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Management Alert

Oregon Adds Employee-Friendly Requirement to Existing Non-Compete Law… But Also Produces Company-Friendly Trade Secrets Law in Recent Court of Appeals Case

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On May 14, 2019, Oregon Governor Kate Brown signed into law HB 2992, which, as of January 1, 2020, requires an employer to provide a terminated employee with a signed, written copy of his or her non-competition agreement within ***30 days*** of his or her termination date. Failure to do so will render the agreement voidable and unenforceable in the state of Oregon.

Backdrop for HB 2992

Under current Oregon law (ORS 653.295), a non-competition agreement is not enforceable unless the following four requirements are met: (1) the employer informs the employee of the non-competition 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 is engaged in administrative, executive, or professional level work; (3) the employer has a protectable interest in requiring the non-competition agreement; and (4) the employee's gross annual salary and commissions at the time of termination exceeds the median family income for a four-person family. Furthermore, the term of a non-competition agreement may not exceed 18 months from the date of the employee's termination. Any time remaining on a non-competition agreement beyond 18 months is voidable and precluded from enforcement by any Oregon court.

HB 2992 now adds to these existing limitations, the requirement that terminated employees be provided with copies of their non-competition agreements within 30 days of termination.

Why HB 2992's Thirty-Day Requirement Matters

Because "termination" includes voluntary termination, i.e., resignation, the new law presents more creative employees with a virtually complete end-run around their non-competition agreements. In theory, such an employee could resign, subsequently request some time to reconsider, and wait until the thirty-day period elapses before immediately starting work with a competitor or engaging in some other activity in violation of his non-competition agreement. If the employer fails to provide him a copy of the agreement within the required time frame, the employer will be left without a mechanism for recourse at the end of the 30 days.

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This will be equally problematic in cases where a sale, merger, reduction in force, purging policy, or even simply a change in HR personnel, has resulted in destroyed, misplaced, and otherwise difficult-to-locate agreements. Without a copy of the agreement to provide, the employer, under the new law, will also be left without a mechanism for recourse at the end of the 30 days.

Employers with Oregon-based employees should consider not only instituting a policy of providing every employee his or her non-competition agreement upon termination, but also taking inventory of existing non-competition agreements and imposing strict polices for the maintenance and tracking of these agreements.

Oregon Court of Appeals Answers the Question of Whether Information Taken by Memory Maintains "Trade Secret" Protection

An Oregon appellate court recently found that information taken by memory may still constitute a "trade secret" under the Oregon Uniform Trade Secret Act and accordingly maintain its protection against disclosure.

The issue before the court of appeals in *Pelican Bay Forest Products, Inc. v. W. Timber Products, Inc.*, was whether the trial court erred in granting summary judgment on Pelican Bay's trade secrets claim. The question turned on (1) whether the information taken by the former employee—in this case, a customer list—was a "trade secret" under ORS 646.461(4), and (2) whether the defendants "misappropriated" that information under ORS 646.461(2)(d)(C), even though the information had been memorized by the former employee. 297 Or. App. 417 (2019).

The Court's Analysis in *Pelican Bay*

The court of appeals ultimately held that the trial court erred in granting summary judgment for the competitors based on insufficient evidence of misappropriation. In its analysis, the court discussed the evidence Pelican Bay presented on the information taken and how the information was acquired by Timber Products, a direct competitor.

The court determined that the customer information taken and disseminated by the former employee constituted a trade secret, which Pelican Bay had made reasonable efforts to keep confidential. The court described the value of customer-specific information and client lists, particularly in the lumber trading industry which, as the defendants admitted, is competitive and requires years to build up a quality book of business. In addition, the former employee hired by Timber Products, would not have been hired *but for* his access to Pelican Bay's customer information, a fact that allowed the court to infer that (1) the information was not generally known to the public, and (2) that the information held economic value as a result.

The court noted that Pelican Bay had required the former employee to sign an "Employee Acknowledgement," in which he agreed to abide by the policies in Pelican Bay's Handbook. The Handbook, incorporated by reference, contained a confidentiality agreement providing that Pelican Bay's confidential proprietary information included its customer lists, and that such information was not to be shared with third parties. In addition, Pelican Bay's president had met with the former employee and personally reminded him of his confidentiality obligations—and this meeting was memorialized by written agreement.

Information Taken "by Memory"

Importantly, the appellate court rejected the defendants' argument that the information taken could not constitute a trade secret because it was taken by memory, as opposed to some tangible form (e.g., emails, copies on a USB drive, etc.). The court observed the lack of any textual support for this argument in Oregon's Uniform Trade Secret Act and stated as follows: "[N]othing in the Act suggests that information otherwise constituting a trade secret would lose that status simply because a person is able to take that information in an intangible form. . . . Rather, the terms of the Act are written broadly so as to

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safeguard trade secrets, no matter the form in which they may be misappropriated." 297 Or. App. at 430-31. Without this limitation in the statute, the court went on to find that the evidence presented by Pelican Bay was "sufficient to permit a reasonable factfinder to find that defendants 'misappropriated' Pelican Bay's confidential customer information. . . . *in that manner*." 297 Or. App. at 431 (emphasis added).

Takeaways

While this is a favorable ruling for Oregon businesses, especially those for whom customer lists are particularly crucial, employers should remain vigilant when it comes to proprietary information, and revisit their policies and agreements governing employee access and use of such information.

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