BendBroadband VoIP Solutions
Your Business Can Benefit.
bendbroadband Business

# Minding the Difference Between Noncompetition & Nonsolicitation Agreements

0

BY CHARLOTTE HODDE OF BARRAN LIEBMAN LLP ON MARCH 23, 2017 E-HEADLINES

Employee talent is often a company's most coveted commodity. Declining unemployment rates in the area and an influx of highly-skilled professionals to Oregon means competition is steep for top talent. This is particularly true in the state's growing technology industry, which tends to have higher turnover rates than other industries, according to statistics from the Bureau of Labor and Industries.

In the race for the best employees, employers have gotten creative about avoiding the fall-out associated with employee departures. The Department of Justice (DOJ) recently investigated allegations of agreements between high-tech companies to limit how they will solicit each other's employees. In 2010, the federal government sued several large tech companies: first, over allegations that the companies had agreed to restrict the practice of cold-calling each other's employees to offer job interviews; and then, over an alleged agreement to notify the competitor before offering its employees a job.

The cases were settled before the allegations were verified, but they provide valuable insight into how the DOJ will prosecute employee poaching arrangements. The DOJ argued in documents filed in those cases that these arrangements are a direct threat to the labor market, by depriving highly-trained professionals of information and access to better job opportunities.

Late last year, the DOJ and the Federal Trade Commission (FTC) issued a guidance document titled Antitrust Guidance for Human Resources Professionals. At first glance an HR department might ask how antitrust laws could impact hiring and firing. But the guidance should be part of any HR audit and considered in assessing a company's

MOST READ THIS WEEK

POSTED ON APRIL 13, 2017
Bend, Oregon-Based High School Robotics Team Qualified for FIRST World Championship Event in Houston, Texas

POSTED ON APRIL 11, 2017
City Club of Central Oregon Holds Regional Forum May 4 at Eagle Crest, Redmond, Oregon

POSTED ON APRIL 13, 2017
MountainStar Welcomes Clyde the Therapy Dog

Subscribe to our FREE E-News Headlines Tuesdays & Thursdays

Email Subscribe

recruiting and hiring practices. Arrangements between competitors to prevent poaching each other's employees will be treated like price-fixing by the DOJ and the FTC. Violators could face civil and criminal penalties, including felony charges.

Naked wage-fixing and anti-poaching agreements between competitors are the most obvious culprits and are per se illegal, but the guidance also warns against sharing competitively-sensitive information with competitors.

But the problem remains that the cost of employee turnover takes a toll on a company. When employees leave, the investment spent on training and development is lost, an effect that is compounded if the employee joins a competitor. The former employee can take clients, business relations, and confidential information. To protect against taking this hit, employers want to use every legal tool available to them to avoid or mitigate losing their investment.

The Antitrust Guidance for Human Resources Professionals leaves intact an important area where employers can protect themselves against competition from former employees. Restrictive agreements between employers and their employees that prevent the employee from competing for colleagues, clients, and business post-employment remain perfectly legal in the wake of the DOJ/FTC guidance. It is as important as ever for employers to ensure that they understand the distinction between these tools and how to use them.

**Noncompetition Agreements**

Noncompetition agreements are generally enforceable under Oregon law if entered into as a condition of a job offer or a "bona fide advancement" (a promotion with accompanying salary increase and change in title). If entered into upon initial employment, employers must notify the employee of the agreement at least two weeks before the first day of employment.

If the agreement is a condition of a post-hiring "bona fide advancement," it is important to avoid taking the employee by surprise that the agreement is a condition of the promotion. Tell the employee about the requirement to sign the noncompetition agreement if you discuss the terms and benefits of the new job before providing a formal offer letter. Ideally the first conversation with the employee about the promotion should happen at the same time you provide an offer letter that clearly states that promotion is conditioned on acceptance, and before the employee begins the responsibilities of the new position.

These agreements generally restrict the employee's ability to work for a competitor or start a competing business for a certain period of time and within a certain geographic scope following departure from their current job. The goal is to draft the noncompetition agreement to provide maximum protection, but at the same time avoid unreasonable restrictions that invalidate the agreement. A noncompetition agreement should identify the protectable interest, establish reasonable time limits, and identify the geographic territory.

Remember that some states, including California, have enacted legislation making noncompetition agreements unenforceable. If you have California employees, consult legal counsel about protecting against competition.

**Nonsolicitation Agreements**

Oregon does not regulate nonsolicitation agreements as closely as noncompetition agreements. The agreements must still be reasonable in time and geographic scope of restriction and the employer must show a protectable interest. A nonsolicitation agreement generally prohibits departing employees from soliciting existing customers, employees, and business opportunities.

The DOJ/FTC guidance creates a new overlay: make sure the nonsolicitation agreements are between the company and the employee while the employee is still employed with the company.

Employee turnover can take a toll on a company and the DOJ and FTC have cracked down on agreements between competitors, but employers still have legal resources available to them in the form of noncompetition and nonsolicitation agreements with their employees.

Charlotte Hodde is an attorney with Barran Liebman LLP. She advises clients on a range of employment law issues and counsels higher education institutions on Title IX and FERPA issues. Contact her at 503-276-2102 or chodde@barran.com.

SHARE.

## ABOUT AUTHOR

CHARLOTTE HODDE OF BARRAN LIEBMAN LLP

## RELATED POSTS

APRIL 13, 2017 0

Dog Bite Prevention Week

APRIL 13, 2017 0

Shred Your Documents for Free at Four Central Oregon Locations – Saturday, April 15

APRIL 13, 2017 0

AAUW of Oregon to Host Dynamic Math & Science Camp for Girls at Oregon State University – Cascades Campus

## LEAVE A REPLY

Your Name

Your Email

Your Website

Your Comment

POST COMMENT

## ABOUT

**CASCADE BUSINESS NEWS**

Cascade Business News, Central Oregon's business newspaper, is a local, family owned and operated by Pamela Hulse Andrews and Jeff Martin. CBN is published the first and third Wednesdays of each month. CBN is a division of Cascade Publications Inc.

## RECENT ARTICLES

APRIL 13, 2017 0

Dog Bite Prevention Week

APRIL 13, 2017 0

Shred Your Documents for Free at Four Central Oregon Locations – Saturday, April 15

APRIL 13, 2017 0

AAUW of Oregon to Host Dynamic Math & Science Camp for Girls at Oregon State University – Cascades Campus

## TOWN & COUNTRY

Copyright © 2014 Cascade Publications. Developed by Five Talent.