

# Oregon Amends Restrictive Covenant Statute to Further Limit Employers' Use

By Mark A. Crabtree & Scott Osborne

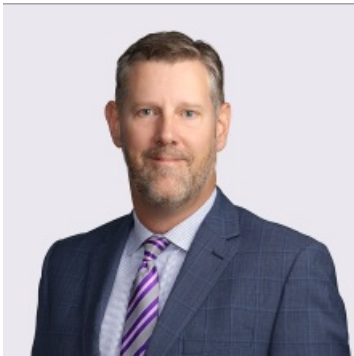
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Oregon law on permitted covenants not to compete has been amended to void nonconforming agreements and limit such agreements to employees making at least \$100,533, among other changes.

The bill ([Senate Bill 169](#)), signed by Governor Kate Brown on May 21, 2021, changes the current statutory framework for non-compete agreements, ORS 653.295. Because it does not contain an “effective date,” the new law will become effective for agreements entered into after January 1, 2022, pursuant to Oregon law.

### “Void” Instead of “Voidable”

Under the new law, non-compete agreements with employees that do not satisfy all statutory requirements for enforceability will be “void and unenforceable.”

Before the amendment, nonconforming agreements are merely “voidable,” and Oregon courts have interpreted the statute to require employees to take affirmative steps to void the agreement. *See Bernard v. S.B., Inc.*, 270 Or. App. 710, 350 P.3d 460 (2015). If an employee fails to timely void a noncompliant agreement, the non-compete portion would no longer be “voidable,” and instead would presumptively be valid.

Under the new law, all noncompliant agreements will be void and unenforceable, regardless of employee inaction.

### Minimum Salary

The new law clarifies the minimum compensation necessary for an enforceable non-compete covenant. With limited exceptions, a non-compete will be void unless the employee’s annual salary at the time of termination exceeds \$100,533. The salary threshold will be adjusted annually to track inflation.

Before the amendment, the salary threshold is set at the median income for a four-person family, as determined by the most recent U.S. Census Bureau data (around \$97,311, at the time of this writing).

While the revised salary requirement makes calculation more straightforward than the current “median income for a four-person family” standard, it increases the minimum threshold for enforceable covenants, for now and likely going forward.

### One Year in Duration

The new law reduces the maximum length of an enforceable non-compete agreement from 18 months in duration to one year.

As discussed below, the one-year limit similarly would apply to any “garden leave” enforcement.

## “Garden Leave” Option

Oregon’s current statute’s use of “garden leave” permits employers to enforce non-compete agreements despite violating either of two specific statutory requirements:

1. That the employee be paid on an exempt, salary basis; and
2. That the employee be paid a minimum compensation (discussed above).

Notwithstanding those situations in which an employee does not meet either requirement, an employer can unilaterally elect to enforce a non-compete provision by agreeing to pay the employee during the restricted period the greater rate of:

1. At least 50 percent of the employee’s annual gross base salary and commissions at the time of termination; or
2. 50 percent of the “median income for a four-person family” standard.

The new law retains the “garden leave” option, despite the non-compete agreement going from “voidable” to “void” when these two requirements are not met. However, to exercise this option, the employer must confirm payment of the “garden leave” enforcement in writing. Currently, no writing is required.

The law does not describe the type of writing that will satisfy this new obligation. Further, it does not appear that employee consent is needed for the employer to enforce a non-compete agreement with the “garden leave” option.

An employer exercising the new “garden leave” option must pay the employee the greater rate of:

1. At least 50 percent of the employee’s annual gross base salary and commissions at the time of separation; or
2. 50 percent of \$100,533, adjusted for inflation.

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Oregon’s new legislation reminds employers that non-compete agreements are becoming increasingly difficult to utilize and enforce in some jurisdictions. However, there are other effective ways employers can protect their legitimate business interests. Narrowly tailored non-solicitation and non-servicing provisions, for example, may provide protections to an employer’s business, while avoiding the statutory requirements of ORS 653.295. With unlawful non-compete agreements moving from “voidable” to “void” under the new law, employers with Oregon employees should consider alternative restrictive covenants for inclusion in any agreement that also has a non-compete provision.

Jackson Lewis attorneys in the Restrictive Covenants, Trade Secrets and Unfair Competition Group are available to advise on these issues.

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