating in Oregon.[18] The authors mention the nonsolicitation exclusion but say little about its potential implications.[19]

The recent Oregon noncompete agreement statute presents an interesting potential conflict. On the one hand, the law considerably restricts employers' use of noncompete agreements; on the other hand, it rolls back all restrictions on nonsolicitation agreements, which were formerly subject to the same restrictions as noncompete agreements. The nonsolicitation exemption may, in fact, give employers more room to restrict competition through nonsolicitation agreements than they had previously. Those who are most vulnerable to this new exemption for nonsolicitation agreements are small business entrepreneurs—the hair stylist who, after working for a corporate salon, wants to open a shop of her own or the bike salesman

16 *See* Miller Nash LLP, New Law Affects Arbitration and Noncompetition Agreements in Oregon (Aug. 7, 2007), http://www.millernash.com/showarticle.aspx?Show=1981; Stoel Rives LLP, Employment Law Alert: Oregon Legislature Limits the Use of Noncompetition Agreements (July 3, 2007), http://www.stoel.com/showalert.aspx?Show=2485.

17 Leonard D. DuBoff & Christy O. King, *A New Wrinkle: Noncompetition Agreements in Oregon*, OR. ST. B. BULL., Aug./Sept. 2007, at 36, *available at* http://www.osbar.org/publications/bulletin/07augsep/practice.html.

18 *See id.*

19 *Id.* at 37.

who, after working for low wages at a local shop, wants to start a business of his own. These are just a couple examples of small business hopefuls who could be restricted in their ability to solicit customers by an employer's unregulated nonsolicitation agreement.

This Comment analyzes the recently enacted noncompete agreement statute and its potential implications and problems. In this effort, Parts I and II both explore how Oregon's statute compares to other state statutes in restricting noncompete and nonsolicitation agreements and show how courts have interpreted statutes in Oregon and in some other states that govern both types of agreements. Part III attempts to uncover how the Oregon legislature went about creating this perplexing statute by looking at the legislative history leading up to the passage of Senate Bill 248. Next, Part IV explores some potential effects the statute may have on employees and employers and implications it may have in the courts. Finally, Part V suggests alternative statutory language that the legislature ought to consider to avoid some of the potential problems described in this Comment.

I
NONCOMPETE AGREEMENTS V. NONSOLICITATION AGREEMENTS: STATUTORY DISTINCTIONS

Noncompete agreements and nonsolicitation agreements are both restrictive covenants limiting a former employee's future employment activities. Noncompete agreements—also referred to as noncompetition agreements or covenants not to compete—prohibit an employee from working for a competitor or starting up a competitive business upon termination, whereas nonsolicitation agreements—also referred to as nonpiracy agreements—prohibit an employee from soliciting business from the employer's customer list, soliciting employment from the employer's current employees, or both.[20] They are usually intertwined in one employment contract because nonsolicitation provisions are often used as a subset of a noncompete agreement.[21] For example, there is an element of nonsolicitation within the following definition of a noncompete agreement in the Oregon Revised Statutes:

[20] Elizabeth E. Nicholas, Note, *Drafting Enforceable Non-Solicitation Agreements in Kentucky*, 95 KY. L.J. 505, 508 (2007).

[21] *See id.*

> [A]n agreement, written or oral, express or implied, between an employer and employee under which the employee agrees that the employee, either alone or as an employee of another person, will not compete with the employer in providing products, processes or services that are similar to the employer's products, processes or services for a period of time or within a specified geographic area . . . .[22]

The idea that a former employee will not compete within a certain geographic area implies that the former employee will also not seek out customers or employees of the former employer.

Because nonsolicitation is a subpart of noncompetition, a nonsolicitation agreement clause is typically imbedded or implicit in a noncompete agreement. An employer's interests, such as protecting trade secrets, customer lists, and employee loyalty, can be protected in the same way through either a nonsolicitation agreement or a noncompete agreement.[23] A noncompete agreement is a broad restriction, placing limitations on a former employee's ability to work in a particular field or for certain competitors. On the other hand, a nonsolicitation agreement is more specific; it protects an employer's interests by restricting the former employee's ability to actively seek customers and other employees of the former employer. Solicitation is a form of competition, so it follows that noncompetition agreements would restrict solicitation of customers and other employees along with other forms of competition.

Noncompete and nonsolicitation agreements are the subject of many legal disputes because they impose restrictions on an employee after the employment relationship has been terminated.[24] This concept, by definition, requires an employee to give up certain rights, such as the right to freely pursue future employment and entrepreneurial opportunities. A former employee will almost always resist this restriction once the employment relationship has ended because the employee is no longer receiving the benefit of the employment contract.[25] In other words, the employee is subject to the former employer's terms even though the employee is no longer being paid by that employer. The result is often that an employee will

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22 OR. REV. STAT. § 653.295(7)(d) (2009).

23 Nicholas, *supra* note 20, at 507–09.

24 Harlan M. Blake, *Employee Agreements Not to Compete*, 73 HARV. L. REV. 625, 626–27 (1960).

25 *See id.*; *see also* Michael J. Garrison & John T. Wendt, *The Evolving Law of Employee Noncompete Agreements: Recent Trends and an Alternative Policy Approach*, 45 AM. BUS. L.J. 107, 111 (2008).

contest the legality of the agreement. Or, because an imbalance of power exists between employee and employer, an employee may just succumb to a noncompete agreement and forgo the opportunity to open a business, perhaps without considering any legal rights that could overcome the agreement.[26] Both results—enduring a legal contest or submitting to the employer's superior bargaining power—are problematic. Litigation over the enforceability of a restrictive covenant is costly for both parties, and the enforcement of an illegal contract on an unsophisticated employee is unjust.

A. State Statutes Governing Noncompete and Nonsolicitation Agreements

1. National Trends

A state statute can help guide employers, employees, and the courts by setting specific parameters for when a noncompete agreement or nonsolicitation agreement can be enforceable. No federal law governs these agreements, so states are free to restrict and define this area of employment law in practically any manner they choose.[27] Oregon is not alone in its use of statutory regulation to articulate the law governing the use of noncompete and nonsolicitation agreements within the state. Almost half of the states use some form of statutory regulation to govern noncompete agreements and other restrictive covenants.[28] However, they range from all-out prohibitions to general allowance.[29]

Some state statutes generally do not permit restrictive covenants. For example, California has long been famous for its total prohibition of noncompete agreements.[30] The California law in this area is also the most to-the-point statute as it sums up its effect in the following sentence: "[E]very contract by which anyone is restrained from engaging in a lawful profession, trade, or business of any kind is to that extent void."[31] Some states approach California's all-out restriction, including Oklahoma, which prohibits contracts in restraint of trade except those either between a business and a seller of that

26 Blake, *supra* note 24, at 647–48.

27 *See* Garrison & Wendt, *supra* note 25, at 120.

28 Nicholas, *supra* note 20, at 515.

29 *See generally* CHRISTOPHER REINHART, STATE LAWS ON NON-COMPETITION CLAUSES (2007), *available at* http://www.cga.ct.gov/2007/rpt/2007-R-0112.htm.

30 CAL. BUS. & PROF. CODE § 16600 (West 2008).

31 *Id.*

business's goodwill or between partners that agree none of them will carry out a similar business within a certain geographic area if the partnership dissolves.[32] Similarly, Louisiana's and North Dakota's statutes are nearly identical to the statute in Oklahoma.[33]

While some laws, like those mentioned above, begin with a presumption that restrictive covenants are void or voidable, other statutes begin with a presumption that they are allowed. For example, Florida's statute states that a restrictive covenant is allowed as long as the employer can demonstrate the existence of "one or more legitimate business interests," including trade secrets, confidential business interests, relationships with potential clients, and marketing within a certain geographic area.[34] Texas also has a statute that allows noncompete agreements as long as they are ancillary to, or part of, another enforceable employment agreement and do not impose a greater restraint than necessary on trade.[35] However, the Texas statute does not clarify further what a "greater restraint than is necessary" may be.[36] Statutes in Hawaii and Michigan also generally allow restrictive covenants as long as they are used to protect legitimate business interests.[37]

Finally, some state laws limit the use of restrictive covenants only for certain professions. Delaware has a noncompete agreement statute that voids such agreements when they restrict the right of a physician to practice medicine within a particular geographic region and for any period of time.[38] Similarly, a Maine statute presumes all contracts that restrict employees in the broadcasting industry from obtaining employment within a certain geographic area for a specific time to be unreasonable.[39]

Although states vary on the language they use to describe what types of covenants are covered by the statute, most restrictive covenant laws cover both noncompete agreements and nonsolicitation agreements.[40] But very few state statutes make clear that the statute

32 OKLA. STAT. tit. 15, §§ 217–219 (Supp. 2007).

33 LA. REV. STAT. ANN. § 23:921 (Supp. 2008); N.D. CENT. CODE § 9-08-06 (2006).

34 FLA. STAT. § 542.335(1) (2007).

35 TEX. BUS. & COM. CODE ANN. § 15.50 (Vernon 2002).

36 *Id.*

37 HAW. REV. STAT. § 480-4(c)(4) (2008); MICH. COMP. LAWS § 445.772 (2008).

38 DEL. CODE ANN. tit. 6, § 2707 (2005).

39 ME. REV. STAT. ANN. tit. 26, § 599(2) (2007).

40 *See* statutes cited *supra* note 13.

governs all restrictive covenants.[41] Florida is one state that does explicitly regulate all restrictive covenants between employers and employees, including nonsolicitation agreements.[42] The term used to describe the subject of the Florida statute is "restrictive covenant," which includes noncompete and nonsolicitation agreements.[43] Also, the "legitimate business interests" that the Florida law lists include relationships with "specific prospective or existing customers, patients, or clients," which are the types of interests that a nonsolicitation agreement is written to protect.[44]

The language used to describe the subject of most state restrictive covenant statutes is some version of "any contract or covenant in restraint of trade." This broad language is used in California, Hawaii, Louisiana, and North Dakota.[45] Such language implies that the statute is meant to apply to all restrictive covenants, including nonsolicitation agreements. However, none of these statutes are as explicit as Florida in demonstrating that nonsolicitation agreements are included in the definition of "contract" or "covenant."[46]

More difficult to interpret are those statutes that only use the term "covenant not to compete." Statutes in states including Oregon, Texas, and Wisconsin apply to "noncompetition agreements," but it may be unclear from the language whether or not that term includes nonsolicitation agreements.[47] None of these laws, except Oregon's statute after the 2007 amendments, exempts any other restrictive covenants, such as nonsolicitation agreements, from the restrictions imposed on noncompete agreements.[48] As the next Part explains, the decision whether or not nonsolicitation agreements should be subject to the same restrictions as noncompete agreements is generally left to the courts. Courts tend to hold that the terms "noncompetition

41 *See* statutes cited *supra* note 13.

42 FLA. STAT. § 542.335 (2007).

43 *Id.*

44 *Id.*

45 *See* CAL. BUS. & PROF. CODE § 16600 (West 2008); HAW. REV. STAT. § 480-4(c)(4) (2008); LA. REV. STAT. ANN. § 23:921 (Supp. 2008); N.D. CENT. CODE § 9-08-06 (2006).

46 *See* FLA. STAT. § 542.335 (2007).

47 *See* OR. REV. STAT. § 653.295 (2009); TEX. BUS. & COM. CODE ANN. § 15.50 (Vernon 2002); WIS. STAT. § 103.465 (2002).

48 OR. REV. STAT. § 653.295(4) (2009).

agreement" and "covenant not to compete," as used in these statutes, include nonsolicitation agreements.[49]

2. The Oregon Statute: A Unique Approach

No state statute follows Oregon's law after the 2007 amendments by severely restricting noncompete agreements while also completely freeing nonsolicitation agreements. Prior to the 2007 amendments to ORS 653.295, Oregon's restrictive covenant statute was similar to those in Wisconsin, Texas, Michigan, and Hawaii; it generally allowed restrictive covenants with some specific constraints.[50] The most noteworthy restriction made a noncompetition agreement void and unenforceable unless entered into upon the initial employment of the employee or upon subsequent bona fide advancement.[51]

The 2007 amendments significantly changed the law to make noncompete agreements generally unenforceable, with some exceptions.[52] At first glance, these strict restrictions on noncompete agreements appear to make the statute, in effect, similar to those in North Dakota and Oklahoma because the statute begins with a presumption that noncompete agreements will be voidable unless they are applied in specific circumstances.[53] Subsection (1) of the statute opens with the following statement: "A noncompetition agreement entered into between an employer and employee is voidable and may not be enforced by a court of this state unless . . . ."[54] However, unlike the Oklahoma and North Dakota statutes, which have language providing one or two general examples of when noncompete agreements will be allowed, Oregon's law describes which types of noncompete agreements will be allowed in extraordinary detail.

Subsection (1)(a) of the Oregon statute describes the process by which the agreement must be entered into to be enforceable, including

[49] *See* First Allmerica Fin. Life Ins. Co. v. Sumner, 212 F. Supp. 2d 1235, 1238–39 (D. Or. 2002); MicroStrategy, Inc. v. Bus. Objects, S.A., 233 F. Supp. 2d 789, 794 (W.D. Va. 2002); Edwards v. Arthur Andersen LLP, 189 P.3d 285, 292–93 (Cal. 2008); Dymock v. Norwest Safety Protective Equip. for Or. Indus., Inc., 334 Or. 55, 58–59, 45 P.3d 114, 115 (2002).

[50] *See* Act of Aug. 7, 2007, ch. 902, 2007 Or. Laws 248 (codified at OR. REV. STAT. §§ 36.620, 653.295 (2009)).

[51] § 653.295(1)(a).

[52] § 653.295(1).

[53] *Id.*; *see also* N.D. CENT. CODE § 9-08-06 (2006); OKLA. STAT. tit. 15, §§ 217–219 (Supp. 2007).

[54] OR. REV. STAT. § 653.295(1) (2009).

a provision requiring the agreement be entered into at least two weeks before the employee starts the job.[55] Subsections 1(a)(A) and (B) require that

> [t]he employer informs the employee in a written employment offer received by the employee at least two weeks before the first day of the employee's employment that a noncompetition agreement is required as a condition of employment; or . . . [t]he noncompetition agreement is entered into upon a subsequent bona fide advancement of the employee by the employer.[56]

Subsection (2) adds another temporal provision to the statute by limiting the time a noncompete agreement may be in effect.[57] It states as follows: "The term of a noncompetition agreement may not exceed two years from the date of the employee's termination."[58]

Subsections (1)(b), (c), and (d) of the amended statute limit the enforceability of noncompete agreements to certain employees. Subsection (1)(b) states that the employee must be "a person described in ORS 653.020(3),"[59] which is an employee that exercises independent judgment and predominantly performs managerial tasks.[60] Subsection (1)(c) restricts the use of noncompete agreements to an employer with "a protectable interest."[61] "[A]n employer has a protectable interest when the employee: (A) [h]as access to trade secrets . . . (B) [h]as access to competitively sensitive confidential business or professional information that otherwise would not qualify as a trade secret, including product development plans, product launch plans, marketing strategy or sales plans . . . ."[62] Subsection (1)(c)(C) provides for the enforceability of noncompetition agreements against an employee hired as an on-air talent in the field of broadcasting but requires that the employer pay the former employee half the employee's salary during the time the agreement is enforceable.[63] Finally, subsection (1)(d) states that an employee must

[55] § 653.295(1)(a)(A).

[56] § 653.295(1)(a)(A)–(B).

[57] § 653.295(2).

[58] *Id.*

[59] § 653.295(1)(b).

[60] *See* § 653.020(3).

[61] § 653.295(1)(c).

[62] § 653.295(1)(c)(A)–(B).

[63] *See* § 653.295(1)(c)(C).

have an "annual gross salary and commissions [that] . . . exceeds the median family income for a four-person family."[64]

Subsections (1) and (2) of the statute are highly restrictive, like some other state laws. The Oregon statute is different, however, in its approach to restricting the use of noncompete agreements. No other state statute sets strict provisions—the way Oregon does—on the manner in which a noncompete agreement should be entered into or the type of employee with whom a noncompete agreement may be used. Oregon's statute essentially micromanages the process of forming and utilizing noncompete agreements, rather than generally protecting the interests of employees and employers.

Further, while the noncompete agreement provisions are highly restrictive and specific, the Oregon statute contains an exemption for nonsolicitation agreements, including covenants not to solicit customers or employees of the former employer.[65] The law removes all statutory restrictions on nonsolicitation agreements. Subsection (4)(b) of the statute states that none of the restrictions on noncompete agreements apply to "covenant[s] not to solicit employees of the employer or solicit or transact business with customers of the employer."[66] This subsection creates a distinction between noncompete agreements and nonsolicitation agreements, stating that the restrictive and narrowly defined provisions of the recently enacted statute do not apply to nonsolicitation agreements.

This exemption, coupled with the restrictive provisions of subsections (1) and (2), makes the Oregon statute highly unusual compared to the statutes of other states. While, on the one hand, subsections (1) and (2) drive the Oregon law of noncompete agreements to resemble the more restrictive statutes of North Dakota and Oklahoma by significantly limiting enforceability, subsection (4) makes the Oregon law of nonsolicitation agreements even more lenient than those in Texas and Florida. This is a somewhat illogical approach to the law of restrictive covenants. Most statutes are either generally lenient or highly restrictive of all restrictive covenants. The inconsistency of the Oregon approach is troubling because it will likely create confusion for employers and employees as to what terms of a restrictive covenant are enforceable.

64 § 653.295(1)(d).

65 § 653.295(4).

66 § 653.295(4)(b).

II
BACKGROUND LAW: COURT INTERPRETATIONS OF RESTRICTIVE COVENANTS

A. General Common Law

Although state statutes have helped employers and employees determine the enforceability of restrictive covenants, the statutes often do not prevent these groups from contesting these contracts in court. Legal conflict over noncompete agreements dates back to eighteenth-century English law. The first important case was *Mitchel v. Reynolds*, which involved a dispute over a noncompete agreement restricting a baker from practicing his trade following his employment with a bakery.[67] The *Mitchel* decision first articulated the underlying conflict presented by a noncompete agreement: restraint of trade for employees versus the protectable interests of employers.[68] Courts continue to work to strike a balance between these two interests despite the likely presence of a state statute.

Courts generally follow the common law for restrictive covenants articulated in section 188 of the *Restatement (Second) of Contracts*: A noncompete agreement will be enforceable as long as (1) the restraint is no greater than necessary to protect the employer's legitimate interest or (2) the employer's need is not outweighed by the hardship to the employee and the likely injury to the public.[69] This *Restatement* definition was shaped by many court decisions, including the Oregon Supreme Court's decision in *Rem Metals Corp. v. Logan* (*Rem Metals*).[70] In *Rem Metals*, the court held that the employer bears the burden of showing either that a noncompete agreement is necessary to protect trade secrets or other protectable interests of the employer or that other special circumstances exist to enforce a restrictive covenant.[71]

Along the lines of the *Rem Metals* decision, courts generally have held that legitimate protectable interests of an employer include (1) trade secrets, (2) special investment in training of employees, and (3) preventing direct competition by a former employee within a certain

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67 Mitchel v. Reynolds, (1711) 24 Eng. Rep. 347, 348 (Ch.D.).

68 *Id.* at 349.

69 RESTATEMENT (SECOND) OF CONTRACTS § 188(1) (1979).

70 Rem Metals Corp. v. Logan, 278 Or. 715, 565 P.2d 1080 (1977).

71 *Id.* at 721–22, 565 P.2d at 1083–84.

geographic area.[72] A trade secret is an item owned by an employer that derives independent economic value from not being generally known and is subject to employer efforts to maintain its secrecy.[73] Trade secrets are commonplace in the high-tech industry.[74] A court will also protect an employer's investment in special training of an employee. The employer bears the burden of showing that the training in question was beyond "general training" given to its entire workforce.[75]

Finally, a court will often uphold a noncompete agreement that prevents a former employee from directly competing with the employer within a certain geographic area.[76] Imbedded in this employer interest is the concept of nonsolicitation. At the heart of this protectable interest is the desire of an employer to prevent a former employee from soliciting customers, or even other employees, by competing within a certain geographic area.

Of course, a noncompete agreement will not be enforceable if the employer's interests are outweighed by those of the employee and the general public. Employee interests include adequate consideration for the restrictive covenant and the ability for the employee to make a living.[77] Many jurisdictions require that an employee must receive separate consideration, beyond continuing employment, from an employer to create an enforceable noncompete agreement.[78] Other jurisdictions, like Oregon prior to the statutory amendments, require a noncompete agreement to be signed at the time of initial employment.[79] In other words, courts generally do not approve of employers springing a noncompete agreement on an employee in the middle of the employment relationship. Courts also generally disfavor noncompete agreements that are too restrictive on a former

[72] *See* TIMOTHY P. GLYNN ET AL., EMPLOYMENT LAW: PRIVATE ORDERING AND ITS LIMITATIONS 405, 437 (2007).

[73] Rachel S. Arnow-Richman, *Bargaining for Loyalty in the Information Age: A Reconsideration of the Role of Substantive Fairness in Enforcing Employee Noncompetes*, 80 OR. L. REV. 1163, 1177 (2001).

[74] *Id.* at 1190 (noting that the independent economic value of technical trade secrets includes not just the technological data, but also the application of such data by employees who know how to use it).

[75] GARY S. BECKER, HUMAN CAPITAL: A THEORETICAL AND EMPIRICAL ANALYSIS, WITH SPECIAL REFERENCE TO EDUCATION 19–20 (2d ed. 1975).

[76] GLYNN ET AL., *supra* note 72, at 436–37.

[77] *Id.* at 435–38.

[78] *Id.* at 435–36.

[79] *See id.*

employee's mobility and ability to make a living.[80] Finally, courts disfavor noncompete agreements if they infringe too heavily on the interest of society in maintaining a robust marketplace of innovation and free and fair competition.[81]

Nationally, courts are generally disfavoring contracts in restraint of trade and trending away from enforcing noncompete agreements.[82] Given this trend, it is not surprising that Oregon took steps to further restrict its noncompete agreement statute. It is surprising, however, that Oregon went in a different direction with regard to nonsolicitation agreements.

B. Courts' Interpretations of State Noncompete and Nonsolicitation Statutes

1. National Trends

Along with trending toward general disfavor of restrictive covenants in employment relationships, courts are also more inclined to treat noncompete and nonsolicitation agreements as subject to the same statutory restrictions. A common question for the courts is whether or not the statutory language used to describe the subject of these laws is meant to include all restrictive covenants or be subject to exceptions. As mentioned above, state statutes vary as to what specific language they use when referring to restrictive covenants. Some states, like Florida, use inclusive terms like "restrictive covenant,"[83] some, like California and Louisiana, use general terms that essentially amount to "contract in restraint of trade,"[84] and others, like Oregon, use the term "noncompetition agreements."[85]

When a statute is explicit, courts have an easier time determining whether or not all restrictive covenants are covered by the statutory regulations. For example, Florida's statute is fairly explicit in that it covers all restrictive covenants including nonsolicitation agreements. Consequently, a decision of the Florida Court of Appeals reiterated that nonsolicitation and noncompete agreements are subject to the

80 Garrison & Wendt, *supra* note 25, at 115.

81 *Id.* at 114–15.

82 *Id.* at 137–38.

83 FLA. STAT. § 542.335 (2007).

84 CAL. BUS. & PROF. CODE § 16600 (West 2008); LA. REV. STAT. ANN. § 23:921 (Supp. 2008).

85 OR. REV. STAT. § 653.295 (2009).

same statutory regulations in a case involving a nonsolicitation agreement between an automobile dealer and a sales manager.[86]

Courts have more room for interpretation when the statutory language is not explicit. Some courts have inferred exceptions to the restrictions when the subject of the statute is less specific. For example, Louisiana's statute states that "[e]very contract or agreement . . . by which anyone is restrained from exercising a lawful profession [or] trade" is null or void,[87] with some exceptions for the sale of goodwill and the dissolution of partnerships.[88] Although this appears to be an all-encompassing definition, Louisiana courts have held that employment agreements containing provisions prohibiting a former employee from soliciting other employees are outside the scope of the statute.[89] It is worth noting that those holdings came from decisions in 1952 and 1980.

Currently, however, courts are trending away from allowing exceptions to be inferred in restrictive covenant laws, no matter how vague the statutory language might be. The 2002 decision in *MicroStrategy, Inc. v. Business Objects, S.A.*, held that, under Virginia law, noncompete and nonsolicitation agreements were subject to the same restrictions.[90] The court held that a three-prong test required for enforceability of noncompete agreements was also required for the enforceability of nonsolicitation agreements.[91]

A recent decision before the Supreme Court of California had a similar holding. The California Business and Professions Code states that "every contract by which anyone is restrained from engaging in a lawful profession, trade, or business of any kind is to that extent void."[92] Until recently, California courts have held that noninterference agreements[93] were exceptions to this all-out prohibition on contracts in restraint of trade. The precedent for this

[86] Balasco v. Gulf Auto Holding, Inc., 707 So. 2d 858, 859–60 (Fla. Dist. Ct. App. 1998).

[87] LA. REV. STAT. ANN. § 23.921(A) (Supp. 2008).

[88] § 23:921(B).

[89] Martin-Parry Corp. v. New Orleans Fire Detection Serv., 60 So. 2d 83, 85 (La. 1952); *see also* Nat'l Oil Serv. of La., Inc. v. Brown, 381 So. 2d 1269, 1273 (La. Ct. App. 1980).

[90] MicroStrategy, Inc. v. Bus. Objects, S.A., 233 F. Supp. 2d 789, 792 (W.D. Va. 2002).

[91] *Id.* at 794.

[92] CAL. BUS. & PROF. CODE § 16600 (West 2008).

[93] Noninterference agreements are similar to nonsolicitation agreements. Noninterference agreements focus on intentional acts to interfere with the former employer's business relationships.

exception was grounded in a 1985 decision from the California Court of Appeals—and several decisions from the U.S. Court of Appeals for the Ninth Circuit—which held that noninterference agreements were part of a "narrow restraint" exception because they did not directly restrain anyone from engaging in a lawful profession.[94] Therefore, nonsolicitation agreements were treated as an exception to the rule. Recently, however, the California Supreme Court held in *Edwards v. Arthur Andersen LLP* both that the "narrow restraint" exception was not allowed under a strict reading of section 16600 of the California Business and Professions Code and that nonsolicitation agreements could no longer be considered outside the restrictions of the general restrictive covenant prohibition.[95]

2. Courts' Interpretations of Oregon's Statute

Some of the best examples of the court trends described above—to generally not enforce restrictive covenants and to hold that noncompete and nonsolicitation agreements are subject to the same restrictions—have come from state and federal interpretations of Oregon's statute. Prior to the 2007 amendments to ORS 653.295, the vagueness of Oregon's law left much to be interpreted by the state and federal courts in noncompete agreement disputes. For example, the term "initial employment" was subject to various interpretations. Several cases attempted to interpret that phrase, including the following: *Konecrances, Inc. v. Scott Sinclair*, which held that a noncompete agreement signed sixteen days after employment was not valid because sixteen days was too late after initial employment;[96] *Pacific Veterinary Hospital v. White*, which held that amended or subsequent agreements could not replace the original noncompete agreement signed when the employee began employment;[97] and *McGee v. Coe Manufacturing Co.*, which held that a noncompete agreement is no longer valid if full-time work becomes part-time work.[98] Similarly, the Ninth Circuit Court of Appeals clarified the meaning of the term "bona fide advancement" in the Oregon statute to

94 Loral Corp. v. Moyes, 219 Cal. Rptr. 836, 840–44 (Ct. App. 1985).

95 Edwards v. Arthur Andersen LLP, 189 P.3d 285, 290–93 (Cal. 2008).

96 Konecranes, Inc. v. Scott Sinclair, 340 F. Supp. 2d 1126, 1129 (D. Or. 2004).

97 Pac. Veterinary Hosp. v. White, 72 Or. App. 533, 537, 626 P.2d 570, 572 (1985).

98 McGee v. Coe Mfg. Co., 203 Or. App. 10, 16–17, 125 P.3d 26, 28–29 (2005).

mean new and more responsibilities, different reporting relationships, and a change in title and higher pay.[99]

The most significant court interpretations of the pre-2007 statute, however, were those regarding nonsolicitation agreements. As stated above, Oregon's statute only refers to "noncompetition agreements." However, in 2002, the Oregon Supreme Court held that a nonsolicitation agreement was subject to the same statutory restrictions as a noncompete agreement.[100] In that case, an employer required an employee to sign a nonsolicitation agreement after the start of employment.[101] The court held that the nonsolicitation agreement, like noncompete agreements, had to be entered into at either the start of initial employment or bona fide advancement to be valid.[102] Similarly, the U.S. District Court of Oregon held in *First Allmerica Financial Life Insurance Co. v. Sumner* that employment contract provisions prohibiting employees from soliciting other employees after the termination of an employment relationship constituted noncompetition clauses under Oregon law and came under the purview of the statute.[103]

In sum, Oregon law prior to the 2007 amendments was such that noncompete agreements and nonsolicitation agreements were treated as the same instrument under the law. Both agreements were subject to the same statutory restrictions in ORS 653.295. Under that statute, both were to be entered into at the start of initial employment or upon a bona fide advancement. Beyond those statutory restrictions, courts generally used the *Restatement* standard—whether the protectable interest of the employer outweighed the harm from restraint of trade on both the employee and the public—to determine whether a noncompete or nonsolicitation agreement should be enforceable. However, as explained below, the 2007 amendments instituted through Senate Bill 248 took Oregon in a completely different direction.

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[99] Nike, Inc. v. McCarthy, 379 F.3d 576, 581–83 (9th Cir. 2004).

[100] Dymock v. Norwest Safety Protective Equip. for Or. Indus., Inc., 334 Or. 55, 58–59, 45 P.3d 114, 115–16 (2002).

[101] *Id.* at 57, 45 P.3d at 115–16.

[102] *Id.* at 60, 45 P.3d at 116.

[103] First Allmerica Fin. Life Ins. Co. v. Sumner, 212 F. Supp. 2d 1235, 1238–39 (D. Or. 2002).

III
OREGON'S RECENT DEVELOPMENTS: HOW THE STATUTE CAME TO BE

According to the Oregon Bureau of Labor and Industries (BOLI), the laws governing noncompete agreements in Oregon were insufficiently protecting employees from unnecessary postemployment restrictions imposed by employers.[104] BOLI had compiled data showing that, from 2005 to 2007, low-wage and blue-collar workers, ranging from mechanics to call center employees to parking lot attendants, were threatened with lawsuits by employers for violating noncompete agreements.[105] For example, two electricians in Bend, Oregon, were threatened by a lawsuit from their former employer when they went to work for a competitor across town.[106] In Salem, Oregon, a manager of a copy center had signed a noncompete agreement and then was laid off when his company downsized.[107] He went to work for another copy center across town, and his former employer threatened to sue claiming, "[y]ou are now liable for all present and future lost profits that [the company] sustains as a result of your actions."[108] He then took a job in McMinnville, Oregon, resulting in an eighty-mile, round-trip commute, in an effort to not violate the contract.[109]

BOLI took notice of these complaints and found that this use of restrictive covenants was creating an unfair burden on and severely limiting employment options for many employees, especially those who earned lower wages.[110] The Agency was also concerned that many employees held to noncompete agreements were laid off for economic reasons, rather than being fired or quitting voluntarily.[111] BOLI contended that it was unfair to hold employees to a noncompete

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104 *Hearing*, *supra* note 4, Exhibit L, at 1–3 (written testimony of Dan Gardner, Comm'r, Bureau of Labor and Industries).

105 Brent Hunsberger, *You Can't Take That Job*, OREGONIAN (Portland, Or.), Apr. 29, 2007; *see also* Nigel Jaquiss, *Unreleased Rage: Before Leaving to Work for the Competition, Better Make Sure You Can*, WILLAMETTE WK. (Portland, Or.), May 23, 2007, *available at* http://www.wweek.com/editorial/3328/9004.

106 Hunsberger, *supra* note 105.

107 *Id.*

108 *Id.* (internal quotation marks omitted).

109 *Id.*

110 *Id.*; *see also* Jaquiss, *supra* note 105.

111 *Hearing*, *supra* note 4, Exhibit L, at 1–2 (written testimony of Dan Gardner, Comm'r, Bureau of Labor and Industries).

agreement if the former employer simply could not afford to keep them on the payroll.[112] For these reasons, BOLI Commissioner Dan Gardner filed Senate Bill 248 prior to the start of the 2007 Oregon legislative session.[113] Section 2 of Senate Bill 248 contained the amendments to ORS 653.295.[114]

A. The Legislative History of Senate Bill 248

Senate Bill 248 went through a complete transformation from its first draft to the final version signed by the governor.[115] In its original form, section 2 of Senate Bill 248 contained only two modest amendments to ORS 653.295.[116] The first draft required that a noncompete agreement be signed prior to the start of employment, rather than at the start of employment, and the bill voided a noncompete agreement if an employee was laid off for reasons other than "misconduct connected with work."[117] The bill stated that a noncompete agreement would be voidable

> (a)(A) [u]nless the employer informs the employee at the time the offer of employment is first communicated to the employee that a noncompetition agreement is required as a condition of employment; . . .
>
> (B) [u]nless the noncompetition agreement is entered into upon a subsequent bona fide advancement of the employee by the employer[; or]
>
> (b) [i]f the employee is discharged or laid off by the employer for a reason other than misconduct connected with work. As used in this paragraph, "misconduct connected with work" has the meaning applied to that term under ORS 657.176.[118]

The Oregon Senate Judiciary Committee amended the bill to provide some exceptions to the layoff language.[119] Employees exempt from the layoff provision included the following: (1) chief executive officers, chief financial officers, or members of the board of

112 *Id.*

113 *Id.* at 1–3.

114 S. 248, 74th Legis. Assem., Reg. Sess. (Or. 2007), *available at* http://www.leg.state.or.us/07reg/measures/sb0200.dir/sb0248.intro.html.

115 *See* Or. State Legislature, *supra* note 1.

116 *See* S. 248, 74th Legis. Assem., Reg. Sess. (Or. 2007), *available at* http://www.leg.state.or.us/07reg/measures/sb0200.dir/sb0248.intro.html.

117 *Id.*

118 *Id.*

119 A-Engrossed S. 248, 74th Legis. Assem., Reg. Sess. (Or. 2007).

directors of the company; (2) employees who were rehired within ninety days of the layoff; and (3) employees that were entitled to receive full salary during the term of the noncompete agreement.[120] Also, the subsection related to layoffs did not apply to covenants not to solicit or transact business with customers of the former employers.[121] In other words, the layoff subsection did not apply to nonsolicitation agreements. Basically, if an employee was laid off, that employee was held to a nonsolicitation agreement but not a general noncompete agreement.

Why was this nonsolicitation agreement exception included in the subsection regarding layoffs? Likely because the employees for whom the layoff provision was written to protect, including low-wage workers such as parking attendants or copy center employees, were not the type of employees who normally would solicit customers from a former employer. However, they were the type of employees who would likely need to work for a competitor in a similar position within a close geographic area. An exception for nonsolicitation agreements within the layoff restrictions is a more understandable and appropriate place to exempt these agreements, as opposed to the exemption from all the statutory regulations established by the current statute.

The Senate passed this version of the bill, and the proposal moved on to the House of Representatives.[122] During the first public hearing of the Oregon House Judiciary Committee, Labor Commissioner Gardner testified that the version of the bill that passed the Senate was a work in progress and that more work needed to be done to protect employees from unjust noncompete agreements.[123] The Commissioner was concerned that proposals to amend the bill were not going far enough toward meeting the "goal of protecting a large swath of Oregon workers from the reach of non-competition agreements."[124]

Throughout two work sessions, the Oregon House Judiciary Committee completely overhauled the language of Senate Bill 248.[125]

120 *Id.*

121 *Id.*

122 *See* Or. State Legislature, *supra* note 1.

123 *Hearing*, *supra* note 4, Exhibit L, at 1–3 (written testimony of Dan Gardner, Comm'r, Bureau of Labor and Industries).

124 *Id.* at 1.

125 STAFF OF HOUSE COMM. ON JUDICIARY, SENATE BILL 248 SUMMARY, 74th Leg., Reg. Sess. (Or. 2007).

The version of the bill that passed the Senate focused on voiding noncompete agreements when employees were laid off for reasons other than just cause.[126] The amendments drafted by the House focused on the type of employee that could be held to a noncompete agreement.[127] The new version stated that a noncompete agreement was voidable and may not be enforced by an Oregon court unless an employee was the person who "(a) [p]erforms predominately intellectual, managerial or creative tasks; (b) [e]xercises discretion and independent judgment; and (c) [e]arns a salary and is paid on a salary basis."[128]

The new version of the bill also explicitly stated that noncompete agreements would be enforceable against both employees who have access to trade secrets, "competitively sensitive confidential business," or "professional information that otherwise would not qualify as a trade secret," and employees who are on-air talents in the field of broadcasting.[129] Finally, the bill contained the following new temporal requirements: the agreement must be signed two weeks prior to the start of employment, rather than merely "prior" to employment, and it may only extend for a period of two years.[130]

The new version of the bill limited the enforceability of noncompete agreements to certain types of employees.[131] This was a significant shift from the previous bill language, which focused primarily on the layoff provision. The new bill was also more restrictive and specific, particularly with regard to the temporal restrictions. Significantly, the first amended version of the bill also did not contain any language exempting nonsolicitation agreements from any parts of the bill.[132]

However, BOLI was not the only group lobbying for specific changes to the bill. The Professional Insurance Agents of Oregon/Idaho group had a large stake in the legislation and a strong

126 House Amendments to A-Engrossed S. 248, 74th Legis. Assem., Reg. Sess. 1–3 (Or. 2007).

127 *Id.* at 1–2.

128 *Id.* at 1. The employee must be a person described in ORS 653.020(3).

129 *Id.* at 2.

130 *Id.* at 1–2.

131 *See id.* at 1–3.

132 *Id.*

presence in front of the House Judiciary Committee.[133] The lobbying group testified before the committee that the bill in its current form did not go far enough to protect employers, like insurance agents, from losing their customer lists and other confidential information.[134] They requested that the bill contain language exempting nonsolicitation agreements from the new restrictions on noncompete agreements.[135] In testimony before the committee, lobbyist Lana Butterfield expressed that independent insurance agents rely heavily on customer lists to maintain their businesses and insurance agencies require that the agents have solid customer lists in order to renew their contracts.[136] She explained that if customer lists and relationships are not adequately protected, then insurance agents may suffer a decrease in the value of their agencies.[137] She argued that a nonsolicitation exemption to the noncompete agreement restrictions would adequately protect these insurance agents.[138]

While the insurance agents were concerned about customer lists and relationships, employment attorneys were concerned that the bill did not go far enough to prevent former employees from soliciting a former employer's current employees.[139] They recommended that the committee amend the bill to include an exemption for covenants not to solicit employees, as well as customers, of the former employer.[140]

The House Judiciary Committee included both of these exemptions in the bill.[141] Once approved by the committee, the bill went on to

133 *See Hearing*, *supra* note 4, Exhibit I, at 1 (written testimony of Lana Butterfield, Oregon Lobbyist, Professional Insurance Agents of Oregon/Idaho); Letter from Randy Sutton, *supra* note 9.

134 Letter from Randy Sutton, *supra* note 9.

135 *Hearing*, *supra* note 4, Exhibit I, at 1 (written testimony of Lana Butterfield, Oregon Lobbyist, Professional Insurance Agents of Oregon/Idaho).

136 *Id.*

137 *Id.* ("For agency owners who have sunk their savings into building up an independent insurance agency, the renewal book of business becomes their retirement. If customer lists and customer relationships of an agency are not adequately protected, this may impact the value of an agency and thus the retirement prospects of the agency owner.").

138 *Id.*

139 *Hearing*, *supra* note 4, Exhibit M, at 2–3 (written testimony of Craig Smith & Andrew Lewis, Attorneys, Hershner Hunter LLP). Smith and Lewis suggested that "[b]ecause the courts have recognized that employers have a protectible interest in their customers and employees, the legislature's distinction between those two valuable employer assets cannot be justified." *Id.* at 2.

140 *Id.*

141 B-Engrossed S. 248, § 2, 74th Legis. Assem., Reg. Sess. (Or. 2007).

the House floor for a vote.[142] The debate about the bill on the House floor focused primarily on the burden created for employers, and potentially employees, by the "two week prior to employment" requirement.[143] The bill passed, but narrowly, with thirty-two ayes and twenty-seven nays; it was primarily a vote along party lines.[144]

Since the bill had been completely altered by the House, it was necessary to send the bill back to the Senate for another vote of approval before passing it to the governor's desk.[145] Because the bill did not really resemble the original Senate version at all, the House and Senate formed a conference committee to discuss the new language of the bill and make any further changes. The conference committee made minor amendments.[146] Both the House and Senate repassed the bill with the amendments made in the conference committee.[147] The bill was ultimately signed into law by Governor Kulongoski on August 6, 2007, and took effect on January 1, 2008.[148]

IV

IMPLICATIONS: INCONSISTENT REGULATIONS ON RESTRICTIVE COVENANTS

The amendments to ORS 653.295 are relatively new, so we have not yet seen case law asking the courts to clarify any of the language in the statute. The purpose of the bill was to limit the use of noncompete agreements by employers.[149] The highly restrictive language in subsections (1) and (2) of the statute may deter employers

142 *Floor Record*, S. 248, 74th Legis. Assem., Reg. Sess. (Or. June 22, 2007) (House Audio Tape).

143 *Id.*

144 *Id.*

145 Or. State Legislature, *supra* note 1.

146 STAFF OF HOUSE COMM. ON JUDICIARY, CONFERENCE COMMITTEE MEASURE SUMMARY, 74th Legis. Assem., Reg. Sess. (Or. 2007).

147 *Floor Record*, S. 248, 74th Legis. Assem., Reg. Sess. (Or. June 27, 2007) (House Audio Tape) (voting mostly along party lines—thirty-four ayes to twenty-six nays); *Floor Record*, S. 248, 74th Legis. Assem., Reg. Sess. (Or. June 26, 2007) (Senate Audio Tape) (voting eighteen ayes to ten nays). The debate on the House floor focused on the burdens Senate Bill 248 might have on employers and employees who want to start a job right away but may need to wait two weeks to begin after signing a noncompete agreement. *See Floor Debate*, S. 248, 74th Legis. Assem., Reg. Sess. (Or. June 22, 2007) (House Audio Tape).

148 Or. State Legislature, *supra* note 1.

149 *Hearing*, *supra* note 4, Exhibit L, at 1 (written testimony of Dan Gardner, Comm'r, Bureau of Labor and Industries).

from using noncompete agreements. But the overly specific, micromanaging language in subsections (1) and (2) is perhaps unnecessary to effectuate the purposes of the original bill. This language could be simplified to be less confusing to employers, employees, and courts. Further, the nonsolicitation exemption in subsection (4) significantly changes Oregon law and opens the door for employers to have unrestricted use of those covenants. Much of what the statute is trying to accomplish in subsections (1) and (2) could be effectively undone by section (4).

A. Subsections (1) and (2): Overly Detailed, but Not Well Defined

Subsections (1) and (2) of the statute detail the manner in which a noncompete agreement may be entered into and the type of employee against whom a noncompete agreement may be enforced.[150] As previously mentioned, Oregon's statute is unique because it sets very specific parameters for the use of noncompete agreements by employers. However, there are many terms within the law that are not well defined and likely will lead to more, not less, litigation. Given the history of case law in Oregon, such disputes over specific terms in the statute will likely arise when questions of enforceability pertaining to higher-paid workers come before a court. Because so many disputes arose out of terms like "initial employment" and "bona fide advancement" in the past, parties are likely to hassle over many of the new specifications.[151]

For example, disputes will likely arise over the terms that define professional employees who are still subject to noncompete agreements. Courts will be faced with fact-based questions of what constitutes "predominantly intellectual, managerial or creative tasks" or "exercises discretion and independent judgment."[152] Does "predominantly" refer to the time the employee spends on intellectual, managerial, or creative tasks, or does "predominantly" refer to the most important tasks or roles of the employee? Does the employee have to exercise discretion and independent judgment all the time or

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150 OR. REV. STAT. § 653.295(1), (2) (2009).

151 *See* Nike, Inc. v. McCarthy, 379 F.3d 576 (9th Cir. 2004); Konecranes, Inc. v. Scott Sinclair, 340 F. Supp. 2d 1126 (D. Or. 2004); McGee v. Coe Mfg. Co., 203 Or. App. 10, 125 P.3d 26 (2005); Pac. Veterinary Hosp. v. White, 72 Or. App. 533, 696 P.2d 570 (1985).

152 § 653.295(1)(b). The language referred to in this statute to describe the type of employee that can be held to a noncompete agreement is the same language used in ORS 653.020(3) to describe professional employees who are exempt from overtime benefits.

just with certain tasks? If the employee reports to a supervisor, does that mean the employee does not exercise discretion?

Similarly, although the term "trade secrets" is fairly easy to define through the cross-referenced statute, ORS 646.461, a more ambiguous phrase is "competitively sensitive confidential business or professional information that otherwise would not qualify as a trade secret."[153] "Competitively sensitive confidential" information could be broadly interpreted by employers and by courts. For example, this phrase could be used to describe a specific sales technique or marketing strategy that the employer uses. Does this strategy have to be written down to be protectable? Does the employee need to have notice that the strategy is "competitively sensitive?" It also seems that this category could encompass the commercial lists the insurance agents were so concerned about protecting. The category seems broad enough to encompass confidential customer lists, among other things.

Employers will certainly need to adjust their noncompete agreements to comply with these restrictions. Law firms are posting open letters to their clients instructing them on the specific changes they will need to make to comply with the law.[154] Similarly, employees will need to ensure that any noncompete agreement they sign complies with the restrictions before signing. The statutory restrictions likely have, or will have, the effect of forcing employers to err on the side of caution with regard to noncompete agreements. If the general understanding of the law is that noncompete agreements are usually unenforceable, employers will likely limit their use of them. However, the statute could use much simpler and less confusing language to accomplish this goal. The recommendations below in Part V of this Comment give an example of alternative language.

Another criticism of the recently enacted statutory restrictions on noncompete agreements comes from business advocates.[155] Many believe that the restrictions will deter businesses from setting up in Oregon because the noncompete laws are so restrictive.[156] However, this concern can be dispelled by looking at states where noncompete agreements are prohibited outright, particularly California. California

153 § 653.295(1)(c)(B).

154 *See* sources cited *supra* note 16.

155 *See* DuBoff & King, *supra* note 17.

156 *Id.*

houses the most high-tech businesses in the country, even though high-tech companies are generally the most concerned with protecting trade secrets.[157] Although California prohibits noncompete agreements, and now even further limits restrictive covenants after the *Arthur Anderson* decision, the state continues to attract big businesses. Further, Oregon's largest employer, Intel, does not even use noncompete agreements.[158]

B. Subsection (4): A Dangerous Loophole

Despite the hand-wringing from the business community and employer advocates, the most significant problem with the statute is the nonsolicitation exemption. The nonsolicitation exemption not only provides employers with noteworthy protections from unwanted competition; it also removes previous restrictions on nonsolicitation agreements that existed under the old statute. The significance of this exemption has caught the attention of only a handful of legal analysts. As one attorney writes, "Although it's more difficult under the new law to prohibit many employees from working for competitors, an employer still has many options for seeking relief against employees who leave and set up a competitive business."[159] Another attorney points out the nonsolicitation exemption and suggests that "[p]erhaps unintentionally, the Legislature also left off the former requirement that such nonsolicitation agreements must be entered when an employee starts work or receives a meaningful promotion. This might mean employers will be free to impose nonsolicitation agreements at any time."[160]

The effect of exempting nonsolicitation agreements from all the provisions in the statute is that these agreements have no restrictions, including limits on when an employer may require an employee to sign one, how long an employer may enforce a nonsolicitation agreement, and the geographic range within which the employee may not solicit customers. Potentially, an employer could require an

157 Arnow-Richman, *supra* note 73, at 1190.

158 Hunsberger, *supra* note 105.

159 Richard Hunt, *Commentary: New Non-Compete Rules Not Entirely Problematic*, DAILY J. COM., Dec. 18, 2007, *available at* http://www.allbusiness.com/company-activities-management/sales-selling-sales/8888905-1.html.

160 Jeffrey M. Edelson, *Misguided New Law Muddles Noncompete Agreements*, PORTLAND BUS. J., Aug. 24, 2007, *available at* http://portland.bizjournals.com/portland/stories/2007/08/27/editorial12.html. Edelson is an attorney with Markowitz, Herbold, Glade, and Mehlhaf PC.

employee to sign a nonsolicitation agreement at any point in time, that lasts for however long, and restricts the employee from any solicitation of customers and employees within however many miles.

The Oregonians most vulnerable to this significant change in the law are those employees who plan to start their own businesses within a trade they practice for their employers. For example, a hair stylist who works for a corporate salon may be required to sign a nonsolicitation agreement at any time during her employment. If this employee has signed a nonsolicitation agreement, she will not be able to open her own business and let her clients know about her new operation. This is a burden not only on the stylist, but also on the general public. It limits the available choices for customers. A nonsolicitation agreement does not prevent customers from seeking out that former employee's new business, but many customers may not be aware that the former employee has left to start up the business.

The exemption of nonsolicitation agreements from all statutory restrictions was perhaps unintentional. Recall that in the original Senate version of the bill there was an exemption for nonsolicitation agreements only within the subsection regarding layoffs.[161] Later, in the House version of the bill, the exemption was changed to apply to all of subsections (1) and (2), which contain all the restrictions on noncompete agreements.[162] Given the hasty nature of the Oregon legislature's short, every-other-year sessions, it is likely that the bill was pushed through quickly toward the end without full contemplation of the implications of the bill language. Perhaps the legislators knew what they were doing, although there is no record showing that they contemplated the implications of a total exemption of nonsolicitation agreements. It is unlikely that the legislators intended to take such an extreme approach with this legislation. Nonsolicitation agreements are so inherently similar to noncompete agreements that to completely remove all restrictions on one while significantly restricting another defies legal and legislative logic.

161 A-Engrossed S. 248, 74th Legis. Assem., Reg. Sess. (Or. 2007).

162 B-Engrossed S. 248, 74th Legis. Assem., Reg. Sess. (Or. 2007).

V
RECOMMENDATIONS

The legislature should amend ORS 653.295 to eliminate some of the unnecessary, micromanaging language in subsections (1) and (2) and the nonsolicitation agreement exemption in subsection (4). The statute can still accomplish the goals of BOLI—limiting the use of noncompete agreements by employers—while carving out some protection for the insurance agents. But the language on both ends of the spectrum does not need to be so severe.

Taking cues from some other states' statutes, and taking into consideration some of the problems that could result from the current version of ORS 653.295, the Oregon legislature could draft language similar to the following:

> (1) Every restrictive covenant entered into between an employer and employee that restrains the employee from exercising a lawful profession, trade, or business of any kind is voidable unless:
>
> (a) The employee:
>
> (1) is bona fide executive or management personnel;
>
> (2) earns a salary;
>
> (3) has access to trade secrets or other commercially sensitive information; and
>
> (b) The employer is explicitly protecting a legitimate business interest, which may include:
>
> (1) trade secrets; or
>
> (2) certain confidential customer lists.
>
> (2) Any enforceable restrictive covenant described in section (1) must:
>
> (a) be entered into two weeks prior to initial employment or upon a bona fide advancement; and
>
> (b) not exceed a period of two years after the end of the employment relationship.

In fewer words, this language accomplishes much of what BOLI intended while providing some protection for insurance agents. Notice in the proposed subsection (1), the subject of the statute is any "restrictive covenant . . . that restrains the employee from exercising a lawful profession" rather than "noncompetition agreement." This recommended language is clearer as to what types of contracts the

statute applies, whereas "noncompetition agreement" is more ambiguous because it depends on court interpretation.

Proposed subsection 1(a) describes the type of employee against whom an employer may enforce a restrictive covenant. Rather than bogging down the statute with a myriad of descriptive terms and cross-references to other statutes, this language focuses on the important aspects of the employee. A phrase like "bona fide executive or management personnel" can encompass all the terms in the current version of ORS 653.295 without using ambiguous phrases such as "predominately performs."

Proposed subsection 1(b) provides some protection for employers who might have a legitimate business reason to protect customer lists, such as the insurance agents. This subsection allows an employer to use a restrictive covenant to protect legitimate business interests as long as the employee is one described in proposed subsection 1(a). By allowing an employer to protect aspects of the business that it deems confidential, the statute has protected that employer without creating a loophole that undercuts the other provisions of the statute. Also, this protection only occurs within one provision of the statute and is still subject to the other restrictions in the statute. The current version of ORS 653.295 exempts nonsolicitation agreements from all the other terms of the statute, including the minimum temporal and employee requirements.

CONCLUSION

When the Oregon legislature passed Senate Bill 248, it did so with the goal of protecting Oregon employees from the unjust use of noncompete agreements by employers. Most of the language in the amended version of ORS 653.295 serves to limit employers' use of noncompete agreements. In fact, this language is perhaps excessively stringent and detailed as to the manner in which noncompete agreements may be carried out. However, the exemption for nonsolicitation agreements that applies to all the restrictions in the statute serves to undercut much of the law's force. Most importantly, the exemption for nonsolicitation agreements undercuts the legislative intent for Senate Bill 248. It appears the legislature was trying to carve out some protection for Oregon insurance agents by inserting the exemption. But it does not appear from the legislative history that the legislature contemplated the gravity and full implications of a blanket exemption for nonsolicitation agreements.

The resulting Oregon law—severe and detailed in its restrictions for noncompete agreements but void of all restrictions for nonsolicitation agreements—places Oregon in its own category amongst states with regard to laws dealing with restrictive covenants in employment relationships. The Oregon law is not consistent with national trends governing this area of law. Most states generally restrict or generally allow all restrictive covenants.[163] Likewise, courts tend to hold that noncompete agreements and nonsolicitation agreements are subject to the same restrictions.[164] State and federal court interpretations of Oregon's restrictive covenant law have held that noncompete agreements and nonsolicitation agreements are subject to the same restrictions.[165]

Perhaps the legislature was intending to make the Oregon law unique, but, more likely, this was a drafting oversight. Instead of providing protection for the insurance agents from parts of the statutory restrictions, the legislature exempted nonsolicitation agreements from all of the restrictions.

The legislature should go back to the drawing board and draft a new statute governing restrictive covenants in employment relationships. The language in the current law is confusing and frustrating for employers and employees because of the inflexible and overly wordy restrictions in subsections (1) and (2). At the same time, the nonsolicitation agreement exemption in subsection (4) threatens to undercut much of the employee protections set out in the first part of the statute and the protections provided to employees in past Oregon judicial decisions. If the legislature cannot go as far as California and just ban these restrictive covenants outright, it needs to at least simplify and clarify the statutory language. As it stands, ORS 653.295 contains too much fine print.

163 *See* statutes cited *supra* note 13.

164 *See* First Allmerica Fin. Life Ins. Co. v. Sumner, 212 F. Supp. 2d 1235, 1238–39 (D. Or. 2002); MicroStrategy, Inc. v. Bus. Objects, S.A., 233 F. Supp. 2d 789, 794 (W.D. Va. 2002); Edwards v. Arthur Andersen LLP, 189 P.3d 285, 292–93 (Cal. 2008); Dymock v. Norwest Safety Protective Equip. for Or. Indus., Inc., 334 Or. 55, 58–59, 45 P.3d 114, 115 (2002).

165 *See First Allmerica Fin. Life Ins. Co.*, 212 F. Supp. 2d at 1238–39; *Dymock*, 334 Or. at 58–59, 45 P.3d at 115.