



# Employment Agreements, Noncompetition, Nonsolicitation, and Trade Secrets

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# Chapter 3A

## Employment Contracts

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## I. ALL EMPLOYMENT IS CONTRACTUAL

### State Law

“The basis of the employee-employer relationship remains a contractual one . . . .” *Leonard v. Arrow-Tualatin* 76 Or App 120 (1985) (citing *Nordling v. Johnston*, 205 Or 315 (1955)).

### Federal Law

As stated above, the government's sole argument in the court below and in this court is that the relation between government and soldier is that of master and servant, or, at least, a relation analogous thereto. The right of a master to sue for the loss of services of his servant is an old remedy at common law. The action appears to have arisen when the basis of society was that of 'status' and when there was no procedure in the King's courts for enforcing a simple contract. In that early day, the servant was looked upon as a member of the master's family, and, thus, the action was similar to writs of trespass for injury to a wife or child, or for debauching a wife, daughter, or female servant. See Admiralty Commissioners v. S.S. Amerika, (1917) A.C. 38, 44, 45, 54 et seq.; Holdsworth, History of English Law, v. 8, p. 429; Wigmore, Interference with Social Relations, 21 Am.L.Rev. 764, 765-769; Green, Relational Interests, 29 Ill.Law.Rev. 460, 1041, 1042.

Today the master-servant relation is generally based on contract.

*Standard Oil Co. of Cal. v. United States*, 153 F2d 958, 960 (9th Cir 1946), *aff'd*, 332 US 301 (1947)

## II. EXPRESS WRITTEN/ORAL AND IMPLIED CONTRACTS

Employment contracts are generally governed by the same rules of contract interpretation as apply to other contracts. *See Fleming v. Kids and Kin Head Start*, 71 Or App 718 (1985).

Employment contracts may be either **written or oral express contracts**, or **implied contracts**, which are created by conduct between the parties.

## III. IMPLIED CONTRACT DOCTRINE

For an interesting discussion and example of how the implied contract doctrine expanded, then contracted in the employment law context in California, which parallels developments in other jurisdictions, *see* “The Inevitable Demise of the Implied Employment Contract,” Fineman, J., *Berkeley Journal of Employment and Labor Law* (2008).

## IV. CONTRACTS ARISING IN EMPLOYMENT

- Employment Contracts
- Offer letters
- Handbooks
- Policies

- Commission Agreements
- Option Agreements
- Shareholder Agreements (e.g. partnership agreements etc. Note that for purposes of Title VII, shareholders are employees)
- Arbitration Agreements<sup>1</sup>
- Indemnification Clauses
- Loan Agreements
- Severance Agreements (addressed later today, Sept. 30, 2021)
- Collective Bargaining Agreement
- Independent Contractor Agreements

### **Restrictive Covenants (see *Laura Salerno Owens*)**

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<sup>1</sup> “The district court properly determined that the cost-sharing provision was substantively unconscionable. The provision required Capili, a retail employee making \$15 per hour, to pay up to \$10,000 at the outset of arbitration, not including the fees and costs for legal representation. . . . the cost-sharing provision here imposes substantial non-recoverable costs on low-level employees just to get in the door, effectively foreclosing vindication of employees’ rights.” *Capili v. Finish Line, Inc.*, 699 Fed Appx 620, 622 (9th Cir. 2017).

[S]ection 2 of the FAA “establishes an equal-treatment principle: A court may invalidate an arbitration agreement based on ‘generally applicable contract defenses’ like fraud or unconscionability, but not on legal rules that ‘apply only to arbitration . . . . Specifically, the FAA preempts state laws that create notice requirements that apply only to arbitration provisions, and not to contract provisions in general. *See Doctor’s Associates, Inc. v. Casarotto*, 517 U.S. 681, 683, [ ] (1996). [where] the . . . Supreme Court held that the FAA preempted a Montana statute that declared arbitration clauses unenforceable unless notice of the arbitration provision appeared on the first page of the contract in underlined, uppercase letters.” *Id.* at 688, 116 S.Ct. 1652. Like the Montana statute in *Doctor’s Associates, Inc.*, ORS 36.620(5) purports to impose notice requirements “specifically and solely on arbitration provisions.” 517 U.S. at 688, 116 S.Ct. 1652. Accordingly, the FAA preempts that provision, and ORS 36.620(5) provides no basis for invalidating the parties’ arbitration agreement.”

*Lumm v. CC Servs., Inc.*, 290 Or App 39, 44–45 (2018).

- Confidentiality Agreements
- Non-disclosure Agreements
- Invention Assignments
- Noncompetition/nonsolicitation and other Restrictive Covenants

## V. **CONTRACT FORMATION**

*Gaswint v. Case*, 265 Or. 248, 254 (1973) (“The letter agreement did, however, set forth the usual elements of an employment agreement in that it stated the term of employment, the amount of compensation, the place of employment, the type of employment, and a general description of the duties to be performed in that it was stated that plaintiff was to be employed ‘in the capacity of foreman of the corporation's plastics and fiber glass department. . . . Under the facts of this case the trial court did not err in holding that the letter agreement of August 14, 1969, included provisions which constituted a valid and enforceable contract of employment.”

### **Objective Theory of Contracts**

*Arboireau v. Adidas-Salomon*, 347 F.3d 1158, 1163 (9<sup>th</sup> Cir. 2003) (“That undisputed fact is dispositive in precluding the asserted contract claim under Oregon's objective theory of contract. Although there is contested evidence about the Arboireaus' asserted *impression* that Mignano was making a fixed-term offer, their subjective

impression does not bear on the words of Mignano's offer; *see also Arboireau, supra.* re “cultural ignorance” and “mere nondisclosure of material facts can be a form of misrepresentation.”).

Oregon subscribes to the objective theory of contracts. *Kabil Devs. Corp. v. Mignot*, 279 Or. 151, 155–57, 566 P.2d 505, 507–8 (1977) (“objective” theory of contracts operates in Oregon); *Wieck v. Hostetter*, 274 Or.App. 457, 471, 362 P.3d 254, 262 (2015) (“In assessing whether a contract was formed, Oregon applies an objective theory of contracts.”). Under this approach, in “determining whether a contract exists and what its terms are, we examine the parties' objective manifestations of intent, as evidenced by their communications and acts.” *Ken Hood Constr. Co. v. Pac. Coast Constr., Inc.*, 201 Or.App. 568, 578, 120 P.3d 6, 11 (2005), *modified on reconsideration*, 203 Or.App. 768, 126 P.3d 1254 (2006); *see also Wooton v. Viking Distr. Co., Inc.*, 136 Or.App. 56, 59, 899 P.2d 1219, 1222 (1995) (“we examine the parties' objective manifestations of intent, measured by whether a reasonable person would construe a promise from the words and acts of the other.”).

*Glob. Executive Mgmt. Sols., Inc. v. Int'l Bus. Machines Corp.*, 260 F Supp 3d 1345, 1367–68 (D. Or. 2017).

### **Re. “Meeting of the minds”**

We recognize that some commentators consider this phrase “quaintly archaic.” *See* Bryan A. Garner, *Garner's Dictionary of Legal Usage* 571 (3d ed. 2011) (quoting Grant Gilmore's *The Death of Contract* 43 (1974)). In fact, Garner calls “meeting of the minds” outmoded as a matter of substantive law because it “denotes a subjective rather than objective theory of contract.” *Id.* But our case law links a meeting of the minds to “objective evidence and not hidden subjective intent.” *See Schaer v. Webster Cnty.*, 644 N.W.2d 327, 338 (Iowa 2002). So we do not shy away from the phrase.

*Forbes v. Benton Cty. Agric. Soc'y*, 2021 WL 1907130, at \*3 (Iowa Ct App 2021).

Promissory estoppel can best be explained as an equitable substitutionary theory that replaces the consideration theory of contract law with a reasonable reliance theory. The exact genesis of the ascendancy of the doctrine of promissory estoppel is difficult to identify but it seems plain it was contributed to mightily by Grant Gilmore's classic claim in his work, *The Death of Contract* (1974) that the

consideration theory or “bargain theory” was largely invented by Samuel Williston, Christopher Langdell, and Oliver Wendall Holmes in the nineteenth century. Gilmore’s history has been disputed by such scholars as Richard E. Speidel, An Essay on the Reported Death and Continued Vitality of Contract, 27 Stanford Law Review, 1161 (1975)(book review).

*Mitchell v. DynCorp Int’l, LLC*, 2012 WL 12860119, at \*9 (D.N.D. 2012).

### **Note Re Unsigned Contracts (Employee Hoping to Evade the Conditions of Your Unsigned Contract, Don’t Get Your Hopes Up)**

When considering whether a contract is enforceable, the fact that a contract is unsigned is not dispositive. “It is equally efficacious if a written contract is prepared by one party and delivered to the other party, and acquiesced in by the latter without objection.” *W.B. Coppersmith & Sons v. Aetna Ins. Co.*, 222 N.C. 14, 21, 21 S.E.2d 838 (1942); see also *Peddler, Inc. v. Rikard*, 266 S.C. 28, 32, 221 S.E.2d 115 (1975).

*Federated Serv. Ins. Co. v. STIHL Inc.*, 2013 WL 1100728, at \*4 (D. Or. 2013).

### **Note re Counter-offers**

In Oregon, it is settled that “[t]he acceptance of an offer ... must ... correspond to the offer at every point, leaving nothing open for future negotiations.” *C.R. Shaw Wholesale Co. v. Hackbarth*, 102 Or. 80, 201 P. 1066, 1067 (1921) (internal quotation marks omitted); see also *Doughty Appliance, Inc. v. White*, 282 Or. 757, 580 P.2d 186, 187 (1978).

...

Even if we were to assume that Mignano did make an offer for fixed-term employment, Oregon’s parol evidence rule bars the admission of evidence of this alleged oral agreement made before the offer letter was signed if that agreement is used to contradict the offer letter. See, e.g., *State ex rel. Cipriano v. Triad Mech., Inc.*, 144 Or.App. 106, 925 P.2d 918 (1996); *Siegner v. Interstate Prod. Credit Ass’n of Spokane*, 109 Or.App. 417, 820 P.2d 20 (1991). The offer letter’s integration clause (“[The letter] is not to be construed as a contract of employment beyond the terms outlined herein”) bars the admission of the alleged

oral contract preceding the written offer letter.

*Arboireau v. Adidas-Salomon AG*, 347 F3d 1158, 1163 (9th Cir. 2003).

## **VI. CONTRACT MODIFICATION**

A modification of an existing contract requires additional consideration in order for the modification to be binding. *Jole v. Bredbenner*, 95 Or.App. 193, 196, 768 P.2d 433 (1989). Consideration is “the accrual to one party of some right, interest, profit or benefit or some forbearance, detriment, loss or responsibility given, suffered, or undertaken by the other.” *Shelley v. Portland Tug & Barge Co.*, 158 Or. 377, 387, 76 P.2d 477 (1938). Under that definition, “benefit” means that the promisor has, in return for the promise, acquired a legal right to which the promisor would not otherwise be entitled; “detriment” means that the promisee has forborne some legal right that the promisee would otherwise have been entitled to exercise. *Id.* at 388, 76 P.2d 477.

*McPhail v. Milwaukie Lumber Co.*, 165 Or App 596, 600–01 (2000).

### **Implied Acceptance**

As a matter of law, the promise of an at-will employee to continue in an employer's service for some specified future period of time constitutes consideration for an additional benefit promised by the employer. *See Stuart v. Tektronix, Inc.*, 83 Or.App. 139, 143–44, 730 P.2d 619 (1986) (an at-will employee who continues employment in reliance on a promise of a future salary increase may hold the employer liable for a breach of promise).

*Swenson v. Legacy Health System*, 169 Or App 546, 552–54 (2000).

## VII. CONTRACT INTERPRETATION UNDER OREGON LAW

### **Yogman Three-Step Process**

Under Oregon law, the primary objective for any court interpreting a contract is to give effect to the parties' agreed-upon intentions. *See, e.g., Connall v. Felton*, 225 Or. App. 266, 272, 201 P.3d 219 (2009). Oregon courts have established a three-step process for interpreting contracts. *See Yogman v. Parrott*, 325 Or. 358, 361, 937 P.2d 1019 (1997); *Ross Dress For Less, Inc. v. Makarios-Oregon, LLC*, 210 F. Supp. 3d 1259, 1263 (D. Or. 2016). **First**, a court must determine **whether the relevant contract provision is ambiguous**. *See Apeldyn Corp. v. Eidos, LLC*, 943 F. Supp. 2d 1145, 1149 (D. Or. 2013) (citing *McKay's Mkt. of Coos Bay, Inc. v. Pickett*, 212 Or. App. 7, 12, 157 P.3d 291 (2007)).

After finding that a contractual provision is ambiguous, a court proceeds to the second step in the *Yogman* analysis. **At the second step**, the trier of fact must look beyond the four corners of the agreement to determine the parties' mutual intention, if a mutual and common intention in fact existed. *Id.* “At the second step, **the trier of fact examines extrinsic evidence of the contracting parties' intent and construes the disputed contractual provision consistent with that intent**, if such a resolution can be determined.” *Id.* Oregon follows the objective theory of contracts, and thus relevant evidence at step two may include manifestations of intent, including any expressions of any common understanding communicated by the parties. *Id.* Without direct evidence of the parties' intent, a court also may look to the parties' course of dealing or their performance during the term of the contract as relevant circumstantial, or inferential, evidence of their common understanding, if any, of the ambiguous provision. *See Apeldyn*, 943 F. Supp. 2d at 1149; *Yogman*, 325 Or. at 363-64, 937 P.2d 1019.

Without either direct or circumstantial evidence to aid the trier of fact in determining the parties' intent, or if the contract remains ambiguous even after considering that evidence, **the third step is to apply any relevant maxims of construction**. *Id.* at 364, 937 P.2d 1019. When a contractual provision is ambiguous, determining its meaning at steps two and three of the *Yogman* analysis is generally a question of fact not appropriate for resolution at summary judgment. *Dial Temp. Help Serv., Inc. v. DLF Int'l Seeds, Inc.*, 255 Or. App. 609, 611, 298 P.3d 1234 (2013) (noting the general rule that the

meaning of a contract may be disposed of through summary judgment only if the contract is unambiguous).”

*McKenzie Law Firm, P.A. v. Ruby Receptionists, Inc.*, 501 F Supp 3d 965, 971 (D Or 2020) (emph. added).

## Maxims of Construction Examples

- **See, ORS Title 4, Chapter 42, e.g., 42.240 (intent)** (In the construction of an instrument the intention of the parties is to be pursued if possible; and when a general and particular provision are inconsistent, the latter is paramount to the former. So a particular intent shall control a general one that is inconsistent with it.”)
- ***Noscitur a sociis*** – Words are known by the company they keep: *Wayne Land & Mineral Grp. v. Del. River Basin Comm’n*, 894 F.3d 509, 532 (3<sup>rd</sup> Cir. 2018) (“[R]ules of contract interpretation advise us to interpret the meaning of a word by considering the words associated with it.”)
- ***Epressio unius est exclusion alterius*** – when certain matters are mentioned in a contract other similar matters not mentioned were intended to be excluded.
- ***Contra proferentum*** – ambiguities construed against the drafter.

## Statutory Guidance Governing Certain Employment Contracts

**ORS 15.320(3) Oregon law governs certain types of contracts,**

**including:**

“A contract of employment for services to be rendered primarily in Oregon by a resident of Oregon.”

**ORS 20.096(1) reciprocity of attorney’s fees provisions:**

In any action or suit in which a claim is made based on a contract that specifically provides that attorney fees and costs incurred to enforce the provisions of the contract shall be awarded to one of the parties, the party that prevails on the claim shall be entitled to reasonable attorney fees in addition to costs and disbursements, without regard to whether the prevailing party is the party specified in the contract and without regard to whether the prevailing party is a party to the contract.

**ORS 652.360:**

And in furthering a level playing field between employers and employees in matters concerning wage claims, Oregon's wage and hour provisions maintain a unique primacy *vis-à-vis* workplace contracts that might contravene those protections. That is so because ORS 652.360(1) expressly renders those statutes superior to *any contrary means* that an employer might apply to remove itself from the ambit and effect of the wage and hour provisions:

“An employer may not by special contract or *any other means exempt the employer from any provision of or liability or penalty imposed by ORS 652.310 to 652.414 or any statute relating to the payment of wages*, except insofar as the Commissioner of the Bureau of Labor and Industries in writing approves a special contract or other arrangement between the employer and one or more of the employer's employees.”

(Emphasis added.) This court has held that that statutory proscription preventing employers from exempting themselves from “any provision” relating to the payment of wages encompasses, among other things, contract terms that are contrary to those wage provisions. *See Taylor v. Werner Enterprises, Inc.*, 329 Or. 461, 468-69, 988 P.2d 384 (1999) (holding that, under ORS 652.360, where parent company hired long-haul truck driver and wage statutes defined “employer” as one so engaging an employee, the fact that the employment contract expressly identified parent company's wholly-owned subsidiary as truck driver's employer did not exempt parent company from liability for wage claim violation).

*Jones v. Four Corners Rod & Gun Club*, 366 Or 100, 131–32, 456 P3d 616, 633 (2020);

*see also Cordova v. FedEx Ground Package Systems, Inc.*, 104 F.Supp.3d 1119, (D.Or. 2015)

(employers may not “contract away their wage-related obligations” in light of the public policy underlying ORS 652.360, which is applicable to an employer’s legal duties under ORS 652.610).

## VIII. DEFENSES TO CONTRACT ENFORCEMENT

Moreover, a party who seeks to recover damages on a contract must plead and prove its own performance or a valid excuse for its failure to perform. *See Wasserburger v. Amer. Sci. \*\*66 Chem.*, 267 Or. 77, 82, 514 P.2d 1097 (1973). That principle is consistent with *Restatement (Second) of Contracts*, section 237 (1981). With regard to those principles, a material breach of a land sale contract by a party will prevent that party from obtaining strict foreclosure of the contract and excuse the other party's obligation to perform. *Cf. Reeder v. Kay*, 282 Or. 191, 577 P.2d 925 (1978) (holding that an immaterial breach of a land sale contract did not defeat strict foreclosure). Here, plaintiff is not entitled to strict foreclosure of the contract if his failure to repair the plumbing was an unjustified material breach of the parties' agreement.

*Kim v. Park*, 192 Or App 365, 369 (2004), *rev den.*, 338 Or 16 (2005).

### Impossibility

There is a fascinating contradiction inherent in the judicially created impossibility defense which reveals a basic tension in the law. Contracts are born of the need for certainty. They are the merchant's exchange of serendipity for serenity, the deal upon which he can rely, for better or worse, months or years hence. A contract is insurance against change. The early common law enforced the policy by making contractual liability absolute, *see e.g.*, 18 Williston, *The Law of Contracts* § 1939 (3d ed. 1978), on the theory that a contractual duty, unlike a duty imposed by, for example, tort law, is tailored by the party for himself and any eventuality might be provided for in the contract. *Paradine v. Jane*, 82 Eng.Rep. 897 (K.B. 1647).

But change is what impossibility is about. As Professor Gilmore put it, it arises as a defense when “the real world has in some way failed to correspond with the imaginary world hypothesized by the parties to the contract.” G. Gilmore, *The Death of Contract* 81 (1974). By recognizing impossibility as a sort of ‘escape

hatch' from the self-made chamber of contractual duty, the courts have recognized that absolute contractual liability is economically and socially unworkable. Impossibility accommodates the tension between the changes a party bargains to avoid and the changes, unbargained for and radical, that make enforcement of the bargain unwise.

*Cook v. Deltona Corp.*, 753 F.2d 1552, 1557–58 (11th Cir. 1985).

The impracticability<sup>16</sup> doctrine represents an exception to the accepted maxim of *pacta sunt servanda*, in recognition of the fact that certain conditions cannot be met because of unforeseen occurrences. Cf. *Aetna Casualty & Surety Co. v. Murphy*, 206 Conn. 409, 413, 538 A.2d 219 (1988). A party claiming that a supervening event or contingency has prevented, and thus excused, a promised performance must demonstrate that: (1) the event made the performance impracticable; (2) the nonoccurrence of the event was a basic assumption on which the contract was made; (3) the impracticability resulted without the fault of the party seeking to be excused; and (4) the party has not assumed a greater obligation than the law imposes. 2 Restatement (Second), Contracts § 261; E. Farnsworth, Contracts (1982) § 9.6, p. 678. We discuss only the first two prongs of this test in disposing of the plaintiff's argument.

Although courts in recent years have liberalized the requirements for such an excuse; see G. Gilmore, *The Death of Contract* (1972) pp. 80-81; H. Berman, "Excuse for Nonperformance in Light of Contract Practices in International Trade," 63 *Colum.L.Rev.* 1413, 1414 (1963); only in the most exceptional circumstances have courts concluded that a duty is discharged because additional financial burdens make performance less practical than initially contemplated. See, e.g., *Neal-Cooper \*718 Grain Co. v. Texas Gulf Sulphur Co.*, 508 F.2d 283, 294 (7th Cir.1974) (party not allowed "to escape a bad bargain merely because it is burdensome"); *American Trading & Production Corporation v. Shell International Marine, Ltd.*, 453 F.2d 939, 942 (2d Cir.1972) (closing of Suez Canal requiring charterer to sail nearly twice as many miles at a cost of nearly one-third more than the contract price does not excuse performance); *United States v. Wegematic Corporation*, 360 F.2d 674, 676-77 (2d Cir.1966) (duty of manufacturer to produce revolutionary computer system not excused because of "engineering difficulties" requiring two years and \$1.5 million to correct); *Peerless Casualty Co. v. Weymouth Gardens*, 215 F.2d 362, 364 (1st Cir.1954) (increased costs caused by the unexpected outbreak of war does not constitute superior force ending obligation of contract); *Matter of Westinghouse Electric Corporation*, 517 F.Supp. 440, 452-53 (E.D.Va.1981) (duty to remove spent fuel not excused merely because reprocessing of the fuel became unprofitable . . . .

*Dills v. Town of Enfield*, 210 Conn 705, 717–18, 557 (1989).

### **Contracts That Are Illegal or Against Public Policy**

See *Country Mut. Ins. Co. v. Gyllenberg Constr. Inc.*, Case No. CV-03-856-ST, 2004 WL 1490326, at \*8 (“Contracts which are illegal or against public policy are unenforceable.”) (citing *A-1 Sandblasting v. Baiden*, 293 Or. 17, 22 (1982)); see also *Hendrix v. McKee*, 281 Or. 123, 128 (1978) (recognizing that if a contract's purpose is illegal or against public policy, it is unenforceable).

*Seib v. Metro. Life Ins. Co.*, 2021 WL 2449099, at \*4 (D. Or. 2021), *report and recommendation adopted*, 2021 WL 2446168 (D. Or. June 14, 2021).

### **Impossibility, Force Majeure, and Covid 19**

Frustration of purpose applies “when a change in circumstances makes one party's performance virtually worthless to the other, frustrating his purpose in making the contract.” (*PPF Safeguard, LLC v BCR Safeguard Holding, LLC*, 85 AD3d 506, 508 [1st Dept 2011] [quotation marks omitted].) This doctrine is narrow and does not apply unless the frustration is substantial. (*Crown IT Servs., Inc. v Koval-Olsen*, 11 AD3d 263, 265 [1st Dept 2004].) In the context of the COVID—19 pandemic, the Appellate Division, First Department, rejected the defenses of impossibility and frustration of purpose where the tenant, an electronics store that was shuttered for a period because of pandemic-related executive orders but then reopened for curbside service, had failed to pay rent during the pandemic. (*558 Seventh Ave. Corp. v Times Sq. Photo Inc.*, 194 AD3d 561, 562 [1st Dept 2021].)

\*3 Here, defendant argues that operating a restaurant was prohibited by executive order 202.3 and thus impossible. This argument is not persuasive. First, tenant was at all times permitted to run a restaurant, albeit subject to certain restrictions. Second, the issue is not whether tenant was excused from operating the restaurant, but whether tenant was excused from performing its financial lease obligations. In that regard, the pandemic and the changes in tenant's operations necessitated by the executive order disrupted tenant's business. But the subject matter of the contract—the restaurant premises—

remained intact and usable. That the executive order required tenant to rearrange its operations to take-out-and-delivery services, which turned out to be less profitable, does not render performance of tenant's financial obligations impossible.

*45-47-49 Eighth Ave. LLC v. Conti*, 149 N.Y.S. 3d 891 (N.Y. Sup Ct 2021).

In this Fair Labor Standards Act (“FLSA”) collective action, Plaintiffs are 93 office managers (“OMs”) who sued their employer, Defendants Intelident Solutions, LLC and Coast Dental Services, LLC (collectively, “Defendants” or “Coast Dental” or “Defendants”), for unpaid overtime wages. In September 2020, the District Judge approved the parties’ Settlement Agreement as fair, adequate, and reasonable and retained jurisdiction to enforce the settlement for 180 days after the settlement administrator issued checks to Plaintiffs (Doc. 91). The District Judge's Approval Order dismissed the case with prejudice and directed the clerk to administratively close the case (*Id.* at 2-3).

....

In the FLSA context, courts applying Florida law have rejected Covid-19 as a basis for an impossibility of performance defense or the related frustration of purpose defense. *See Pinero v. Zapata*, 306 So.3d 1117, 1118-119 (Fla. 3d DCA 2020) (reversing lower court and enforcing February 2020 settlement agreement regarding partition sale of condos, despite defendant's May 2020 emergency motion arguing Covid-19 made performance impossible); *In re Cinemex USA Real Estate Hldgs., Inc.*, No. 20-14695-BKC-LMI, --- B.R. ----, 2021 WL 564486, at \* (S.D. Fla. Jan. 27, 2021) (enforcing lease against movie theater; theater could have partially reopened in June 2020 but chose not to because reopening at 50% would cause negative operating income).

*McGuire v. Intelident Sols., LLC*, 2021 WL 3195145, at \*3 (M.D. 2021), *report and recommendation adopted*, 2021 WL 3195051 (M.D. Fla. 2021).

This Court concurs, therefore, with the significant majority of Courts across the country which have considered whether a similar post-pandemic claim should be precluded as a claim for educational malpractice and concluded it should not.<sup>25</sup> More specifically, here as in other such actions, Plaintiffs seek reimbursement for services for which they paid but which were not received. Such claims are grounded in contract, not educational malpractice, and are therefore justiciable. *See Smith v. Univ. of Penn.*, 2021 WL 1539493, \*4 (“This is not a claim for educational malpractice. It is simply an action for breach of

contract.”)

*Figueroa v. Point Park Univ.*, 2021 WL 3549327, at \*10 (W.D. Pa. Aug 11, 2021).

## **IX. THE IMPLIED COVENANT OF GOOD FAITH AND FAIR DEALING, QUASI-CONTRACT, AND TORT CLAIMS**

**Breach of implied covenant good faith and fair dealing is generally a contract claim under Oregon law**

“[T]he law imposes a duty of good faith and fair dealing with respect to all contracts to facilitate performance and enforcement of the contract where it is consistent with and in furtherance of the agreed-upon terms of the contract or where it effectuates the reasonable contractual expectations of the parties.” *Brown v. American Property Management Corp.*, 167 Or.App. 53, 63, 1 P.3d 1051 (2000) ([citation omitted] Viewing the record in the light most favorable to plaintiff, we already have concluded that the trial court erred in granting defendants' motion for summary judgment on plaintiff's breach of contract claim, because the record contains evidence from which a factfinder could find that plaintiff and defendants entered into an enforceable agreement for 24 weeks of severance pay. Maintaining that view of the record, we conclude that a factfinder also could find that defendants did not at all times act in good faith and deal fairly with plaintiff in regard to performance of the alleged agreement. For example, a jury *could* find—whether or not it *would* find—that defendants' unilateral actions in purporting to repudiate the agreement frustrated plaintiff's objectively reasonable expectation that defendants would pay her an enhanced severance amount.

*Swenson v. Legacy Health System*, 169 Or App 546, 554–55, 9 P3d 145, 149–50 (2000)

Defendant also asks for summary judgment on Plaintiff's breach of the implied covenant of good faith and fair dealing claim. First, Defendant argues Plaintiff's claim fails because it is foreclosed by Oregon law. ECF 63 at 31. Defendant notes Oregon law does not recognize tort actions between contracting parties, and Defendant therefore argues that an insured may only sue its insurer for breach of contract. *Id.* at 31–32. This argument is plainly without merit.

141516 While it is true that Oregon law generally does not allow for tort actions between contracting parties, *Georgetown Realty, Inc. v. Home Ins. Co.*, 313 Or. 97, 106, 831 P.2d 7 (1992), Plaintiff is not bringing a tort action, but an action in contract. The Oregon Supreme Court recognizes a claim for breach of the implied covenant of good faith and fair dealing as a claim sounding in contract. See *Best v. U.S. Nat. Bank of Or.*, 303 Or. 557, 561, 739 P.2d 554 (1987) (there is an obligation of good faith in the performance and enforcement of every contract). . . . .

*Degon v. USAA Cas. Ins. Co.*, 511 F Supp 3d 1144, 1155 (D. Or. 2021).

In Oregon, “[t]he law imposes a duty of good faith and fair dealing in the performance and enforcement of every contract.” *Hampton Tree Farms, Inc. v. Jewett*, 320 Or. 599, 615, 892 P.2d 683 (1995). The duty of good faith and fair dealing effectuates the reasonable contractual expectations of the parties. See *Best v. U.S. Nat’l Bank*, 303 Or. 557, 565, 739 P.2d 554 (1987). The purpose of the duty “is to prohibit improper behavior in the performance and enforcement of contracts, and to ensure that the parties ‘will refrain from any act that would have the effect of destroying or injuring the right of the other party to receive the fruits of the contract.’” *Klamath Off-Project Water Users, Inc. v. Pacificorp*, 237 Or. App. 434, 445, 240 P.3d 94 (2010) (quoting *Iron Horse Engineering v. Northwest Rubber*, 193 Or. App. 402, 421, 89 P.3d 1249 (2004) ). **A party may violate the covenant of good faith and fair dealing without breaching the express terms of the contract. *Id.* The covenant, however, “‘cannot contradict an express contractual term, nor otherwise provide a remedy for an unpleasantly motivated act that is expressly permitted by the contract.’” *Id.* (quoting *Zygar v. Johnson*, 169 Or. App. 638, 645, 10 P.3d 326 (2000)).**

Although a breach of contract claim and a claim for a breach of the covenant of good faith and fair dealing are related, each is distinct. See *Morrow v. Red Shield Ins. Co.*, 212 Or. App. 653, 663, 159 P.3d 384 (2007) (holding that the insurer was entitled to summary judgment on the plaintiffs’ breach of contract claim but allowing a breach of the duty of good faith and fair dealing claim based on the same facts to proceed to trial . . . [ citation omitted ] The implied duty of good faith in the performance of a contract cannot “contradict an express contractual term or otherwise provide a remedy for an unpleasantly motivated act that is expressly permitted by the contract.” *Glob. Exec. Mgmt. Sols., Inc. v. Int’l Bus. Machs. Corp.*, 260 F.Supp.3d 1345, 1377 (D. Or. 2017) (quotation marks omitted).

*Foraker v. USAA Cas. Ins. Co.*, 345 F Supp 3d 1308, 1309–10 (D Or 2018) (emph. added).

An example of a breach of implied covenant where there is not also a breach of contract often involves open-ended discretion invested in one party to the contract, which must be exercised reasonably and in good faith; e.g. party X retains complete discretion to terminate contract. For example: “We’ll try to have you work for us for an entire year. But there is no guarantee. We retain complete discretion to terminate the relationship at any time.”

Finally, Defendants argue that the contracts expressly granted the City full latitude to decide whether to extend its contracts with Plaintiff, therefore the implied covenant of good faith and fair dealing does not apply.

...

In the context of agreements granting unilateral discretion to one party, a duty of good faith is always implied absent language expressly allowing consent to be withheld “unreasonably.” *Wells Fargo Bank, N.A. v. The Ash Org.*, No. 09–CV–188–MO, 2010 WL 2681675, at \*7–8 (D. Or. July 2, 2010); *see also Tolbert v. First Nat’l Bank of Or.*, 312 Or. 485, 492 (1991). Without such language, which itself makes clear the objectively reasonable expectations of the parties, a party acts in bad faith by exercising its discretion “for purposes not contemplated by the [original] parties.” *Best*, 303 Or. at 563. To determine the purposes contemplated by the original parties, a trier of fact may consider both the terms of the contract and extrinsic evidence. *Gregory Funding, LLC v. Saksoft, Inc.*, No. 3:16–cv–480–SI, 2016 WL 4480693, at \*3 (D. Or. Aug. 24, 2016). While an implied duty of good faith will often exist by operation of law, its precise contours are always case specific and dependent upon specific evidence. *See Arnett v. Bank of America, N.A.*, 874 F. Supp. 2d 1021, 1033–35 (D. Or. 2012).

*Depaul Indus. v. City of Eugene*, 2020 WL 5078758, at \*4–5 (D. Or. 2020).

## Implied Covenant of Good Faith and Fair Dealing In At-Will

### Employment

*See Duncan v. Office Depot*, 973 F.Supp. 1171 (D.Or. 1997) (“In an at will situation, the duty of good faith and fair dealing applies to the performance and enforcement of the contractual terms, with the exception of the right to terminate”).

### Quasi-Contract Claims

Defendant contends that the doctrine of unjust enrichment cannot apply where an express contract exists. Mot. at 22.

However, “[i]t is proper for a party to plead counts in contract and in [q]uantum meruit covering the same course of events in complaint.” *Kashmir Corp. v. Patterson*, 43 Or. App. 45, 48 (1980) (citations omitted).

Quantum meruit is a form of restitution where the plaintiff has performed services for defendant and seeks to recover their fair value. The law, in appropriate situations, will imply a quasi-contract. It is not consensual. It is not a contract. It is a remedial device which the law affords to accomplish justice and prevent unjust enrichment.... Quantum meruit presupposes that no enforceable contract exists. *Id.* at 47–48.<sup>4</sup> “Such alternative pleading may be beneficial to the pleader in the situation where it is faced with a contract which may be void under the statute of frauds, where its performance has been hindered by the defendant, where the facts at trial may show that it did not substantially perform the contract but that it is entitled to the reasonable value of the services furnished, or *where the pleader is unsure of whether it can actually prove the existence of the contract at trial.*” *Id.* at 48 (emphasis added). Thus, a plaintiff may alternatively plead an express contract and quantum meruit, and is not “**required to elect upon which theory plaintiff will rely.**” *Global Exec. Mgmt. Sols., Inc. v. Int’l Bus. Machs., Corp.*, 260 F. Supp. 3d 1345, 1378 (D. Or. 2017).

*Mil-Ray v. EVP Int’l, LLC*, 2020 WL 3317931, at \*10 (D. Or. 2020), *report and recommendation adopted*, 2020 WL 3316979 (D. Or. 2020).

### **Intentional interference with economic/contractual relations.**

*See Porter v. OBA, Inc.*, 180 Or App 207 (2002) (“[t]o state a claim for intentional interference with economic relations, a plaintiff must allege each of the following elements: (1) the existence of a professional or business relationship (which could include, e.g., a contract or a prospective economic advantage), (2) intentional interference with that relationship, (3) by a third-party, (4) accomplished through improper means or for an improper purpose, (5) a causal effect between the interference and damage to the economic relationship, and (6) damages.”) (*Citing McGanty v. Staudenraus*, 321 Or 532 (1995)).

### **Fraud**

Although a prospective employee can bring a fraudulent misrepresentation claim in the context of at-will employment, we emphasize that there are limitations on those claims. Most notably, a plaintiff will have to prove damages to bring a successful claim. *See, e.g., Riley Hill General Contractor*, 303 Or. at 405, 737 P.2d 595 (listing damage to the plaintiff as an element of a fraud claim). Nonetheless, plaintiff’s decision to plead only damages associated with the loss of the corporate job—rather than damages associated with turning down the Medford Mail Tribune job—does not defeat his fraud claim, as the Court of Appeals suggested. *See Cocchiara*, 247 Or.App. at 552, 270 P.3d 350. As noted, the at-will nature of employment does not create a conclusive presumption barring a plaintiff from recovering future lost pay where the employee has been unlawfully terminated from the job, *Tadsen*, 324 Or. at 470–71, 928 P.2d 980, or, as in this case, where plaintiff was never hired as promised or allowed to start work. Because this case was decided on a motion for summary judgment, however, whether plaintiff can sufficiently prove his damages associated with not being hired for the corporate job is not now before this court.

*Cocchiara v. Lithia Motors, Inc.*, 353 Or 282, 299, 297 (2013).

## X. CONTRACT DAMAGES

When a party materially breaches a contract, including breaching the contract's implied covenant of good faith, the non-breaching party generally has a right to recover that party's expectation interest. *Zehr v. Haugen*, 318 Or. 647, 658 (1994). As explained by the Oregon Supreme Court:

The purpose of the remedy of damages for a breach of contract claim is to compensate the plaintiff for the loss *incurred as a result of the defendant's breach*. As pertinent here, that compensation may be accomplished by placing the aggrieved party in the position that he or she would have occupied had the contract been fully performed, that is, by compensating the party according to his or her “expectation interest.”

*Id.* (emphasis added). The phrase “incurred as a result of the defendant's breach” is simply another way to express causation. . . .

Further, consequential damages resulting from the breach are recoverable, if they are reasonably foreseeable. *Id.* (citing *Welch v. U.S. Bancorp*, 286 Or. 673, 70306 (1979) (stating that in a contract action, “consequential damages are recoverable if they are reasonably foreseeable”)).

.....

In addition, the general rule is that the time to measure damages is as of the time of the breach. *Benson v. Weaver*, 102 Or. App. 225, 227 (1990), *opinion adhered to as modified on reconsideration on other grounds*, 103 Or. App. 320 (1990).

Finally, damages for breach of contract cannot be recovered if they are too speculative. *Bixler v. First Nat'l Bank of Oregon*, 49 Or. App. 195, 202 (1980).

Long ago, the Oregon Supreme Court stated that “the evidence must disclose the damages sustained with reasonable certainty, and they must be shown to be the proximate result of defendant's wrongful acts in violation of its contractual duties.” *Parker v. Harris Pine Mills*, 206 Or. 187, 205 (1955). Approximately 20 years later, the Supreme Court explained the term “reasonable certainty” in this context:

What is actually meant by “reasonable certainty” is discussed in *McCormick, Damages 100*, § 27 (1935), in which it is stated, \* \* \* “[I]t appears that the epithet ‘certainty’ is overstrong, and that the standard is a qualified one, of ‘reasonable certainty’ merely, or, in other words, of ‘probability.’”

*Cont'l Plants Corp.*, 274 Or. at 624 (alterations in original). See Restatement (Second) of Contracts § 352 (“Damages are not recoverable for loss beyond an amount that the evidence permits to be established with reasonable certainty.”).

*Foraker v. USAA Cas. Ins. Co.*, 2020 WL 1914935, at \*3–5 (D. Or. 2020), *aff'd*, 2021 WL 3039418 (9th Cir. July 19, 2021).

## **XI. EMPLOYMENT CONTRACT LAW IN PRACTICE**

**A. Rocket Scientists Promised Funding Secure** – but contract language ambiguous: “This appointment expires June 30, 2024, and is renewable. As with all Rocket Scientist appointments, employment is subject to continued availability of funding.”

**B. Change in Control Clauses, e.g. Chief Medical Officer Promised Severance** – more ambiguity + implied covenant, such as 1 year of severance due “after 12 months of continuous service.” *See also Redmond v. Standard Ins. Co.*, 2020 WL 3051344, at \*5 (D Or June 8, 2020) (“Here Plaintiff alleges a loss of pension benefits merely as an element of his damages. . . . the Court concludes Plaintiff's common-law claims for breach of contract and tortious interference do not relate to the administration or regulation of an ERISA benefits plan. Accordingly, the Court concludes Plaintiff's claims are not preempted by ERISA.”); *Marr v. West Corp.*, 310 Neb. 21 (Aug. 27, 2021) (change in control triggered, including 30-year employee assigned to report to 28-year-old VP).

**C. Physician Promised Salary Increases** - promises of salary increases / employee acquiescence, i.e. implied acceptance.

**D. Entrepreneur Promised Ownership Interest** – oral promises of ownership can be complicated and hard to prove re. promises of ownership

**E. Contract for Lifetime Employment?** Lifetime employment promise

Defendant argued that its production manager's statement “as long as \*\*293 we have production to run” meant that a light duty job would exist, not that it would be promised to plaintiff until he retired. The statement could be so understood. But a jury also could find that plaintiff reasonably understood the statement as an assurance that he could return to employment as long as the work he was able to do was needed. Plaintiff was 55 years old at the time, so an inference that the job would last until plaintiff's normal retirement was not unreasonable. We agree with the Court of Appeals that there was some evidence to support the verdict.

*Seibel v. Liberty Homes, Inc.*, 305 Or 362, 365, 752 (1988).

**F. Oral Commissions Agreement / Past Conduct and Practices** - Oral commissions agreements are surprisingly common.

**G. We Need You in Our Office Full-time, but You're An Independent Contractor**

**H. We'll Take Care of You: Indemnification Agreements** -- various considerations, including who controls litigation? (*see also* Joint Defense Agreements).

**I. Section 1981** -- post-Civil War Act amendment, applies only to race claims.

Causation standard is "but for" rather than Title VII "motivating factor" standard:

“... § 1981 follows the general rule. Here, a plaintiff bears the burden of showing that race was a but-for cause of its injury. And, while the materials the plaintiff can rely on to show causation may change as a \*1015 lawsuit progresses from filing to judgment, the burden itself remains constant.

Congress passed the Civil Rights Act of 1866 in the aftermath of the Civil War to vindicate the rights of former slaves. Section 1 of that statute included the language found codified today in § 1981(a), promising that “[a]ll persons ... shall have the same right ... to make and enforce contracts, to sue, be parties, [and] give evidence ... as is enjoyed by white citizens.” 42 U.S.C. § 1981; Civil Rights Act of 1866, 14 Stat. 27.

*Comcast Corp. v. Nat'l Ass'n of African Am.-Owned Media*, 140 S Ct 1009, 1014–15, (2020).

**J. Contract providing for wage and hour protections** – CBAs will often provide for greater wage and hour protections than statutorily-mandated. But implied or express contracts can do the same thing in non-union settings.

*See Fleming v. Kids and Kin Head Start*, 71 Or.App. 718, 721, 693 P.2d 1363 (1985) (holding that plaintiff who alleged wrongful termination in violation of just-cause termination policy in employee handbook stated a claim and noting that “a breach of contract is a breach of contract”); *Wren v. RGIS Inventory Specialists*, 2009 WL 2612307, at \*17–19 (N.D. Cal. 2009) (discussing whether under Oregon law policies in handbooks can create a right to meal breaks).

**K. Workplace Fairness Act Considerations ORS 659A.370 - Workplace**

Fairness Act provides contracts cannot include various provisions, including a non-disparagement term that would prevent an employee or prospective employee from discussing certain matters:

**“659A.370 Employer prohibited from entering into agreements that prevent employee from discussing certain unlawful conduct;**

**exceptions; remedies.** (1) Except as provided in subsections (2) or (4) of this section, it is an unlawful employment practice for an employer to enter into an agreement with an employee or prospective employee, as a condition of employment, continued employment, promotion, compensation or the receipt of benefits, that contains a nondisclosure provision, a nondisparagement provision or any other provision that has the purpose or effect of preventing the employee from disclosing or discussing conduct: [as defined below].”

**L. Class Certification Granted in Breach of Contract Case**

*See McKenzie Law Firm, P.A. v. Ruby Receptionists, Inc.*, 2020 WL 1970812, at

\*4 (D. Or. Apr 24, 2020):

To satisfy the commonality requirement, Plaintiffs must show that the class members suffered the “same injury”—that their claims depend upon a “common contention.” *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011) (quotation

marks omitted). “That common contention, moreover, must be of such a nature that it is capable of classwide resolution—which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke.” *Id.* Class members, however, need not have *every* issue in common: commonality requires only “a single significant question of law or fact” in common. *Mazza v. Am. Honda Motor Co.*, 666 F.3d 581, 589 (9th Cir. 2012); *see also Wal-Mart*, 564 U.S. at 359. Disputes over form contracts typically satisfy the commonality requirement. *See In re: Premera Blue Cross Customer Data Security Breach Litigation*, Case No. 3:15-md-2633-SI, 2019 WL 3410382, at \*18 (D. Or. July 29, 2019) (collecting cases).

*Id.*

**THE END**



## **Chapter 3B**

# **Presentation Slides: Evaluating, Prosecuting, and Defending Noncompete and Trade Secret Litigation**

**LAURA SALERNO OWENS**  
Markowitz Herbold PC  
Portland, Oregon



# Evaluating, Prosecuting, and Defending Non-compete and Trade Secret Litigation

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*Laura Salerno Owens*

Markowitz Herbold PC

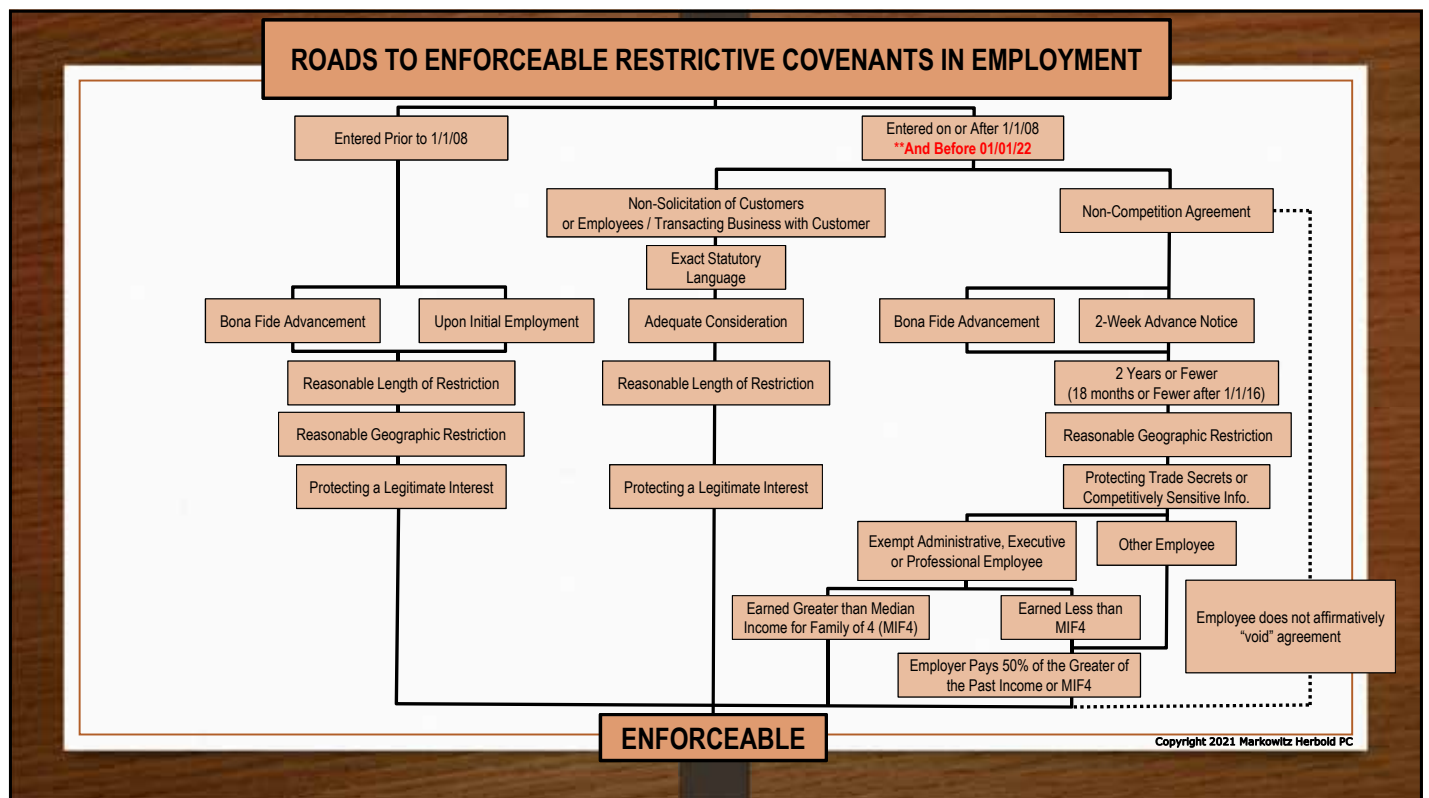
## Introduction

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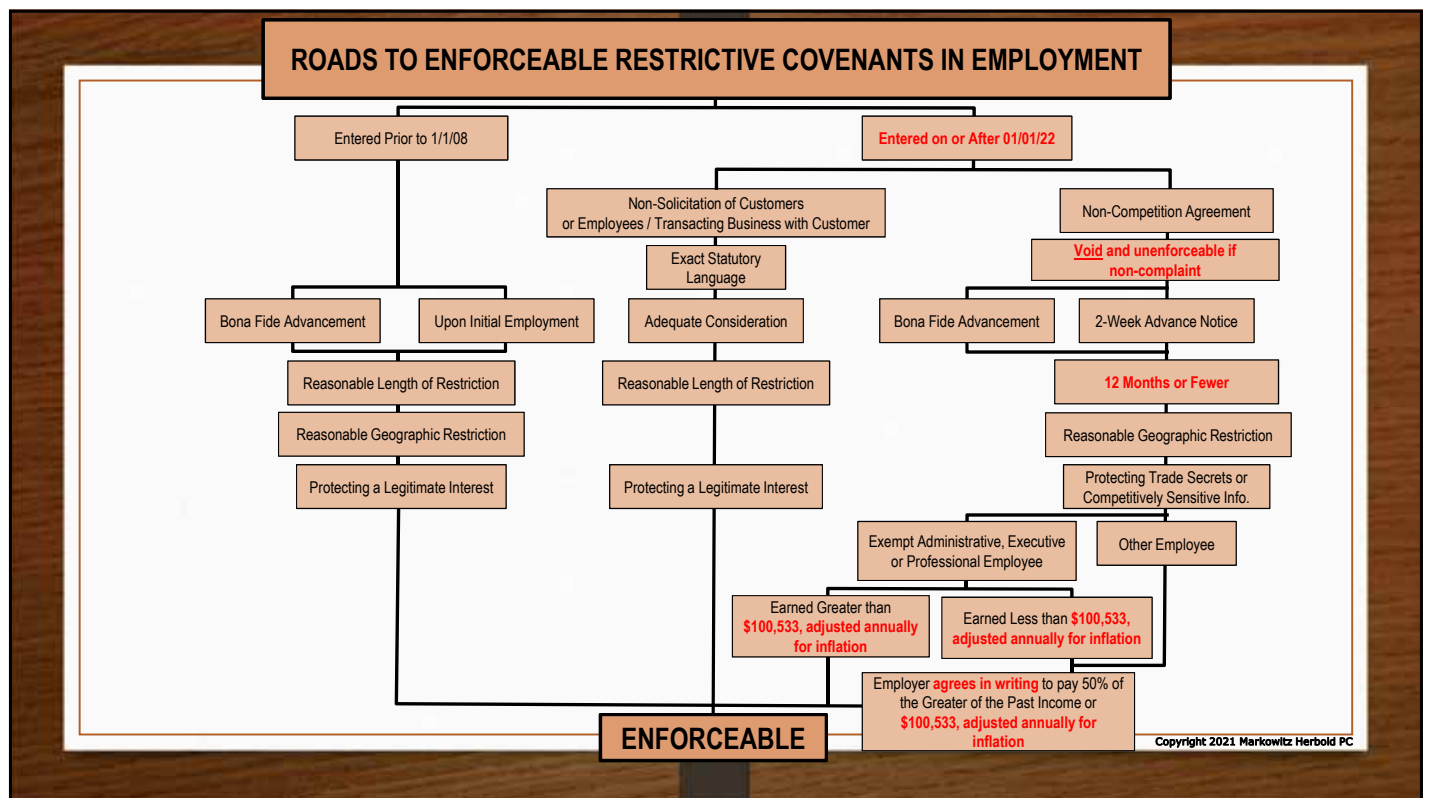
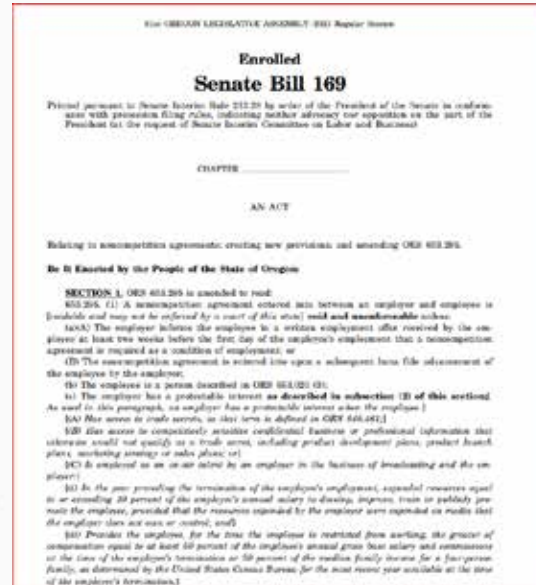
- I. Non-competition and non-solicitation agreements**
- II. Misappropriation of trade secrets**
- III. Prosecuting and defending**

# Non-competition and Non-solicitation Agreements

1. Is there an enforceable non-competition or non-solicitation agreement?
2. Is there anything worth protecting?
3. What can the employee do when there is an enforceable non-competition or non-solicitation agreement?
4. What can the employee do when it is not enforceable?
5. What can employee do to reduce risk of being sued, and be in a better position to defend against a suit?
6. What are some of the most significant cases on these topics?



The law has changed for non-competition agreements entered into on or after **January 1, 2022**



## Misappropriation of Trade Secrets

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1. Does the information satisfy the definition of trade secret under ORS § 646.461? 18 USC § 1839(3)?
2. Is there actual or threatened misappropriation?
3. Identification of trade secrets during discovery?
4. Right to attorney fees?
5. Exemplary damages?
6. Civil seizure under DTSA?

## Prosecuting and Defending

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1. What you need for a TRO
2. How you oppose a TRO

Thank you.

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