Hutchinson Cox, Coons Orr & Sherlock P.C.
Attorneys and Counselors at Law

200 FORUM BUILDING
PO Box 10886
777 High Street
Eugene, OR 97440

PHONE: 541/686-9160
FAX: 541/343-8693

Changes in Oregon Law regarding Noncompetition Agreements

James K. Coons
Attorney at Law

There have been significant changes in Oregon law regarding noncompetition agreements with employees. If you have used noncompetition agreements in the past or may consider noncompetition agreements in the future, these changes will be important. The new law went into effect January 1, 2008. Under the new law:

1. A noncompetition agreement must either be entered into upon the initial employment of the employee or in conjunction with a later bona fide advancement of the employee. If entered into upon initial employment, the agreement must be included in a written employment offer. The written employment offer must be received by the employee at least two weeks before the first day of employment and the offer must inform the employee that a noncompetition agreement is a condition of employment.

2. The employer must have a protectable interest. This means that the employee has access to trade secrets or competitively sensitive confidential information (such as product development plans, marketing strategy or sales plans).

3. The employee must be salaried and engaged in administrative, executive or professional work.

4. The employee must have a gross annual salary (including commissions) which exceeds the median family income for a four person family. At present, that salary level is $64,832.

5. The length of the noncompetition agreement may not exceed two years.

These requirements are far more stringent than the requirements for a valid noncompetition agreement under prior law. The Oregon legislature clearly intended to significantly curtail the use of noncompetition agreements in the future. The new law does provide an option if the above conditions are not met and the employer still wants to create a valid noncompetition agreement. Under that option the employer can pay an amount equal to 50% of the employee's compensation at the time of termination for whatever period of time the noncompetition agreement will last. This is obviously not an attractive option and will likely be rarely used.

Noncompetition agreements entered into before January 1, 2008 will still be governed by current law rather than the new requirements.

The new law does provide one potential benefit to employers. Under current law nonsolicitation agreements are treated similarly to noncompetition agreements. However, under the new law nonsolicitation agreements will no longer be considered to be noncompetition agreements. Therefore it will be easier to enter into an agreement with an employee which would restrict the employee from soliciting your customers or clients after the employee's departure.

What does all of this mean for your business? If you do not use noncompetition agreements and have no plans to do so, than the new law will not impact you. If you use such agreements or have an interest in doing so, your ability to utilize a noncompetition agreement will be restricted to higher level employees who have significant access to sensitive confidential information. Even then it will be necessary to plan for a noncompetition agreement well in advance of making an employment offer and you will need to "jump through the hoops" summarized above.

On the bright side, it will be more feasible for you to enter into a nonsolicitation agreement with an existing employee or a prospective employee if that would be helpful for your business.