EXPLAINING THE OUTLIER: OREGON'S NEW NON-COMPETE AGREEMENT LAW & THE BROADCASTING INDUSTRY

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I. INTRODUCTION

Non-compete agreements can be traced back to British courts of equity that sought to balance an employer's interest in protecting his investment in an employee against an employee's interest in career mobility.[1] As employment conditions changed over time, the laws governing these covenants evolved to sustain this balance. Yet, Oregon's new law, which mandates an employer's compliance with complicated[2] requirements for the enforcement of non-compete agreements in the broadcasting industry, advances neither this traditional goal nor an innovative set of objectives. Rather, legislative history reveals the complexity of the statute is attributable to a legislature's unsuccessful

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1. Cathy Packer & Johanna Cleary, *Rediscovering the Public Interest: An Analysis of the Common Law Governing Post-Employment Non-Compete Contracts for Media Employees*, 24 CARDOZO ARTS & ENT. L.J. 1073, 1078-79 (2007).

2. M. Scott McDonald & Jacqueline C. Johnson, *Across the Board: Changes are in the Works for Noncompete Agreements*, INSIGHT 3 (2007), *available at* http://www.littler.com/PressPublications/Documents/17022.pdf (aptly entitling its explanation of the Oregon law *Oregon Takes a Hard (and More Complex) Stance on Noncompetes*).

attempt to accommodate inconsistent goals of various political players: state senators, the technology industry, broadcasting employers represented in part by the Oregon Association of Broadcasters (OAB), and Oregon broadcasters represented in part by the American Federation of Television and Radio Artists (AFTRA).[3] While policy goals are the basis for these equitable agreements, the conundrum is that this law does not adequately further any such goals. As a result, employers will now craft non-competition agreements to comply with the law, but their compliance will inadequately balance the interests of broadcasting employers and employees. A return to the common law tradition, however, would redress this problem.

To demonstrate that this law does not comport with any set of policy objectives, this Comment first explains the traditional goals of non-compete agreements by tracking their history from English common law to American common and statutory law. An explanation of legislative history, demonstrating the lack of a new set of policy objectives, follows. This explanation includes descriptions of the previous legal regime and Oregon's political atmosphere, the publicized version of the law's implementation, events not covered by the press, and the major players involved in the law's codification.[4] The Comment concludes by exploring the potential effects and shortcomings of the law vis-à-vis the broadcasting industry.

II. THE EVOLUTION OF NON-COMPETE AGREEMENTS

A. *The Birth of Non-Compete Agreements in England*

Non-compete agreements originated in England,[5] where they were born out of a need to balance the interests of masters and their apprentices.[6] This employment relationship was intended to be mutually beneficial: a master of a trade invested time and effort in training his apprentice[7] and the

3. Telephone Interview with James Dominic Monahan, Managing Partner, Luvaas Cobb P.C., in Eugene, Or., General Counsel, the Oregon Association of Broadcasters (Jan. 3, 2008) [hereinafter Monahan] (noting that there were so many interests involved in the formation of the law that this case demonstrated that there are "two things you never want to see made: law and sausage").

4. An examination of legislative history is difficult here because legislative records are incomplete and the narratives of participants in the political process are occasionally inconsistent with both each other and the record. Rather than create a fiction of legislative history by synthesis, I attempt to ensure the integrity of this Comment by explaining the legislative history through the record, and then through the lenses of political participants.

5. William Lynch Schaller, *Jumping Ship: Issues Relating to Employee Mobility in High Technology Industries*, 17 LAB. LAW. 25, 28 (2001).

6. Packer & Cleary, *supra* note 1, at 1078-79.

7. *Id.*

apprentice provided services of the trade for his master in return for his education. In practice, however, this dynamic was fundamentally flawed. As soon as an apprentice learned the trade secrets developed by a master, he could leave his master, establish a competing business or work for a competitor, and use these secrets to run his former master into financial ruin. As a result, the masters began to issue covenants precluding an apprentice from directly competing with them.[8]

In time, English common law developed other restraints on employee mobility. For instance, employees had to complete their work or risk criminal prosecution.[9] These contracts placed a heavy burden on employees who, due to a lack of "inter-craft mobility,"[10] virtually became indentured servants of their employer.

English courts soon reined in the scope of the agreements, thereby restoring the balance between the interests of the employee and employer. For instance, in 1711, English courts began to distinguish between and enforce only some types of restraints: namely, an employer could only enforce a reasonable limitation.[11]

B. The Development of Non-Compete Laws in America

American common law initially adopted the reasonableness test first developed in England.[12] As social norms and attitudes changed, so too did the law governing the employment relationship.

With the onset of the American Revolution, the Civil War, and the Thirteenth Amendment's ban on slavery, the acceptability of indentured servitude faded and judicial reluctance to enforce these covenants grew.[13] Soon, employees were freed from some of the traditional restrictions on their mobility.[14] "Still, the last vestiges of these [relatively extreme] laws did not disappear until the Supreme Court's 1944 decision in *Pollock v. Williams*, which struck down labor contract statutes that criminalized employee fraud in failing to start work or in quitting before an agreed term's end."[15]

While non-compete agreements survived these cultural and legal shifts, courts have been uncertain as to how the common law should change

8. *Id.*

9. Schaller, *supra* note 5; Packer & Cleary, *supra* note 1, at 1080.

10. Packer & Cleary, *supra* note 1, at 1080.

11. *Id.* at 1081-82.

12. *Id.* at 1082.

13. Schaller, *supra* note 5, at 28; *see also* Am. Broad. Cos. v. Wolf, 420 N.E.2d 363, 402 (N.Y. 1981).

14. Schaller, *supra* note 5, at 29 (noting that the Anti-Peonage Act of 1867 prohibited a state from criminalizing nonperformance of an employment contract).

15. *Id.* at 29 (footnote omitted).

to reflect new norms.[16] Consequently, court opinions, although aggregately institutionalizing at-will employment, have "followed a relatively random path and offered differing rationales."[17]

As Kathryn J. Yates contends, judicial confusion may be partially attributable to the fact that multiple bodies of law impact these covenants.[18] For instance, a court may focus on the fact that a non-compete agreement is a restraint of trade.[19] Then, the court will either adopt a reasonableness test or analyze the covenant's "at-will nature."[20] Because non-compete agreements are written in contract form, they are subject to contract law and require adequate consideration.[21] However, they are also based upon the more stringent law of equity, as employers often seek injunctive relief.[22] A court of equity may be more concerned with the over-arching fairness of its decision.[23]

C. *Non-Compete Laws Today*

Currently, the consensus is that non-compete agreements are subject to a reasonableness test.[24] Specifically, these agreements must be: "(1) ancillary to a valid existing employment contract or, alternatively, separately supported by adequate consideration; (2) specific as to time and territory; (3) necessary for protection of the employer's legitimate business interests; and (4) neither unduly harsh toward the employee nor injurious to the public."[25] Litigation arises when an employer seeks to enforce a covenant or an employee seeks to escape one. Each component of the reasonableness test serves to balance the employer's interest in protecting his investment in an employee with the employee's interest in an ongoing

16. Norman D. Bishara, *Covenants Not To Compete In A Knowledge Economy: Balancing Innovation From Employee Mobility Against Legal Protection for Human Capital Investment*, 27 BERKELEY J. EMP. & LAB. L. 287, 295 (2006) ("While the corporate world has been forced to adjust to (or perhaps embrace) the new employment dynamic of highly skilled, mobile workers, the law has been slow to develop any overarching rules to regulate changing aspects of the employment relationship.") (footnote omitted).

17. Schaller, *supra* note 5, at 29.

18. Kathryn J. Yates, Comment, *Consideration for Employee Noncompetition Covenants in Employments At Will*, 54 FORDHAM L. REV. 1123, 1125 (1986).

19. *Id.*

20. *Id.* at 1126 (citing the former Oregon law as an example of a limitation on restrictive covenants).

21. *Id.*

22. *Id.* at 1126-27.

23. *Id.* Alternatively, Courts now may use "negative enforcement," which also requires that the services rendered to the competitor are "unique or extraordinary"; and, because of the unique nature of these services, an unenforced restrictive covenant will result in irreparable harm to the employer. *Am. Broad. Cos.*, 420 N.E.2d at 402-03.

24. Yates, *supra* note 18, at 1125.

25. *Id.* (footnote omitted).

career.[26]

The first requirement addresses "a concern for the average individual employee who as a result of his unequal bargaining power may be found in oppressive circumstances."[27] If the covenant is included in an initial employment contract, the employee can either refuse to work for an employer requiring this contract and/or negotiate other employee benefits in exchange for acquiescence to this agreement. If the employee is already working when presented with the covenant, he trades any future infringement on his career opportunities for fair consideration.[28]

In some jurisdictions, continued employment is sufficient consideration, especially if there is "the possibility that the employee would otherwise have been discharged, the employee was actually employed for a substantial time after executing the contract, or the employee received additional compensation or training or was given confidential information after he signed the agreement."[29] In other jurisdictions, the employee must receive significant consideration in order to avoid "a danger that [these agreements are used where] an employer does not need protection for his investment in the employee but instead seeks to impose barriers to prevent an employee from securing a better job elsewhere."[30]

As with common law, the scope of the contract must be reasonable as to time and place. This requirement provides safeguards to an employee in that an employer must "prove the social utility of what [is a reasonable restriction] . . . [and] permit judicial redrafting in the event the employer is unsuccessful in doing so."[31]

26. *See* Boisen v. Peterson Flying Serv., Inc., 383 N.W. 2d 29, 35 (Neb. 1986) ("A covenant not to compete, as a partial restraint of trade, is available to prevent unfair competition by a former employee but is not available to shield an employer against ordinary competition.").

27. *See* Bennett v. Storz Broad. Co., 134 N.W. 2d 892, 899 (Minn. 1965).

28. *See generally* Rachel Arnow-Richman, *Cubewrap Contracts And Worker Mobility: The Dilution of Employee Bargaining Power Via Standard Form Noncompetes*, 2006 MICH. ST. L. REV. 963, 969-73 (2006) (noting that the reasonableness test rests on the assumption that the employee can bargain with the employer).

29. Davies & Davies Agency, Inc. v. Davies, 298 N.W. 2d 127, 130 (Minn. 1980) (citation omitted).

30. *Id.* (citation omitted); *see also Bennett*, 134 N.W. 2d at 899 ("I[t] may well be surmised that such a covenant finds its way into an employment contract not so much to protect the business as to needlessly fetter the employee, and prevent him from seeking to better his condition by securing employment with competing concerns. One who has nothing but his labor to sell, and is in urgent need of selling that, cannot well afford to raise any objection to any of the terms in the contract of employment offered him, so long as wages are acceptable.") (quoting Menter Co. v. Brock, 180 N.W. 553, 555 (Minn. 1920)); *Boisen*, 383 N.W. 2d at 34 ("'[p]ost employment restraints are scrutinized with particular care,' and '[a] line must be drawn between the general skills and knowledge of the trade and information that is peculiar to the employer's business.'") (citation omitted).

31. Arnow-Richman, *supra* note 28, at 969 (footnote omitted).

Practically speaking, the reasonableness test is meant to ensure that the employee's decision to quit his job is not between unemployment or another occupation (if the restricted area is so large as to make him constructively unemployed, e.g., a non-compete that covers the entire continent), a move outside the restricted area, or continued employment in an unsatisfying job.[32] Instead, the employee chooses between the inconvenience of finding a job outside of an area that is in direct competition with the employer or staying with the current employer. Since the employee had the opportunity to bargain at the time of the commencement of employment for the receipt of fair consideration, he has, in theory, already bargained for compensation for any inconvenience caused by the foregone opportunity.[33]

The agreement also must serve a legitimate business interest; ensuring employee mobility is impaired only for a legitimate reason.[34] Finally, because non-compete agreements originate in the law of equity, there is a test for fairness. This serves as a catchall provision that permits the court to be flexible to case-specific facts.[35]

III. LEGISLATIVE HISTORY

A. *The Previous Oregon Non-Compete Law*

The former Oregon statute attempted to balance competing interests of the employee and employer by mostly "codify[ing] the basic common law rules" of reasonableness.[36] Oregon courts imposed additional requirements for enforcement, tipping the balance in favor of the employee's interest in mobility. In addition, the Oregon approach built in some degree of judicial discretion in recognition that "the variety of employment situations make[s]

32. In *King v. Head Start Family Hair Salons, Inc.*, the court altered the covenant because it essentially forced the employee to choose between unemployment and switching to an entirely different profession. Arnow-Richman, *supra* note 28, at 972 (discussing King v. Head Start Family Hair Salons, Inc., 866 So. 2d 769 (Ala. 2004)).

33. *See generally* Arnow-Richman, *supra* note 28, at 969-73 (noting that the reasonableness test rests on the assumption that the employee can bargain with the employer).

34. Charles A. Carlson & Amy E. Stoll, *Business is Business: Recognizing Referral Relationships as Legitimate Business Interests Protectable By Restrictive Covenants in Florida*, 82 FLA. B.J. 49, 50 (2008) (investigating the legal limits of restrictive covenants in Florida).

35. *See Bennett*, 134 N.W.2d at 899-900 ("The validity of the contract in each case . . . must be maintained between the interests of the employer and the employee.").

36. Kenneth R. Swift, *Void Agreements, Knocked-Out Terms, and Blue Pencils: Judicial and Legislative Handling of Unreasonable Terms in Noncompete Agreements*, 24 HOFSTRA LAB. & EMP. L.J. 223, 243 (2007) (discussing statutes pertaining to non-compete agreements passed in several jurisdictions).

drafting specific limitations impossible."[37]

Oregon statutory law mandated that non-competes in any industry were void unless "entered into upon the: (a) [i]nitial employment of the employee with the employer; or (b) [s]ubsequent bona fide advancement of the employee with the employer."[38] Oregon courts did not take these requirements lightly. In fact, Oregon courts reiterated that "[u]nder Oregon law, the right not to be subjected to a non-competition agreement, except as authorized . . . is an 'important employment-related statutory right.'"[39]

For instance, an employee had to receive "good consideration" in exchange for signing the agreement.[40] Such consideration required that the employee had to sign the agreement either in exchange for a subsequent bona fide advancement or during the first day of work.[41]

Thus, employers who claimed the agreement was signed upon initiation of employment had to meet a stringent standard. Oregon courts found that "the language of the statute . . . [was] an unequivocal statement of public policy."[42] In fact, "[a]ny non-de *minimis* delay, between the commencement of employment and when the agreement was signed, [was] fatal."[43]

The courts also rejected creative arguments meant "to circumvent this restriction[, such as] arguing that a new term of employment begins each day that an at-will employee comes to work."[44] In these decisions, courts noted that an agreement made between an employer and an employee differs from "a contract negotiated between two businesses, or an independent contractor, who may have greater leeway to establish their own terms."[45] Because an employee's bargaining power may not be as powerful as assumed by the traditional common law test, the covenant must be signed when the employee has the most power to either walk away from a new job or to negotiate the terms of a new job or advancement.

The requirements for an employer who argued in the alternative, that the agreement was signed in exchange for a bona fide agreement, were determined by the Ninth Circuit in *Nike v. McCarthy* "[b]ecause the

37. *Id.*

38. OR. REV. STAT. § 653.295(1)(a)-(b) (2005) (amended 2007) (listing the requirements for a noncompetition agreement under Oregon law).

39. Ikon Office Solutions, Inc. v. Am Office Prods., Inc., 178 F. Supp. 2d 1154, 1160 (D. Or. 2001) (quoting Dymock v. Norwest Safety Protective Equip. for Oregon Indus., Inc., 172 Or. App. 399, 405-06 (2001)) (expounding the bounds of Oregon noncompetition law).

40. Carey, *infra* note 51, at 143; *see also* Packer & Cleary, *supra* note 1, at 1087-88 (describing a case where an employment competition restraint was held valid in consideration of installments of stock paid over the ten-year restraint period).

41. *Ikon Office Solutions, Inc.*, 178 F. Supp. 2d at 1159-60.

42. *Konecranes, Inc.*, 340 F. Supp. 2d at 1130 (citation omitted).

43. *Id.* at 1129 (citations omitted).

44. *Id.*

45. *Id.* at 1130.

Oregon Supreme Court had yet to construe the term" "subsequent bona-fide agreement."[46] That court found that, while the statutory language did not provide guidance, the legislative history showed that a bona fide advancement necessitated an increase in responsibility and improvement in status, demonstrated by "new, more responsible duties, different reporting relationships, and change in title and higher pay."[47] Furthermore, it "held that only when all of the elements of the advancement converged could an employer obtain a non-compete agreement."[48]

In addition to these statutory requirements, an employer had to meet each of the common law safeguards to enforce a covenant.[49] The courts attributed the harshness of this rule to it being a "covenant in restraint of trade," the enforcement of which generally runs counter to public policy.[50]

The first common law requirement was that the agreement mandate temporal and geographical limitations. In its application, Oregon courts uniformly held that any agreement spanning over two years was unreasonable.[51] Furthermore, if the agreement was otherwise enforceable, the courts changed unreasonable terms or, if absent, added "reasonably limiting terms to contracts which [were] missing temporal or geographical restrictive language."[52]

Second, the agreement "must be reasonable, meaning that, 'it should afford only a fair protection to the interests of the party in whose favor it is made, and must not be so large in its operation as to interfere with the interests of the public.'"[53]

46. Daniel Hutzenbiler, *Judicial Review of the Employment Relationship: An Overview of Important Ninth Circuit Employment Law Decisions of 2004*, 41 WILLAMETTE L. REV. 551, 567 (2005) (footnote omitted) (discussing the Ninth Circuit's interpretation of Oregon law relating to non-compete agreements).

47. *Id.* (footnote omitted) (quoting Nike, Inc. v. McCarthy, 379 F.3d 576, 583 (9th Cir. 2004)).

48. *Id.* at 567-68 (footnote omitted).

49. Konecranes, Inc. v. Sinclair, 340 F. Supp. 2d 1126, 1130 (D.Or. 2004) (citing North Pac. Lumber Co. v. Moore, 551 P.2d 431, 435 (Or. 1976)) (listing the three requirements essential to the validity of a contract in restraint of trade).

50. *Id.*

51. Kristina L. Carey, *Beyond the Route 128 Paradigm: Emerging Legal Alternatives to the Non-Compete Agreement and their Potential Effect on Developing High-Technology Markets*, 5 J. SMALL & EMERGING BUS. L. 135, 143 (2001) (explaining the requirements for enforcing non-compete clauses in Oregon); *see also* Packer & Cleary, *supra* note 1, at 1086 (noting that courts often "discuss the duration of the . . . agreement . . . in conjunction with other variables").

52. Carey, *supra* note 51, at 143 (footnote omitted); *see also* Packer & Cleary, *supra* note 1, at 1086-87 (discussing cases in which five-year post-employment contractual competition restraints were held unenforceable because they were unreasonable).

53. Olsten Corp. v. Sommers, 534 F. Supp. 395, 397 (D.Or. 1982) (citation omitted) (quoting North Pac. Lumber Co. v. Moore, 551 P.2d 481, 435 (Or. 1976)) (listing the three requirements needed to make a non-competition agreement valid).

Just like in traditional common law, the court based its decision on notions of fairness where an application of the law did not reach an equitable result. For instance, if an employee signed a non-compete upon starting work, the employee could not be held to a different one with the same employer, even with a new contract.[54] The employer could also be estopped from enforcing the covenant if, upon termination and in enumerating the employee's obligations post-employment, the employer omitted mention of that agreement.[55] Moreover, if an employee signed a non-compete with a company that merges with another, then the employee is working for, and has no agreement with, a new company.[56]

Courts also made a fact-based inquiry to ensure that these agreements were enforced only where there was a legitimate business interest. For example, courts were more likely to enforce an agreement restricting use of "goodwill and inside information" than "barring a former employee from competing altogether. The latter . . . is contrary to the public interest, and makes it difficult for the employee to pursue his livelihood."[57]

B. *Oregon's New Law*

1. The Political Atmosphere that Birthed Oregon's New Law

The Oregon legislature replaced the previous law that was in alignment with traditional policy objectives with one that was not. Why would the state legislature implement these changes? How did it pass this new legislation? Simply put, the law was a product of Oregon's political environment, which made its legislature particularly susceptible to compromise labor legislation.

The Oregon legislature is unique for two reasons. First, it is not saturated with lobbyists.[58] Second, the atmosphere is frequently characterized as "collegial."[59] As a result, "it doesn't take that many people to get something written [or] changed . . . . Unfortunately, [the Oregon legislature passes] a lot of legislation that isn't very picked at and

54. Pacific Veterinary Hosp., P.C. v. White, 696 P.2d 570, 570 (Or. Ct. App. 1985) (holding void a more stringent noncompetition agreement in a third employment contract where the first employment contract already contained a noncompetition agreement).

55. *Ikon Office Solutions, Inc.*, 178 F. Supp. 2d at 1161-62.

56. Miller v. Kroger Co., 82 Fed. App'x 557, 559 (9th Cir. 2003) (holding that a non-compete agreement negotiated with an employer in contemplation of a merger does not fall under the initial employment requirement).

57. *Konecranes, Inc.*, 340 F. Supp. 2d at 1131.

58. Telephone Interview with Seth Row, Associate, Holland & Knight LLP (Jan. 8, 2008) [hereinafter Row] (discussing the role of non-compete agreements in Oregon).

59. Row, *supra* note 58.

[is subject to] last minutes changes."[60] So, in this case, where strong interest groups charged in to make changes to the proposed legislation at the last minute, the legislature yielded to their inconsistent demands, and produced this new law.

In addition, there were circumstances that were unique to the time of the legislative debate that prompted the introduction of a proposal for a new non-compete law. "Democrats had a majority in both chambers, [although] labor [would have] a lower success rate in the Senate than [in] the House."[61] In addition, the public was attuned to labor interests. So, representatives were keenly aware that any vote on a bill pertaining to labor interests might play a role in their reelection. Some constituents believed that "the 'special' interests of unions went arm-in-arm with the wider public interest."[62] Others did not look fondly upon unions wielding such power and viewed them as unwelcome lobbyists.[63] Therefore, "media speculation about labor getting whatever it wanted [may have] hurt labor because it made some Democrats wary of Republican attack ads that might later portray them as union stooges."[64] Thus, the spotlight was on labor issues at the time of the bill's enactment.

Under the former Oregon law, not many non-compete agreement disputes made it to trial in Oregon. In fact, political players could only remember enough to "count them on one hand."[65] The absence of litigation, however, did not translate into a lack of controversy.

Non-competes were "used very widely in situations in which most legislatures [and] law professors . . . did not anticipate[,] . . . such as low wage people in basically non-competitive industries[, and] in industries where changing jobs is common."[66] In addition, there was widespread abuse of non-competes both "as a threat to constrain people's ability to change jobs [and against] people that didn't have the sophistication to know that it might not be enforceable to them."[67]

These circumstances caught the eye of Oregon's Commissioner of Labor, Dan Gardner. What he perceived as an inequitable situation

60. *Id.*

61. Don McIntosh, *Legislature Bangs Gavel on Banner Year for Oregon Labor*, NORTHWEST LAB. PRESS, July 6, 2007, at 1, http://www.nwlaborpress.org/2007/7-6-07Salem.html.

62. *Id.*

63. *Id.*

64. *Id.*

65. Monahan, *supra* note 3; *see also* Kenneth J. Vanko, *"You're Fired! And Don't Forget Your Non-Compete . . .": The Enforceability of Restrictive Covenants in Involuntary Discharge Cases*, 1 DEPAUL BUS. & COM. L.J. 1, 2 (2002) ("The law in this area is relatively undeveloped, perhaps because so few termination cases have made their way through the reported decisions or the courts have not given them much reasoned analysis.").

66. Row, *supra* note 58.

67. *Id.*

motivated him to assume the role of the "driving force behind [the new bill]."[68] Furthermore, political aspirations may have played a part in advocating for this high-profile, labor-friendly position. The bill would also have the effect of rallying support for the Democratic Party. "The idea was that [Gardner] thought it would be a great move forward for the Democratic Party in Oregon . . . because [non-compete agreements] are viewed as the albatross around the neck of the working man."[69]

The circumstances seemed ideal to pass this legislation. First, Gardner appeared to be a qualified lobbyist. He "[had] some sway with Democrat[ic] leaders in Salem, if only because he served with many of them before being elected to the labor commissioner position."[70] Second, the timing was right. In the past, there had been "a couple of [unsuccessful] runs earlier in legislative sessions" to restrict these covenants.[71] Now, however, the neighboring state of California had prohibited non-compete agreements, so Gardner believed that he would have the momentum to succeed this time.[72]

2. The Development of the New Law

The bill started as a relatively straightforward prohibition against non-compete agreements where the employer terminated his employee. Yet, the bill would catch the attention of special interest groups who worried about its application, but relished the opportunity to codify into law an exception for their industry.[73] As a result, the bill grew more complex and ineffective as it ping-ponged back and forth between the House and Senate.

On January 9, 2007, the House voted for House Bill 2257. The bill voided any non-compete agreement if "the employee [was] laid off by the employer."[74] Laid off was defined as:

> [P]ermanent termination . . . for reasons that are beyond the employee's control and that do not reflect discredit upon the employee [including] . . . . the elimination of the employee's position, a lack of available funding or work, a reduction in the size of the workforce and changes in the workplace that affect

68. Monahan, *supra* note 3.
69. *Id.*
70. *Non-Compete Bill Appears on Way to Final Passage*, WHAT'S HAPPENING AT THE OAB? THE WEEKLY UPDATE FROM YOUR OAB OFFICE, (Oregon Ass'n of Broadcasters, Portland, Or.) May 8, 2007, at 6.
71. Monahan, *supra* note 3.
72. *Id.*
73. The role of these special interest groups is further explored in Part III(B)(3) of this Comment.
74. H.R. 2257, 74th Leg. Assem., Reg. Sess. (Or. 2007).

staffing needs.[75]

This version carved out an important exception. Under this bill, during an economic downturn, an employer has to effectively pay, in the form of the employee's wages, to protect his investment or release the employee from the covenant. If the situation were otherwise and an employer could terminate the employee and still enforce the covenant, an employee would face some unappealing choices, such as learn a new skill, move, commute outside of the restricted area, or remain unemployed, without having committed any wrong. This amounts to a reasonableness test that tips in favor of employee mobility.

However, this was not the version that was enacted. On January 12, 2007, the Senate expanded the definition of being "laid off" to "discharged or laid off by the employer for a reason other than misconduct connected with work."[76] Gardner advocated this version as a better balance of interests than the previous law. He claimed that enforcement of a covenant where the employee was of no further use to an employer in a broad set of circumstances was an inequitable restraint on employee mobility. Gardner told one newspaper: employers "'didn't need their services anymore but[,] either through legal action or industry action[,] (the noncompetes) are being enforced . . . . [T]hese employees] have to go find a job in a different industry or move out of the state.'"[77] He reassured employers that their interests need not be protected by this type of covenant. Instead, they could resort to "federal legislation [that] protects trade secrets and that would not be changed by this legislation."[78]

Still, the OAB, representing employers of the broadcasting industry, was worried that this bill would not protect their interests. In particular, it was concerned about the meaning of "laid off" on two fronts. First, the OAB anticipated that the ambiguity in the definition would cause a great deal of litigation.[79] Second, it was wary of getting bogged down in litigation over how each former employee departed from employment. In the end, "[t]he OAB reviewed the new bill and determined that the broadcast industry could live with the provisions, even though in a perfect world, [they believed] non-competes would not be a subject worthy of legislative consideration."[80]

75. *Id.* at §1(6)(C)(c).

76. S. 248, 74th Leg. Assem., Reg. Sess. (Or. 2007). In addition, this bill required that the employer either inform the employee of a non-competition agreement when extending the job offer or upon a subsequent bona fide advancement. *Id.*

77. *Bills Would Amend Noncompete Agreements For Laid-Off Workers*, AP ALERT, Apr. 7, 2007.

78. *Id.*

79. *Id.* ("Business interests, though, say [that] the definition of 'laid off' in proposed legislation is vague.").

80. *What's Happening at the OAB*, *supra* note 70, at 5.

While some major unions had yet to get involved at this point, some labor lobbyists lent their voice in support of the provision on grounds of fairness.[81] Yet, others vied for an all-out ban. The media, sympathizing with the employee side, continued to drum up support by recounting personal narratives of discharged employees.[82]

On May 9, 2007, the Senate Interim Committee on Judiciary continued to tweak the contents of the bill. As with past drafts, the Committee wanted the covenants to be void "if the employee is laid off by the employer for any reason other than just cause."[83] The Committee also decided to add more circumstances that would qualify as "laid off": an employee "is laid off due to an economic downturn" and the "employee is not rehired by the employer within 90 days . . . in a position of the same level."[84] In addition, if the non-compete agreement did not satisfy all the criteria for enforcement, the Committee created an unusual exception. Namely, if otherwise enforceable, the court may uphold the agreement "if the employer provides the employee full compensation at the level" of the job from which he was terminated.[85]

In the January 9 bill, an employee in this situation would not be characterized as "laid-off" since the employee was not permanently terminated. The January 12 version, permitting enforcement only where there was misconduct, expunged that exception. The May 9 version reinstated it, tipping the scales in favor of an employer. An employer could escape having to pay in the form of wages, for a time at least, to enforce the covenant during an economic slump.

The bill's second change, permitting an employer to pay the employee's wages in order to enforce the agreement, could work for or against either party, particularly in the broadcasting industry. It could be argued that an employer would not pay this sum unless he truly wanted to protect a business interest. However, name recognition and fame are extremely important in the broadcasting industry. If an employer were to pay this sum and keep a broadcaster off the air, the employer would effectively diminish the employee's good name and, as a result, ruin his career. Additionally, a vindictive employer could destroy the employee's career without a showing of a legitimate business interest. Regardless of

81. *Noncompete Agreements*, AP ALERT, Apr. 8, 2007 ("[L]abor advocates say such clauses are unfair to those who have been laid off against their will.").

82. *See, e.g.*, *id.* (recounting how a physical therapist found out after she was fired that she could not perform similar work within sixty miles); Michael Lloyd, *Bruce Womack Sr., Laid Off*, PORTLAND OREGONIAN, Apr. 29, 2007, at B1 (recounting how fired store manager had to drive forty miles to new job in order to comply with old employer's non-compete agreement).

83. S. 248 Amendment, 74th Leg. Assem., (Or. 2007).

84. *Id.*

85. *Id.*

these concerns, this version was not enacted.

Finally, on June 7, 2007, the Senate Interim Committee drafted the version that would become law. As a preliminary matter, the law states that non-competes are voidable and unenforceable in Oregon courts unless they satisfy several requirements.[86] These requirements were far more complicated than any previous version of the bill.

The first requirement is that the employee cannot be restricted from working for more than two years from the date of termination.[87] If the agreement stipulates a longer duration, "[the agreement] is voidable and may not be enforced by a court of this state."[88] Essentially, this provision codified the common law already in place, which dictated that any restriction over two years, in any factual scenario, was unreasonable.

Next, the agreement must be entered into in one of two ways: (1) the employer informed the employee, in writing, that a non-compete is required two weeks prior to commencement of work; or (2) the employer offered a bona fide advancement, which includes both a raise and additional responsibility, in return for signing the non-compete.[89]

Third, the employee's annual salary and commissions must be greater than the median family income for a four-person family, as determined by the United States Census Bureau.[90] Currently, that figure is about $62,000.[91]

Additionally, the employee must possess certain qualities.[92] The employee must: "[perform] predominantly intellectual, managerial or creative tasks; [exercise] discretion and independent judgment . . . [earn] more than $650 per month on a salary basis . . . [and be] employed by the United States."[93]

Likewise, there are requirements for the employer. Specifically, an employer must have a protectable interest.[94] Ordinarily, a protectable interest is one of two things. First, it could be a trade secret.[95] Second, it could be "confidential business or professional information that otherwise would not qualify as a trade secret, including product development plans, product launch plans, marketing strategy or sales plans."[96] Courts have a

86. OR. REV. STAT. § 653.295(1) (2007).
87. *Id.* at § 653.295(2).
88. *Id.*
89. *Id.* at § 653.295(1)(a)(A)-(B).
90. *Id.* at § 653.295(1)(d).
91. Richard Hunt, *Commentary: New Non-Compete Rules Not Entirely Problematic*, DAILY J. OF COM., Jan. 18, 2007.
92. OR. REV. STAT. § 653.295(1)(b) (2007).
93. *Id.* at § 653.020(3).
94. *Id.* at § 653.295(1)(c).
95. *Id.* at § 653.295(1)(c)(A).
96. *Id.* at § 653.295(1)(c)(B).

longstanding history of protecting these types of secrets. Yet, the statute also extended the definition to the context of broadcasting. In this type of workplace, an employer has a protectable interest if: (1) the employee works as on-air talent; and (2) the employer spends at least ten percent "of the employee's annual salary to develop, improve, train or publicly promote the employee . . . on media that the employer does not own or control."[97] Yet, the broadcasting employer still cannot enforce a protectable interest unless, when the employee is not permitted to work, the employer pays the employee "the greater of compensation equal to at least 50 percent of the employee's annual gross base salary and commissions at the time of the employee's termination or 50 percent of the median family income for a four-person family, as determined by the United States Census Bureau . . . ."[98]

Finally, the statute included a catch-all provision. If the four-person family salary and employee characteristic requirements are met, the employer can enforce the covenant if, when the employee is restricted from working, the employer pays the employee the greater of half of his salary or half of a four-person family income.[99]

The projected effects of this law on broadcasting employers and employees are explored later in this Comment. However, the public reaction to the law was that it was not sympathetic enough to the plight of employees. The media peppered the news with poignant narratives of broadcasters and of electricians. The electricians were not, under traditional common law, intended to be covered by these agreements.[100] In the most biting of articles, the media characterized the support behind the bill as a "backlash . . . with critics accusing employers of abusing the agreements and pursuing complaints against workers who have little to do with intellectual property or who didn't leave voluntarily."[101]

Notwithstanding public sentiments or the imperfections of the original statute, the legislature changed a simple law which was easy to understand, rooted in tradition, and tested over time to something incoherent. As demonstrated below, the legislature permitted interest groups to steer the formation of a new law. These changes resulted in a statute rampant with requirements that fail to further any policy objectives.

97. *Id.* at § 653.295(1)(c)(C)(i).

98. OR. REV. STAT. at § 653.295(1)(c)(C)(ii).

99. *Id.* at § 653.295(6).

100. Brent Hunsberger, *Noncompete Clause Filters Down from Executive Suite*, SEATTLE TIMES, June 24, 2007, at F3.

101. *Id.*

3. The Interest Groups that Shaped the Development of the Law

Gardner's original proposal only derogated from the law in that it carved out an exception that would void the agreement if the employee was "laid off."[102] Therefore, his version protected a class of employees based on their manner of parting with their former employer (as opposed to their salary), the terms of enforcement of the restraint, the existence of a protectable interest, and so forth. His bill was specifically targeted to protect employees whose employer no longer wanted to have the employee in his staff but did not want to permit the employee to work elsewhere.[103]

This exception resonated with the common law tradition of enforcing these agreements only when an employer had a protectable business interest. If an employer did not find this employee valuable anymore and terminated him or her, then this was an indication of a lack of an interest. In addition, this bill could reduce abuse of non-competition agreements. Employers in Oregon were issuing unenforceable non-compete agreements, and employees who were unfamiliar with the law were binding themselves to its terms to their detriment.[104] It would be easy to educate employees about this clear-cut exception. In addition, codification of this bill seemed feasible because the sympathetic narratives of terminated employees tended to garner a lot of support from, and "[struck] a chord with[,] a lot of legislatures."[105]

However, any potential for an easy implementation of the bill dissipated as interest groups stepped into the mix. The bill was an opportunity to advance not only local, but also national broadcasting and technology industry interests on both the managerial and employment side. In addition, on a local level, major advocates for the law "came from the . . . electricians' unions that were very frustrated at having non-exempt hourly employees subject to them in an area where changing jobs was common and didn't think employers had a protectable interest."[106]

a. The High-Tech Industry

On a national level, technology firms worried that the abolition of non-compete agreements in California would start a national trend. It was possible that a slippery slope of prohibition would gain momentum in the

102. Monahan, *supra* note 3.

103. Telephone Interview with Thomas Carpenter, General Counsel and National Director of Legislative Affairs, American Federation of Television and Radio Artists, in New York, N.Y. (Jan. 30, 2008) [hereinafter Carpenter].

104. Gruntled Employees, http://www.gruntledemployees.com (last visited Mar. 7, 2007).

105. Carpenter, *supra* note 103.

106. Row, *supra* note 58.

Oregon legislature, which greatly influenced by that of California.[107] Less established businesses were in favor of such a trend. "[S]tart-up companies wanted to make it more difficult to enforce a non-compete because they had trouble luring people away from big companies . . . ."[108] They perceived the covenants as an undue, artificial restraint on the high employee mobility of the high tech market.[109] In support of a ban, they also pointed to the success of the Silicon Valley technology industry that followed: "[the law] enable[d] employees to move more freely from firm to firm and thus enhance[d] the likelihood of 'spill over' knowledge being transmitted from firm to firm, with an overall net benefit to high tech industries in the region."[110]

On the flip side, technology firms, such as the American Electronics Association, were concerned that if every employee that was "laid off"[111] could escape a non-compete agreement, they would lose their trade secrets to competitors.[112] They argued that while the industry as a whole appeared to be thriving, individual companies were suffering. As Kristina L. Carey observed in her article, "'[p]rofitability turns less and less on building a better mousetrap and more and more on formulating and protecting better ideas, namely trade secrets.'"[113]

Thus, legislative representatives in Oregon had to evaluate the impact of a new non-compete law on the technology industry. In this process, they had to decide whether to value the aggregate industry or "the success or survival of the companies which make up the market."[114]

The final version of the new Oregon law did not derogate, in many respects, from the previous regime governing non-compete agreements in the high-tech industry. However, the involvement of these technology

107. *See* IKON Office Solutions, Inc. v. Am. Office Prod., Inc., 178 F. Supp.2d 1154, 1160 n.5 (D. Or. 2001) (citing California public policy in support of judicial reluctance to enforce non-compete agreements). *See generally Changes to Oregon's Employment Laws Leave Employers Asking: Is Oregon the New California?*, The Pacific N.W. Employer (Jackson Lewis LLP, White Plains, N.Y.), Winter 2008, at 2, 3, *available at* http://www.jacksonlewis.com/legalupdates/newsletters/pdf/209.pdf (stating that while Oregon's legislation appears to enact sweeping changes, carefully crafted agreements remain enforceable).

108. Row, *supra* note 58.

109. Schaller, *supra* note 5, at 25.

110. *Id.* at 31 (footnote omitted).

111. Monahan, *supra* note 3 (noting that high-tech companies were concerned about the definition of the term "laid off").

112. At Work, http://www.blog.oregonlive.com/atwork (last visited Mar. 5, 2007).

113. Kristina L. Carey, *Beyond the Route 128 Paradigm: Emerging Legal Alternatives to the Non-Compete Agreement and Their Potential Effect on Developing High-Technology Markets*, 5 J. SMALL & EMERGING BUS. L. 135, 136 (2001) (alteration in original) (footnote omitted) (quoting John H. Matheson, *Employee Beware: The Irreparable Damage of the Inevitable Disclosure Doctrine*, 10 LOY. CONSUMER L. REV. 145, 145 (1998)).

114. *Id.* at 137.

firms drew media attention to the bill, attracting more interest groups that, in turn, shaped the resultant law.[115]

b. The Broadcasting Industry

Gardner's bill "did not start out targeted at broadcasters—it was silent."[116] That was surprising since, in Oregon, "the local media is very prized."[117] Also surprising was that non-compete agreements still flourished in the industry with "considerably broader and longer restrictions" than in other industries.[118] In fact, efforts to ban them by the American Federation of Television and Radio Artists (AFTRA) had failed in the past.

For instance, years before, "a small group of broadcasters in Oregon had caught wind of a general law on non-competes that was flowing through the legislature that wasn't very specific to this industry. AFTRA had developed model legislation that had been adopted in several other states."[119] The model legislation included a prohibition of non-compete agreements between a broadcasting employer and an employee, aside from those in sales and management.[120] The Oregon legislature, however, did not incorporate AFTRA's text into the law.

So, when news arrived of Gardner's bill, the OAB pounced on the opportunity to squash any further efforts to ban non-compete agreements in the industry. The OAB "approached Mr. Gardner and [found that] he was wholly unfamiliar" with the potential repercussions of the bill on the broadcasting industry.[121]

The OAB tried to convince Gardner to exempt the broadcasting industry from the restriction on non-compete agreements. The OAB argued that: (1) the broadcasting industry makes these broadcasters famous by investing large sums of money in advertising and "should be able to protect that investment;" and (2) broadcasters "make a lot of money, they're on T.V., . . . and therefore they don't deserve the same type of protections as those making middle income salary."[122] In other words, the

115. Monahan, *supra* note 3.

116. *Id.*

117. Row, *supra* note 58 ("[T]he state loves their local news out there . . . . In Oregon more so than other places.").

118. Packer & Cleary, *supra* note 1, at 1075.

119. Carpenter, *supra note 103*.

120. Email from Thomas Carpenter, General Counsel and National Director of Legislative Affairs, American Federation of Television and Radio Artists (Jan. 29, 2008, 11:12 EST) (on file with author) (attaching the Broadcast Employment Free Market Act) [hereinafter Carpenter Email].

121. Monahan, *supra* note 3.

122. Carpenter, *supra* note 103.

OAB argued that employers had a legitimate business interest and employees have sufficient bargaining power.

When it became clear that a complete exemption had not garnered enough support in the legislature, the OAB opposed any suggestion of a salary floor for enforcement against broadcasters. What "bothered them the most was that the non-compete clause was only going to be available if they were paying the individual in excess" of the average salary, aside from the relatively larger Portland, Eugene, Medford, and Bend markets.[123] In short, the OAB perceived the salary floor as an effective ban on non-compete agreements.

After listening to their concerns, Mr. Gardner "wanted to make a compromise that would exclude [broadcasting employers] from the threshold income requirement provided that they were to invest [the equivalent of] ten percent of their [employee's] salary into promotion."[124] Gardner's suggestion was mostly well-received.[125]

This new "bill had surfaced before [AFTRA was] even able to . . . weigh in on it and the OAB was already mobilized."[126] In fact, Thomas Carpenter, the AFTRA National Director of News and Broadcast, commented:

> [B]y the time [AFTRA] got involved, it was pretty much a done deal. The bill [had] caught [AFTRA] off-guard and by surprise. In any other situation, [AFTRA] would have pulled [the] bill and advocated model legislation but [its] local people were asleep at the switch and [instead, AFTRA] got caught with a bill that would have been damaging.[127]

AFTRA immediately "coordinated with other groups and tried to intervene to the extent that [it] could."[128] It worked to avoid what their model legislation was designed to prevent: a compromise that would do more harm than good. Often these statutory compromises are comprised of a salary cap, a termination exemption, and promotion as consideration.[129] Carpenter explained: "it makes for bad policy to agree to these compromises. We find where we make compromises to a model language it hurts other jurisdictions."[130] Without any choice but to compromise, AFTRA sought to ensure that employees in "the most egregious"

123. Monahan, *supra* note 3.
124. *Id.*
125. *Id.*
126. Carpenter, *supra* note 103.
127. *Id.*
128. *Id.*
129. *Id.*
130. *Id.*

circumstances were afforded protection.[131]

AFTRA presented its key arguments in support of its contention that broadcasters were in a unique situation where enforcement of these agreements would be illegal and counter to public policy. First, it purported that broadcasters did not have the bargaining power, an underlying concern in traditional non-compete laws, to negotiate these agreements. This was a result of the small number of both available on-air broadcasting positions[132] and employers in the industry.[133] The number of employers shrank further after the 1996 Telecommunications Act and the Federal Communications Commission's rules.[134]

As a result, the covenants impose an "artificial ceiling on wages" because, when renegotiating an expiring contract, broadcasters must decide to accept lower wages, remain unemployed until the non-compete expires, relocate outside of the designated area, or switch to an entirely new career.[135] In contrast, those who do have bargaining power, like major network broadcasters, do not have non-compete agreements.[136]

Furthermore, unlike other industries, there is no employer interest because a broadcaster is not privy to trade secrets or confidential information.[137] Carpenter explained: "Our fundamental argument is these people are not scientists with access to a secret formula or salespeople with a secret customer's list . . . ."[138] Instead, broadcasters offer their own voice—which is not attributable to an employer's investment.[139]

AFTRA also characterized the employer's advertising expenses of on-air talent, not as an investment in training, but "simply a cost of doing business."[140] A manager's investment rationale also lacks substance when referring to employees who they do not publicize, like producers.[141] In addition, "an employee's personality may have become popular for reasons other than the employer's advertising efforts."[142] For instance, broadcasters often exert great effort promoting themselves in public arenas in order to become well-known enough to get an on-air position in the first

131. *Id.*

132. Cristin T. Kist, Comment, *Blocked Airwaves: Using Legislation to Make Non-Compete Clauses Unenforceable in the Broadcast Industry and the Potential Effects of Proposed Legislation in Pennsylvania*, 13 VILL. SPORTS & ENT. L.J. 391, 395 (2006).

133. Carpenter Email, *supra* note 120.

134. *Id.*

135. *Id.*

136. Carpenter, *supra* note 103.

137. *Id.*

138. *Id.*

139. *Id.*

140. *Id.*

141. *Id.*

142. Kist, *supra* note 132, at 395.

place.[143]

Even when provisions in a non-compete agreement go are unlawfully restrictive, an employee may not have the money or the time to fight against enforcement because litigation may take longer than the span of the non-compete.[144] Finally, AFTRA argued that Oregon should follow other jurisdictions, like California, that have banned non-competes. [145]

While AFTRA lobbied, it directed most of its time and effort toward convincing one man, Senator Metsger, to lobby for the cause. He would represent them in the legislative debate, but this was late in the game, and the last-minute changes to the bill would simply inject more complexity and confusion into the law.

c. Senator Metsger

At the time AFTRA became involved, the Senate had already passed the original version of the bill, which "did not provide a carve-out for broadcasting."[146] Then, in the House, the "OAB came in and . . . carved it out as an exception" for the broadcasting industry.[147] That draft was already submitted to two committees for consideration, and was on its way to a joint committee[148] and "to the Senate for concurrence."[149] At this point, AFTRA stepped in.

Senator Metsger, who had only been involved in the amendments for five days, sat on the joint committee. However, Metsger had personal knowledge about the effects of a non-compete agreement on a broadcaster because he had previously worked as an on-air broadcaster for KION-TV in Portland and for a radio station.[150] Approximately three years into his employment, an employer had asked him to sign a non-compete agreement.[151] While he was not prohibited from working, Metsger, who began his own communications business, believed the covenant was a "limiting factor" in his career possibilities.[152] Still, others perceived Metsger as someone who believed that "he was victimized about twelve

143. Packer & Cleary, *supra* note 1, at 1098 (citations omitted) (noting that in some cases a court does not enforce covenants because "the court suspected that the employee became successful through his or her own talents and efforts, not through the employer's efforts").

144. Carpenter, *supra* note 103.

145. *Id.*

146. Telephone Interview with Rick Metsger, Oregon State Senator, D-Mt. Hood District 26 (Jan. 4, 2008) [hereinafter Metsger].

147. Metsger, *supra* note 146.

148. Monahan, *supra* note 3.

149. Metsger, *supra* note 146.

150. *Id.*; *see also* Monahan, *supra* note 3.

151. Metsger, *supra* note 146.

152. *Id.*

years ago . . . and that was a sore point for him."[153]

Metsger understood the development of non-compete agreements in the industry. He contended that the use of these covenants expanded during the 1970s and early 1980s, because the news industry had recently "discovered they could make money from [the news]."[154] Prior to that, news was something they "had to do" as a public service.[155] Metsger observed that covenants in the broadcasting industry became a standard practice.[156] In his opinion, "the real injustice" was when an employer did not desire to employ the individual (and so either did not renew the employee's contract or terminated him) but restricted his employment nonetheless.[157] He believed that the widespread agreement in academia[158] supported his conclusion that this was an abuse of covenants. In support of this contention, Metsger stated: "it's really hard to make a case that [an employee hired elsewhere] is really injurious to the employer and basically keeping [the employee] out of [his] profession."[159] Metsger believed that because the broadcasting company insisted that there are many others who would take the job position, he had felt "forced . . . to sign it because they are threatening you with your career either now or later."[160]

AFTRA believed Metsger would be an ideal advocate for their cause. A few years before, Metsger had tried to restrict the use of non-competes but the committee head, a Republican, blocked it from reaching the floor. [161]

When AFTRA contacted Metsger, he offered his support.[162] However, their interests were not completely aligned.[163] Metsger's only goal was to make sure that an employer could not enforce a non-compete clause unless the employer compensated the employee.[164] Advocates for the broadcasting industry were perturbed that Metsger "intervened at the eleventh hour" to try to outlaw non-competes altogether.[165] Metsger disagreed with that characterization: "I forced the issue and was successful

153. Monahan, *supra* note 3.
154. Metsger, *supra* note 146.
155. Monahan, *supra* note 3.
156. *Id.*
157. *Id.*
158. *See, e.g.*, Vanko, *supra* note 65, at 1 ("Strict considerations of fairness suggest that it is antithetical to allow an employer to terminate an employee and prevent him from working in his chosen profession.") (emphasis omitted).
159. Metsger, *supra* note 146.
160. *Id.*
161. *Id.*
162. *Id.*
163. *Id.*
164. *Id.*
165. Monahan, *supra* note 3.

in restoring/basically taking that exception back out."[166]

This success was not without struggle. Greg Macpherson, the judiciary chair of the House, put the broadcasting exception in and "lobbied [Metsger] hard because [he believed] it wouldn't pass otherwise and [Metsger] said bologna."[167] Metsger cast aside Macpherson's opinion that, without this exception, the bill would fail.[168] Instead, Metsger believed that the law would be unfair without addressing this issue, especially since there were other "legal shackles" to protect employers, such as laws pertaining to propriety information."[169]

As a result, Metsger "derailed the bill by moving not to concur sending the bill to a joint House-Senate conference committee to deal with provisions specifically related to the broadcast industry."[170] The conference produced a bill that mandated that employers pay half of an employee's salary while the employee was restricted from working for a competitor. Although this may be characterized as a compromise, it "effectively put a stop on non-competes with on-air talent in the [Oregon] broadcasting industry."[171] Yet, this version had a more robust vote from the house and senate than before this exception.[172]

Not everyone was pleased with the outcome. AFTRA wanted to start from scratch, but believed "[t]his was the best [they] could do.[173] Metsger, too, believed that a completely new bill would have threatened any protection that this law provided; likewise, he preferred the confusing language of this law. Metsger explained: "when you make too many changes [to a bill], [you] risk at getting off track. I was willing to compromise with any of their goofy percentages in order to make sure [broadcasters] were broadly covered."[174]

Ironically, Metsger, by adding "goofy percentages," became just another participant who made "too many changes" to the law, stripping it of its effectiveness.

IV. EFFECTS OF LAW

Aside from the timing requirements that were already in place, the

166. Metsger, *supra* note 146.
167. *Id.*
168. *Id.* (recounting that Macpherson advocated the position that it was better to "get ninety-five percent of the apple rather than lose the whole apple").
169. Metsger, *supra* note 146.
170. Conkling Fiskum & McCormick, *Non-compete Bill Hits Snag, Bounces Back* (June 26, 2007), http://www.cfm-online.com/pu_articleprintable.cfm?ArticleID=1211.
171. Monahan, *supra* note 3.
172. Metsger, *supra* note 146.
173. Carpenter, *supra* note 103.
174. Metsger, *supra* note 146.

new law did not meet, let alone balance, the interests of employers and employees in the broadcasting industry. Admittedly, the new law did help codify the common law already in place. For example, it said that a covenant not to compete spanning over two years is void, and that the agreement must be entered upon commencement of employment or along with a bona fide advancement.[175] Unlike the former Oregon law, a new employee must now learn of the agreement two weeks prior to starting employment. This boosts an employee's bargaining power because an employer can no longer surprise a new employee with the covenant on the first day of work. Of course, this does infringe upon an employer's interest because the employer, who may need help immediately, must wait two weeks for the employee to begin work.

The Oregon law that is now in effect also prohibits enforcement of non-compete agreements against employees making the median family income for a four-person family,[176] which is approximately $62,000.[177] As of 2007, median news salaries nationwide did not reach that level. The national median news salaries in television are: $60,000 for news anchors; $53,300 dollars for weathercasters; $40,000 for sports anchors; $29,500 for news reporters; and $29,000 for sports reporters.[178] Compared to Oregon figures, these numbers may be inflated due to the fact that "[o]verall, salaries are highest in the Northeast and lower in the West."[179] As of 2007, the median salaries in radio broadcasting are also below the threshold: $25,000 for news reporters; $29,000 for news anchors; $30,000 for sports anchors; and $19,300 for sports reporters.[180]

There are two potential consequences of this requirement, both of which are detrimental to at least one side of the broadcasting industry. First, this could serve as an effective ban on non-compete agreements for the majority of employees earning below this amount. Employers clearly are not amenable to this result. Secondly, the salary minimum may act as a ceiling on wages for those earning above that figure, which is detrimental to employees. The floor would then "essentially [be] putting a situation in play where employers are still not going to pay employees fair value for their services"; in short, there is "no incentive for employers" to pay other

175. OR. REV. STAT. § 653.295(1)(a)-(b),(2) (2008).

176. OR. REV. STAT. § 653.295(1)(d) (2008).

177. Hunt, *supra* note 91.

178. Bob Papper, *Seize the Pay: As Newsroom Compensation Chases Inflation, Not Everyone Is Able to Catch Up, According to the Latest RTNDA/Ball State University Survey*, COMMUNICATOR, June 2007, at 16-17, *available at* http://www.rtnda.org/media/pdfs/communicator/2007/jun/062007-16-25.pdf.

179. *Id.*

180. *Id.; see also id.* at 22 (stating how broadcasters have voiced additional concern that "radio salary increases during the past five years are only 40 percent of inflation").

employees more than that low floor.[181] Furthermore, a salary requirement does not indicate, at least in common law tradition, that the employer has a protectable business interest.

The next prerequisite for enforcement of the covenants is that the employee must conduct "administrative, executive or professional work[;] . . . [p]erform[] predominantly intellectual, managerial or creative tasks; [and] [e]xercise[] discretion and independent judgment."[182] While employees that perform on-air are explicitly included in the statute, the elusive language does not give guidance as to who else in the industry can be subjected to an agreement. For instance, are producers performing "creative" work? How far down the chain of production does the statute apply, considering that many employees use "independent judgment"? This will create uncertainty in the industry because even employees and employers who are knowledgeable about their legal rights will have difficulty entangling this mess.

The statute also stipulates that an employer has a protectable interest in the employee, meaning that the employer spends money training or advertising the broadcaster in media not owned by the employer, and the employee works as on-air talent.[183] Employee interests are not met here because neither advertising expenses nor training (such as public speaking classes) necessarily gives rise to a legitimate protectable interest, like a trade secret, under traditional common law. Moreover, non-compete agreements are only intended for situations where the employee poses a real threat to an employer's business by potentially bringing secrets to a competitor. Neither voice lessons nor billboards pose this type of threat. In addition, the employer actually benefits from the additional advertising expenses, further indicating that it does not give the employee additional bargaining power.

Next, the employer must pay the employee greater than half of the employee's salary or the minimum income during the period that the employee is forbidden from working.[184] In fact, if some of the requirements are not met, but (1) the employee still earns the minimum income and performs a job of certain characteristics, and (2) the employer is willing to pay that same amount while the covenant is enforced, the agreement is valid.[185] Like the minimum salary, this will either serve as a salary cap or as an effective ban on these covenants "because employers won't want to pay them" while they are restricted from employment.[186]

181. Carpenter, *supra* note 103.
182. OR. REV. STAT. § 653.020(3) (2008).
183. OR. REV. STAT. § 653.295(1)(c)(C)(i) (2008).
184. OR. REV. STAT. § 653.295(1)(c)(C)(ii) (2008).
185. OR. REV. STAT. § 653.295(6) (2008).
186. Row, *supra* note 58.

Combined, these requirements are complicated and neither employees nor employers will be able to predict, with certainty, whether they are unenforceable. Non-compete agreements, both enforceable and unenforceable, were prevalent in 2007.[187] In that year, the number of non-compete agreements dropped from previous years, although it is uncertain whether this decline will continue into the future.[188] Even so, the covenants are still prevalent in the television industry: 89.7% of sports anchors, 89.3% of weathercasters, and 91.5% of news reporters are subject to a non-compete agreement.[189] The figures for radio are also high-90% of news reporters, 70.6% of news anchors, 75% of sports anchors, and 100% of sports reporters are under a non-compete agreement.[190] These statistics reflect the belief that, unlike the management side of the industry, many employees do not know that their agreement may be unenforceable.[191] The complex nature of the new law increases the likelihood that employees will have difficulty discerning their rights and assessing their bargaining power. In addition, given the lack of litigation over these agreements, it is likely that employees will not challenge an unlawful non-compete agreement.

Employers will suffer from this uncertainty too. Aside from its effects on salary, the uncertainty of the law "certainly raised an awareness amongst companies that you can't take non-competes for granted [even if they are within the bounds of the law because there are] so many ways to challenge and get out of them."[192]

Following the law's enactment, companies are trying to adjust in a number of ways. Beginning in 2008, companies will enter into agreements two weeks prior to an employee's start date.[193] In addition, companies may be resorting to other types of agreements covering trade secrets[194] and solicitation. However, these contracts may not be sufficient to please employers. For instance, while some attorneys are turning to non-solicitation agreements for employees with lower wages, "there has to be a great deal of legislation before [the legal community] understand[s] it."[195] The ambiguous body of law has led to fears that if the solicitation agreement is drafted "broadly so a court can construe it as a non-compete, [the] court may void it," especially in an industry where there are few

187. Papper, *supra* note 178, at 24.
188. *Id.*
189. *Id.*
190. *Id.*
191. Row, *supra* note 58 (discussing the common problem of employees not knowing that their non-compete agreement with their employer was unenforceable).
192. *Id.*
193. Monahan, *supra* note 3.
194. Row, *supra* note 58 (discussing the California technology industry's transition to agreements based on trade secret law).
195. *Id.*

customers.[196]

Meanwhile, unions are pushing employers to adopt other "less onerous means" to keep employees that do not "create unemployment or compress salaries," including paying what the market will bear for their services (if that anchor is truly a valued employee); long term contracts; contracts that have first negotiation rights (e.g., during last six months of the contract, an employee will not talk to a competitor and will give his current employer the first opportunity to reach an agreement).[197]

V. CONCLUSION

Non-compete agreements have a longstanding history—one that clearly conveys the purpose of these covenants. The enforcement of non-compete agreements is limited to protecting a legitimate business interest, but only when an employee's mobility is not unduly burdened. However, this new Oregon law does not balance these interests. Instead, the law, a conglomeration of advocated requirements by interest groups, will be detrimental to the broadcasting industry by affecting salaries, increasing uncertainty in the law, and enforcing non-competes based on arbitrary requirements rather than sound policy. Hopefully, this article will compel the Oregon legislature to revisit this issue. After all, a non-compete law should not just have the effect of placing burdensome restrictions on the broadcasting industry, or any industry for that matter; it should be a thoughtful attempt to aid both employers and employees, and in the process, help the industry thrive.

196. *Id.*

197. Carpenter, *supra* note 103 (discussing routes an employer can take that provide similar protections to a non-compete agreement yet reduce the burden on an employee).