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Electronic Alert

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It's Termination O'Clock: Do You Know Where Your Noncompetition Agreements Are?

By Charlotte Hodde

Remember the public service announcement about the youth curfew used in the 1960s to shock parents about the dangers after dark? There are new threats to the enforcement of noncompetition agreements in Oregon that deserve a public service announcement. Noncompetition agreements are precious commodities for businesses – they are delicately crafted and cautiously timed to protect important client and customer information and relationships.

But all that careful planning could be useless under a bill signed by the Oregon governor this spring. As of January 1, 2020, Oregon law will require an employer to provide a terminated employee with a signed, written copy of their noncompetition agreement within *30 days* of their termination date. Failure to do so will render the agreement voidable and unenforceable in the state of Oregon.

This new law adds to existing statutory requirements, including:

(1) the employer must inform the employee of the noncompetition agreement in a written employment offer received at least two weeks before the employee's first day, or the agreement is entered into upon promotion;
(2) the employee must be engaged in exempt administrative, executive, or professional level work;
(3) the employer must have a protectable interest in requiring the noncompetition agreement; and
(4) the employee's gross annual salary and commissions at the time of termination must exceed the median family income for a four-person family.

The requirement to provide a terminated employee with a copy of the noncompetition agreement within 30 days of termination also applies when an employee voluntarily quits. Accordingly, we recommend providing signed noncompetition agreements as a regular part of every employee off-boarding process.

In fact, your efforts to remind the employee at separation about the restrictive covenants they signed will strengthen your legal position to meet the most elusive requirement for an enforceable agreement—that the employer has a "protectable interest." Generally, this requirement means that an employee had access to trade secrets while employed and the employer took reasonable efforts to shield those trade secrets from the public. Case law informs us that steps taken at separation to identify for the departing employee what company information is proprietary and protected under the employee's continuing nondisclosure duties is evidence of the employer's efforts to protect the privacy of its trade secrets. The new Oregon law does not apply to nonsolicitation agreements or confidentiality agreements. However, we recommend providing signed copies of all agreements containing ongoing obligations for the separated employee at the time of separation to demonstrate how seriously the company takes the protections of its proprietary information.

The new requirement only applies to agreements entered into after January 1, 2020. So if an employee was promoted in 2018 and signed a noncompetition agreement as part of that advancement and then resigns in February 2020, you will not have to present the noncompetition agreement to ensure enforceability. But like the 11pm announcement broadcasted each night decades ago, providing copies of noncompetition agreements at separation should become routine. The safety of your noncompetition agreements depends on it.

For questions about noncompetition agreements and off-boarding best practices, contact Charlotte Hodde at 503-276-2102 or chodde@barran.com.