HARRANG LONG GARY RUDNICK P.C.
ATTORNEYS & COUNSELORS AT LAW

## UNDER ATTACK: COURTS AND LEGISLATURES CHIP AWAY AT EMPLOYERS' ABILITY TO ENTER INTO AND ENFORCE NONCOMPETITION AGREEMENTS

With the current economic turbulence, the airwaves have been filled with discussions on asset protection strategies. For business owners, a significant portion of their assets generally consists of their customer base and trade secrets. How can these business assets best be protected? One set of tools available to employers are noncompetition, nonsolicitation, and confidentiality agreements.

**Noncompetition Agreements**

A noncompetition agreement typically restricts an employee's post-termination ability to compete in a certain industry within a specified geographical area for a proscribed period of time. Such agreements have come under increasing attacks by courts and legislatures. In a recent decision by the California Supreme Court (Edwards v. Arthur Andersen, LLP), the court acknowledged well "settled legislative policy in favor of open competition and employee mobility." The court rejected a "narrow-restraint exception" that allowed for some restraints on competition that had been adopted by other courts. In refusing to enforce the noncompetition agreement that Mr. Edwards had signed, the court ruled that it "was invalid because it restrained his ability to practice his profession."

Effective this year, the Oregon legislature adopted new requirements that reduce the ability of employers to enter into valid noncompetition agreements. The basics of the old law remain the same: to be enforceable, a noncompetition agreement must be entered into upon the inception of employment, or upon the "bona fide advancement" of the employee. Under the new law, the term of the noncompetition restrictions cannot exceed two years from the date of termination. In addition, the employee must: (1) be notified in writing of the requirement at least two weeks prior to the first day of employment; (2) be basically exempt from overtime law; (3) have access to the employer's trade secrets or other confidential business information in which the employer has a protectable interest; and (4) be earning at the time of termination total annual compensation greater than the median income of a four person family as determined by the US Census Bureau (approx. $70,000 currently). There are limited exceptions

The Closely Held Business Team attorneys at Harrang Long Gary Rudnick are committed to serving the needs of business owners in a responsive and proactive manner. They understand the challenges and the opportunities provided by the law in today's business climate, and are focused on the advancement of each client's success in business.

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to these requirements. Noncompetition agreements entered into prior to the effective date of the new law, January 1, 2008, are not subject to the new rules, but remain subject to the rules in place at the time the agreement was made.

**Nonsolicitation Agreements**

Oregon's new law specifically exempts nonsolicitation agreements from the requirements set forth above. Simply put, employers may require employees to enter into a nonsolicitation agreement as a condition of initial or continuing employment. A nonsolicitation agreement can restrict an employee's ability to solicit or transact business with customers and an employee's ability to solicit other employees for a reasonable period of time post-termination (generally two years). Effective nonsolicitation agreements can be a powerful tool in protecting customers and valuable employees. Many of our closely held business clients agree that what they need most is a nonsolicitation agreement, rather than a noncompetition agreement, to protect their customer base.

**Confidentiality Agreements**

A confidentiality agreement typically prohibits an employee from using or disclosing the employer's confidential, proprietary, and trade secret information at any time, except as authorized in the furtherance of the employer's business. Like nonsolicitation agreements, confidentiality agreements may be entered into as a condition of initial or continuing employment. A carefully crafted confidentiality agreement can provide protections that general trade secret protection laws do not provide, and can also serve as an express warning to employees against using or disclosing confidential business information in an unlawful manner.

We strongly recommend that business owners protect their business assets now by implementing appropriate noncompetition, nonsolicitation, and confidentiality agreements.

If you have questions or would like further information regarding this E-Newsletter, please contact Randall L. Duncan, Chair of our Closely Held Business Team, at (503) 417-6010, and we would be pleased to accommodate your request.

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