Oppose SB 997—Noncompetition Agreements
Senate Judiciary, April 12, 2017

Betsy Earls, Associated Oregon Industries/Oregon Business Association

Just last session (2015), the Oregon Legislature changed the legal limit on noncompetition agreements from 2 years to only 18 months. It is our position that further limiting the scope of noncompetition agreements, as SB 977 does, is unfair to the businesses that have invested heavily in development of the people and the intellectual property that makes their work a success.

In fact, SB 977 basically takes the noncompetition statute and turns it into nothing more than a non-solicitation statute.

Limiting the scope of noncompetition agreements will have the effect of stifling innovation, and will make Oregon a much less friendly climate for knowledge based companies—both those that are established and those that are just getting started.

As Senator Beyer said, 977 is oriented toward noncompetition for employees, not between companies that are being sold, spun off, or divided. But people are incredibly valuable assets, and Oregon courts have a long history of balancing the interests of the employee with the temporal and geographic interests of the company seeking to protect their assets.

Senator Beyer mentioned that if this bill passes, employers could still protect their valuable intellectual property by getting an injunction against the employee. But when an key employee has left a company, and is headed for the airport for their new job with a competitor in Asia, it is very expensive, not to mention a flat out panic, to try to get an injunction in order to prevent them from sharing that intellectual property.

With that said, I want to talk with you a little bit about how noncompetition agreements are currently constructed and interpreted.

The temporal restriction in noncompetition agreements is only one factor of several that courts consider when determining whether a noncompetition agreement is reasonable.

The other thing that's a very important factor in the balancing test is geography and how wide-ranging the agreement is. Employers carry an extremely heavy burden of proving that a noncompetition agreement is reasonable if they end up in court. The calculus in balancing the demands of the agreement against the needs of an employee is that if an employer wants to impose a longer period of time in the agreement, the court will want to see a very limited region that the agreement can be imposed within.

For example, if you have a company in downtown Portland that only wants to impose the agreement within the tri-county area, it makes more sense for the agreement to be as long as the statute allows—which right now is 18 months. But if you have a company seeking to impose such an agreement on, say, a scientist who could work anywhere in the world, and the company's competitors are in Asia, then the court is not going to look favorably on an agreement that lasts 18 months.

Even at 18 months, that limit is a problem, because many of the Oregon companies—especially tech or bio science companies that seek to impose non-competes are doing so in order to protect trade secrets,

that make their product unique, and the value of those secrets generally lasts far more than 18 months. It's nearly impossible for an employee to agree that they will go to work for a competitor, but then somehow never access the part of their brain that contains the protected formula or information that is so crucial to the success of their former employer's products.

When we're talking about the value of a noncompetition agreement to a company, I want to point out that trade secrets and are not the only thing worth protecting. SB 977's exemption for trade secret protections doesn't cover sensitive confidential business information like design or product launch plans, marketing strategy or strategic sales plans. "*((2) Nothing in this section restricts the right of any person to protect trade secrets or other proprietary information by injunction or any other lawful means under other applicable laws*.)"

Courts in Oregon have very broad authority to modify noncompetition agreements that they see as unreasonable. Courts have what's known as "blue pencil authority", which means that they can rewrite the agreement right there in court if they find them unreasonable based on the factors that they think are most important for the particular employer and employee. The balancing that a court has to do in each case is very fact-dependent, so it makes sense to allow them as much latitude as possible in evaluating noncompetition agreements.

We urge your opposition to SB 997.