

Safeguarding your Business – Noncompetition Agreements

By Jon Napier, Attorney at Law, Karnopp Petersen LLP

When hiring employees, one of the issues many business owners consider is the risk of the employee leaving and competing against their business. After all, who wants to bear the expense of training and establishing their competition? Noncompetition agreements can be an effective tool in reducing this risk.

Many people have the misconception that noncompetition agreements are inherently unenforceable. In some jurisdictions this may be the case, but not in Oregon. In fact, there have been cases involving successful enforcement of noncompetition restrictions in the local business community.

Oregon law does, however, impose strict requirements regarding enforcement of noncompetition agreements. Details matter - if a noncompetition agreement between an employer and employee does not meet the applicable statutory requirements, the agreement is voidable, and may not be enforced by an Oregon court. The remainder of this article summarizes some of the statutory requirements applicable to agreements entered into after January 31, 2007 (yes, earlier agreements have different requirements).

Noncompetition restrictions are enforceable only if entered into on a “bona fide advancement,” or on initial employment if the employee received, at least two weeks before starting work, a written offer of employment stating that a noncompetition agreement is required. To constitute a bona fide advancement, the promotion should involve a pay raise, not just a change in job title. For new hires, be sure to document delivery of the written job offer to the employee.

The term of a noncompetition agreement may not last for a period of more than two years after the employee’s termination. Anything in excess of two years is voidable.

The employer must have a “protectable interest,” meaning, essentially, that the employee has access to trade secrets or other competitively sensitive confidential information (there are also circumstances in which an employer may have a protectable interest in restricting an “on-air talent”).

Employers may enforce noncompetition agreements only against employees whose annual gross salary and commissions at the time of termination exceeds the median family income for a four-person family as calculated by the United States Census Bureau, and who are exempt executive, administrative or professional employees. Interestingly, the statute does not include authority to restrict sales staff (unless they are exempt), who, in many circumstances, may be particularly well positioned to compete against their former employer. Note that the median family income amount is significant (it appears to have been recently fluctuating in the range of approximately seventy-thousand dollars per year) - many employees will not meet this income requirement.

An employer may avoid the minimum income and exempt status limitations described in the preceding paragraph if the employer pays the former employee, for the period of time the employee is restricted from working, an amount calculated based on the greater of fifty percent of the employee’s annual gross base salary and commissions at the time of termination, or fifty

percent of the median family income for a four-person family at the time of termination. In essence, the employer may have the option (subject to the other applicable requirements) of paying an employee to “stay on the shelf.”

If the above sounds complicated, it can be. Sound legal advice and drafting are, in the author’s experience, critically important in binding employees to enforceable noncompetition agreements. Likewise, employees should carefully consider noncompetition agreements before signing them and seek legal counsel if they have any questions.

Need more information regarding noncompetition agreements and other ways to protect your business? Please feel free to contact Jon Napier at 541-382-3011 or jjn@karnopp.com.