Oregon Business Lawyer

Oregon State Bar Business Law Section Newsletter • September 2021

OSB New Lawyers Mentoring Program

A Conversation Between Mentor and Mentee

Since 2011, the Oregon Supreme Court has required all new Oregon State Bar members to participate in the New Lawyers Mentoring Program. The program is designed to provide one-on-one guidance for new lawyers to help them develop a professional and successful law practice. An experienced lawyer is matched with a new one; the two meet regularly to work through a curriculum that covers various facets of lawyering. Recent participants W. Todd Cleek and Marina Elliot talked about their experience and how the pandemic affected it.

Marina: Why did you volunteer to be a mentor?

Todd: In 2008, the Oregon State Bar had a leadership college I attended, and the mentor-mentee program was just getting off the ground. It was voluntary then. When they switched over to a mandatory program for all new admittees, they were having trouble getting enough mentors. I've done mentoring for the Multnomah Bar Association for many, many years and it's always been a great experience. I thought doing it for the state Bar would be very nice, too.

Marina: So the mentor program—I know this year was a little different—normally has a structure and a schedule, right?

Todd: Yes. The Bar gives you mentees a curriculum that we go through and see if we can check the boxes on things to talk about and hypothetical problems to address. The things that have been challenging this last year have been some of the more practical ones, like introducing you to other lawyers. Normally, I would be going to the spring parties and fall open houses at the big firms, and we could go together. That hasn't been possible this year. We met one time in person before it shut down.

What were your expectations from the program, Marina?

Marina: I did a couple of mentor programs in law school, so I thought it would be similar to that, but I was hoping it would be better than that experience–which it ended up being. In law school, I met with the person I was assigned to once or twice and then they kind of fell off the face of the earth and I never heard from them again. It was always nice whenever I would email Todd, he would email me right back—usually within a hour. You were pretty responsive. That was welcoming.

What were *your* expectations?

Todd: Well, I try to keep low expectations, because people have different levels of stick-to-it-ive-ness and desires. I try to let the mentees set the tone for how much time they want to spend together and how much practical question-asking they want to do—how much networking they want to do. It varies a lot, depending upon who the mentees are.

You were in great shape. You already had employment, and you have people around you whom you can ask a lot of those practical questions. But I've had several mentees who have been looking for a job or starting their own practice, and they have different needs and wants. I try to match my expectations to what yours are. I always hope that I learn a few fun things from you, which I usually do.

Now that we've said what our expectations were, did it meet your expectations to some degree?

Marina: Even with all the complications and not being physically able to see you or meet anybody, I still felt like I learned a lot, even in areas in which I was currently practicing.

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Mentor/Mentee

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The Mentor
W. Todd Cleek is a sole practitioner with a focus on business law, estate planning, and real estate. He has practiced law since 1994, and established Cleek Law Office LLC after working at a large Portland firm and being a partner at a boutique firm.

The Mentee
Marina Elliottt is an associate at Sohler Whitman, where she began practicing in September 2019. Her firm handles business, tax, real estate, and estate planning. She focuses on business and tax law.

Thanks to Wendy Beth Oliver for facilitating and recording this conversation.

Learn more about the OSB New Lawyers Mentoring Program at https://www.osbar.org/nlmp

It was nice to have someone else not in my firm to bounce ideas off of and make sure I was understanding a theory or a document or something. I found it really helpful.

I am very much a low-key kind of person, so it actually worked out for me to have a lot of the networking stuff not be available, because I don't tend to network on my own.

Todd: I would say that was the one part that I was a little disappointed with—not from you, but the fact that we couldn't do anything. I enjoy those, as a solo practitioner. After being in big firms, I miss the collegiality you get from being around a lot of your peers.

We did a really good job of connecting in the ways we were able to; but having a meal or a drink with somebody is just one more level to that—particularly when we can bring in other people. I have a new mentee this year, and we actually managed to go have lunch out at a cart pod a couple of times—once with another lawyer.

You did a great job of reaching out to me on a regular basis. I think the Bar gives the material on the mentorship program to you the day of the bar exam, and I think you guys are really distracted. A lot of times when I touch base with a mentee, they say, "I don't even know what we are supposed to do." You were really good about knowing all the curriculum boxes you had to check off, and what your time frames were. You did a good job bird-dogging on all of that stuff.

Marina: My organizational skills came in handy.

Todd: You know, when the Bar decided the mentorship program was going to be mandatory, I had a couple of reservations about it, because it's sort of like saying, "You have to go out and make a friend." Initially I thought, "Wow, that's imposing a lot of expectations about how people are going to behave and get on with one another." I've had some mentees who have never called, but most of the mentees are enthusiastic and I think are going to go on to be great lawyers. I now think it's really good that it has become mandatory.

How's the new lawyering treating you? Was the program helpful in indoctrinating you into our industry?

Marina: It was nice to get to know someone in my practice field whom I don't see every day. I would face an issue and I would know what my boss and one of my colleagues would say, but I wanted to know what somebody else would say. I could ask Todd, and he would usually give a different take on something that I would not originally have thought about. It was nice to have another sounding board for me to make sure that I was thinking about all angles of something—which is important when you're new and learning, and you didn't maybe study tax law in law school and that's all you do.

What challenges did you face as a new lawyer? Did you have a mentor?

Todd: I didn't have a formal one. But over the course of my career I've had different people I've looked to as either a mentor or a patron. When you're working at a big firm, you tend to have one or two partners you get a lot of your work from; so those folks have served in those roles. The interesting thing about practicing law is there's a lot of gray areas, so people don't always approach problems the same way. They don't even land on the same answers to questions which you would think would be black and white. It's good to get some practical advice on how to handle those situations—not so much the legal answer but the professional answer. My favorite mentors have been the folks that have taught me professionalism and how to get along well.

When I was a new lawyer, there were sometimes difficult situations to deal with. You're young. You're idealistic. You thought you knew everything, and it turned out that you didn't always—or people didn't always agree with your interpretation. It's nice to have a community to sort of help you navigate those situations.

One thing I think is important to get out there is that mentors get an awful lot out of this. You get the connection with people. You never know where your mentees are going to wind up. But it's just a really nice way to connect with people who are in my industry, but not necessarily of my immediate generation—and I don't get a chance to do that all the time.

I would encourage folks to think about signing up to be mentors. It doesn't take a tremendous amount of time, and the benefit you get out of it is really worth the time you put into it.

Marina: I would agree from the mentee side of things. When I heard this was mandatory I thought, "OK, fine. I'll do it because I have to." But it was a very rewarding experience to have—to learn from other people I don't see every day, to force myself to branch out and think about other areas that maybe I wasn't thinking about. And it didn't take a lot of time—just meeting every month or so, even if it was just an email stream back and forth. ◆

2021 Legislative Highlights

By the Business Law Section Legislative Subcommittee

Among more than 2,500 bills, memorials, and resolutions introduced during the 2021 annual session of the Oregon legislature were numerous items of interest to the business law community. These included several proposed bills related to COVID-19 relief for businesses, a proposed bill regarding board diversity for public companies, and other bills related to real estate, insurance, and labor matters. Only a fraction of these bills, however, were ultimately passed into law. We have highlighted a few bills that may be of interest to the broader business-law community.

SB 169: Amendments to Oregon's Noncompetition Agreement Statute

On May 21, 2021, Oregon Governor Kate Brown signed Senate Bill 169, amending ORS 653.295, Oregon's statute governing employee noncompete agreements. Effective January 1, 2022, employee noncompete agreements entered on or after that date must comply with four notable changes under the modified statute.

Unlawful noncompetition agreements are void instead of voidable

Under the current version of ORS 653.295, a noncompete agreement that fails to satisfy the requirements of the statute is voidable rather than void—meaning that an employee bears the burden of taking some affirmative step to demonstrate their intent to void an unlawful noncompete agreement. Under the new iteration of the statute, noncompete agreements that fail to comply with all of the requirements of ORS 653.295 will be rendered void and unenforceable, regardless of what steps an employee does or does not take to void the unlawful agreement.

Revised minimum salary requirements

Currently, for a noncompete agreement to be valid, employees must earn a salary that exceeds the median income for a four-person family, as determined by the U.S. Census Bureau. Moving forward under the amended statute, an employee's annual gross salary must exceed $100,533 at the time of the employee's termination, and this compensation amount will be adjusted annually for inflation.

Reduced limit on post-employment restriction period

The current maximum period for post-employment restrictions in a noncompete agreement is 18 months, and any restricted period that exceeds 18 months is voidable rather than void. With the amendments to the statute, the period for post-employment restrictions is limited to 12 months, and any post-employment restriction period that exceeds 12 months is rendered void and unenforceable.

"Garden leave" option for non-qualifying employees

Under the current statute, an employer can impose a noncompete agreement on an otherwise non-qualifying employee—that is, an employee who is not paid on an exempt, salary basis, or an employee who is not paid the statutory minimum compensation mentioned above—by use of the statute's "garden leave" option. Using this option, an employer may unilaterally enforce a noncompete agreement on a non-qualifying employee by paying the employee during the restricted period a minimum of 50% of the employee's gross annual salary at the time of the employee's termination, or 50% of the median income for a four-person family, as determined by the U.S. Census Bureau. The option to enforce noncompete agreements against non-qualifying employees remains available to employers under the amended statute. To exercise this option an employer will be required to confirm in writing payment to the employee that is the greater rate of either 50% of the employee's gross annual salary at the time of the employee's termination, or 50% of $100,533, as adjusted for inflation.

What's unchanged in Oregon's statute?

Outside of the amendments, several existing limitations on noncompete agreements will remain unchanged under the new version of ORS 653.295.

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Legislation *Continued from page 3*

These continuing limitations include—among others—notifying employees in writing two weeks before the first day of employment that a noncompetition agreement is required as a condition of employment, and providing the employee with a signed, written copy of the terms of the noncompetition agreement within 30 days of termination of employment.

Finally, the limitations set out in ORS 653.295 do not apply to all types of restrictive employment agreements. Most notably, under the current and amended statute, the law only applies to employee noncompete agreements and does not apply to confidentiality agreements or agreements not to solicit an employer's customers or employees.

HB 2131: Amendments Regarding Liability for Certain Unpaid Taxes

On June 11, 2021, Governor Brown signed House Bill 2131, amending ORS 307.883, 320.325 and 403.225, effective as of September 25, 2021. Under the current version of these statutes, qualified heavy-equipment providers, transient tax lodging collectors, and providers and sellers of certain emergency telecommunications systems are deemed to hold certain taxes collected in trust for the State of Oregon and for payment to the Oregon Department of Revenue.

As amended, each applicable law now provides that, upon a deficiency in the payment of these taxes deemed to be held in trust, the Department of Revenue may issue a notice of liability to any officer, employee, or member of the relevant entity.

The amendments set out a process, including objection to the notice of liability, request for a conference, and appeals to the tax court. The officers, employees, or members who receive the notice of liability may be held jointly and severally liable for the unpaid taxes.

House Bill 2131 also extends the laws in regard to deemed holding of certain collected taxes in trust—and the new liability provisions—to sellers of petroleum products withdrawn from a bulk facility.

Businesses affected by these amendments should inform their applicable directors, officers, employees, managers, and members of the liability associated with a deficiency in payment of the taxes deemed to be held in trust.

Those individuals and the businesses they serve may wish to confirm the entity's indemnification obligations, and the applicability of any insurance policies intended to cover director, officer, employee, manager, or member liability.

SB 220 and SB 765: Remote Online Notarization and Remote Attestation

On June 30, 2021, with effective dates as of June 15, 2021, Oregon Governor Brown signed Senate Bill 220 and Senate Bill 765, both related to remote notarization and attestation procedures permissible in light of the COVID-19 pandemic.

Senate Bill 765 made permanent the 2020 temporary law permitting remote online notarization. The law allows commissioned notary publics to perform notarial acts remotely in certain circumstances, including registering, completing required training, and using an authorized vendor.

Senate Bill 220 permits and establishes forms of declaration for the remote attestation of documents in the "electronic presence" of another. The allowance for remote attestation of documents does not extend to notarial acts, witnessing the execution of a will, or witnessing of signatures by the circulator of a petition pursuant to certain Oregon laws. ◆

Business Law Section News

New Business Lawyers Subcommittee

Subcommittee members will conduct one-hour panel discussions for law students about the ins and outs of practicing business law.

- University of Oregon School of Law: September 22, 12:00–1:00 PM via Zoom
- Willamette University College of Law: September 23, 12:30–1:20 PM via Zoom
- Lewis and Clark Law School: September 29, 12:00–1:00 PM via Zoom

CLE Subcommittee

Coming in October is a Zoom presentation by Natalie Pattison, attorney with Barran Liebman LLP. She will discuss:

- Legislative updates
- Returning to the workplace
- Vaccines and mask mandates
- OR OSHA's rules on heat and wildfire smoke

Date and Time: Thursday, October 21, 8:30 AM

Save the Date. Please join the Section for its annual CLE program on Thursday, November 4, 2021, from 8:30 AM to 4:30 PM via Zoom. The morning session will explore recent changes under the Biden Administration, including updates on administration policy and executive orders, tax and estate planning issues, and cannabis regulation. The afternoon sessions will explore issues faced by distressed businesses, including buying and selling assets out of bankruptcy, representations and warranties insurance, and business interruption insurance. We will also have one hour of ethics for business lawyers, and the Section will hold its annual business meeting over the lunch hour via Zoom.

Registration information coming soon.

Companies Should Conduct an Annual Review of Their Legal Health

By Scott Rennie, Schmidt & Yee, PC

Scott T. Rennie practices with Schmidt & Yee P.C. in Aloha, Oregon, focusing on corporate law, real estate and land use, and estate planning and probate. A Portland native, Scott enjoys working to help his clients meet their goals and grow their businesses throughout Oregon.

A forward-looking review covers future operational concerns and prepares your client's business to begin its next operational year with freedom to focus on growth and improvement. Annual meetings are backward looking, and generally only cover executive-level matters, financial changes, and significant employment issues, such as bonuses or additional benefits. Therefore, they are not ideal to prepare for future operational concerns or to implement tools to monitor and manage legal changes throughout the year. This article will demonstrate that an annual internal review can set your clients on the right path in its next operational year.

Outside contracts

Companies should maintain a contract-tracking database with detailed information on each contract, including ticklers for any expiration, auto-renewal, termination, or other notice or performance deadlines.

If an agreement is terminating or auto-renewing at year end or in the first quarter, the company must assess whether the contract should be terminated, renegotiated, or renewed. The review process should carefully consider the agreement's effect on business operations. Has the market for the services or products changed such that a price adjustment is justified? Have the company's needs changed so that an adjustment makes business sense? Did the other party sufficiently perform? What, if any, obligations affected the efficiency of the relationship? Was there a breach or regularly occurring conditions which would likely precipitate a breach? Only after answering these questions can the business determine whether an agreement ought to be terminated, renegotiated, or renewed. Once the decision is made, your client can make timely contact with the other party in the appropriate form.

Companies and consumers are becoming more sophisticated in providing service through digital means. The laws and protections customers expect are quickly evolving, and you should ensure that your clients' agreements with independent contractors match their obligations in regard to customer privacy and confidentiality, especially in the digital environment. Therefore, it is important that a company regularly revisit and adjust its agreements with contractors to ensure they reflect the same or similar privacy and confidentiality protections that the company offers its own clients. This assessment should include the terms of service your customers agree to for any digital account servicing. However, privacy and confidentiality protections are not limited to digital services, and should be appropriately tailored to the type of consumer information the company gathers—and adjusted as necessary.

Certain tax matters

Generally, by the end of the third quarter a company should be relatively well positioned to forecast its annual finances. Encourage your clients to contact their accountants sometime early in the fourth quarter to make sure they are on track with gathering necessary information for returns. Appropriate written evidence, such as resolutions or meeting minutes that confirm any ownership or significant operational changes or changes to terms of any security agreements or other debt instruments a client holds. should be maintained and reviewed by counsel.

A company should estimate excise taxes on any fixtures, furniture, and equipment so it can quickly take any necessary action, such as appealing an assessment. Almost all business property tax appeals are brought before the Board of Property Tax Appeals, and appeals must be filed prior to December 31 of the year the assessment is issued (e.g., if an assessment is issued October 2021, the appeal must be filed by December 31, 2021, to be timely).

Businesses should always require a Request for Taxpayer Identification Number and Certification form (W-9) from any contractor. Midway through the fourth quarter is a good time for your clients to review the list of contractors and W-9s.

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Annual Review *Continued from page 5*

An annual internal review can set your clients on the right path in its next operational year.

Any contractor that does not have a matching W-9 should be contacted and asked to supply one, so the business is prepared to process and issue its IRS 1099 forms in January. Generally, any contractor who provided at least $600 of services must receive a 1099. If the company is a wholesaler there may be other 1099 requirements.

While the information that a company's accountant will need varies with the size and operations of the company, in general your clients should provide information on gross income, certain deductible expenses (home office, mileage, phones, licensing/training), retirement matching (IRA, 401(k), profit sharing), tax-preferred employer matched medical expense accounts, operating expenses and cost of goods sold, K-1 data and ownership information (1099 for C-Corp distributions), and new equipment acquired and other asset listings.

Employment matters

Courts and legislatures nationwide continue to target restrictive covenants. With the passage of Senate Bill 169 (SB 169), Oregon is no different. Beginning January 1, 2022, the restricted period for all noncompetition agreements is limited to 12 months, rather than 18.

Further, employees affected by such an agreement must have a salary of at least $103,533, adjusted annually to the consumer price index (CPI). One significant change is that a noncompetition agreement is no longer *voidable*, but rather *void* if it fails to meet the new requirements. Adding a noncompetition agreement to a current employee's employment agreement still requires a bona fide advancement, which has been identified as an increase in both duties and salary. Accordingly, companies should take the necessary steps to appropriately address any concerns about the enforceability of current noncompetition agreements under the pre-SB 169 rules and adjust their use of noncompetition agreements to meet SB 169's new requirements going forward.

Companies should consider whether noncompetition agreements are critical for employees who do not otherwise meet the salary criteria, and assess which roles truly necessitate noncompetition agreements. Your clients' best option to effectively protect its proprietary interests may be stronger non-solicitation and confidentiality agreements that are not subject to SB 169's new requirements.

However, be careful that a non-solicitation agreement is not overly broad, or it risks a court viewing it as a de facto noncompetition agreement subject to the new statutory requirements.

Companies should also review their employee benefits, including retirement and health-care programs. Several health-care notices must be given at the time of hire, but some are required annually thereafter—most of which must be given at or around the open enrollment period (October 15 to December 7 for the 2022 coverage year). The notice requirements are beyond the scope of this article, but merit brief mention as an item to review annually.

If your clients offer medical spending accounts, certain notices must be given annually. These are separate from open enrollment notices. Some medical spending accounts are trustee managed, similar to IRAs, so any notice requirements of the plans are the responsibility of the trustee. However, if your client is making contributions to its employees' plans, the client should be aware of the maximum amount that can be contributed for the coming plan year, so they do not exceed the contribution limits. The contribution limits for various medical spending accounts is beyond the scope of this article, but are an important item to review.

A Qualified Small Employer Health Reimbursement Arrangement (QSEHRA) is a type of medical spending plan that merits special mention. QSEHRAs are limited to businesses with fewer than 50 employees that do not otherwise offer health plans or other savings accounts. The QSEHRA must be renewed annually, with notice of any adjustments to employer contributions or rollover eligibility communicated not less than 90 days prior to the next plan year.

Any client that offers or administers a retirement plan should be aware of and review any required annual notices for accuracy and compliance with the rules of the plan, especially regarding any plan changes. The U.S Department of Labor maintains a reporting and filing frequently asked questions page at https://www.dol.gov/agencies/ebsa/employers-and-advisers/plan-administration-and-compliance/reporting-and-filing, and the IRS maintains a similar page on its website at https://www.irs.gov/retirement-plans/retirement-plan-reporting-and-disclosure.

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Annual Review *Continued from page 6*

Year-end is a good time for companies to check in with their employees.

Year-end is a good time for companies to check in with their employees, even if there is no formal review procedure. According to the Pulse of the American Worker Survey (https://news.prudential.com/presskits/pulse-american-worker-survey-is-this-working.htm) conducted by Prudential Financial, approximately 26% of workers are looking to change jobs once the threat of the pandemic subsides. Are there any employees the client plans to promote into the executive suite, or offer an ownership interest? What is the company's plan for year-end bonuses, and how should they be structured? If a client plans to convert an employee from an hourly wage to a salary to limit its exposure to overtime rules, do the employee's duties qualify for a "white collar" exemption?

Even if your client does not have a standardized review process, brief check-ins with employees may provide valuable insight into its current workforce morale and help retain employees who may be looking for greener pastures.

Moreover, companies can get a jump on filling any roles they want to bring online in the new year, including job interviews, hiring, initial training, or sorting out any required credentials so the new employee is ready to immediately contribute.

More than just retaining its best employees, a company review of employee benefits and any changes to employment matters will serve the company well as it enters its next operational year.

Encourage your clients to discuss any significant changes in the company's management structure, pay, or other incentives to ensure that they are observing the legal formalities required. Year-end is also a good time for the company to review and communicate any changes to fringe benefits for the next operation year.

Special considerations for 2021

CARES payroll deduction

If your clients deferred any (up to 6.2%) of Social Security payroll taxes, the first installment of one-half of the amount deferred is due by December 31, 2021.

Paycheck Protection Program (PPP) loan forgiveness application

Businesses that took PPP funds must apply for forgiveness within ten months from the end of their covered period. The Small Business Administration is currently piloting its direct forgiveness program for businesses that took less than $150,000 from participating lenders.To learn more, visit the SBA Loan Forgiveness webpage: https://www.sba.gov/funding-programs/loans/covid-19-relief-options/paycheck-protection-program/ppp-loan-forgiveness.

Economic Injury Disaster Loan

Applications can be submitted through December 31, 2021, extending awards into 2022, Denials may be appealed within six months.

Oregon teleworkers

The presence of a teleworker in Oregon will not be considered when making the nexus determination for the purpose of imposing the Oregon corporate excise, income, or personal income tax for teleworkers who would have otherwise been absent from the state for work between March 8, 2020 through the later of the expiration of Executive Order 20-67, the expiration of an emergency declaration, a stay-at-home order, or similar government order related to COVID-19 by the state government for an employee's assigned work location, or December 31, 2021.

Oregon payroll relief

Employers who were in good standing prior to the pandemic (March 2020) and have seen an increase in unemployment taxes of or greater than 0.5% may apply for a payment arrangement with the Oregon Employment Department to avoid late fees and penalties. Employers will still be required to file quarterly payroll reports, pay two-thirds of any unemployment insurance taxes imposed upfront, and enter a monthly payment plan to pay the remaining taxes in full by June 30, 2022.

In conclusion

Clients face different challenges daily. A standardized annual legal review process allows them to monitor changes more effectively throughout the year and frees up time to concentrate on growing their business and deal with any unexpected matters which may arise. ◆

If it is of the Essence, Make Time Matter

By Mick Harris, Tonkon Torp LLP

Mick Harris is a second-year attorney at Tonkon Torp in Portland. He graduated from Willamette University College of Law in 2019. Before entering law school, he worked as a political consultant, helping clients pass meaningful legislation and developing winning campaign strategies for candidates on the state and local level. Mick currently serves on the boards of the Oregon Lawyers Chapter of the American Constitution Society, the College Possible Ambassadors, and Community Services Inc.

This article is the third in a series on miscellaneous contract provisions of common business, commercial, and real-estate agreements. When disputes arise, these overlooked provisions can determine the fate of a transaction. If not closely examined in the context of every agreement, they can provide grounds for litigation or threats of litigation.

Clients and attorneys often squabble over timing issues as they navigate transactions. While it is always worthwhile to step back and place things in perspective (e.g., Is that small extension of the closing date necessarily the end of the world?), there is no question that timing issues matter. This is why contracts must be carefully drafted to ensure that all parties understand timing expectations and obligations. To that point, including a clear Time is of the Essence (TE) provision can be crucial to establishing whether the dates and timelines in a contract are hard and fast or merely guidelines.

Of the miscellaneous contract provisions covered in this series, TEs may at first glance seem like the simplest. However, they are complex in their own right and important to understand. A layperson who is told that "time is of the essence" may feel like they are on the receiving end of nothing more than a curt reminder to perform their obligations in a timely fashion. Yet from a legal perspective, an enforceable TE clause means that a breaching party's failure to comply in a timely manner with underlying contractual obligations will result in a material breach.[1] This stands in contrast to provisions that require obligations to be met within a "reasonable" time frame and which inherently allow for greater flexibility.

When a TE is included in a contract, the time for performance is treated as a material obligation. This means that a delay in performance or a failure to perform results in a breach of that material clause. If that happens, the injured party may be entitled to a claim for breach of contract, damages incurred by the delay or failure to perform, or the right to terminate the contract altogether.[2]

Oregon courts recognize the validity of TEs and acknowledge that either party can waive a TE clause that benefits both parties.[3] This makes intuitive sense, because there are circumstances in which parties to an agreement do not intend for the smallest delay to qualify as a material breach. For that reason, some courts will not give literal effect to the phrase, although they would likely enforce a more specific statement (e.g., "any delay in delivery is a material breach").[4]

Given the importance of timing in transactions, consequences for noncompliance, and the ability to waive a TE if it is mutually beneficial, isn't it a no-brainer for a drafting attorney to include a TE? The answer depends on the circumstances. There may be instances when a TE clause creates problems, particularly if you have a client that is likely to struggle to meet deadlines imposed by a contract. In that case, a TE might be better left out. However, if you're going to include a TE in a contract, there are ways to make this provision stronger as a matter of practice.

Some scholars have debated the value of these provisions when they are stated too generally. In her article, "Say the Magic Word: A Rhetorical Analysis of Contract Drafting Choices," Lori D. Johnson discusses some of the issues associated with TEs with a look to the work of Ken Adams, a leading light on contract drafting. According to Johnson:

> Adams notes that time is of the essence clauses are often misused by drafters who mistakenly include an overbroad statement that "Time is of the essence of this agreement." This construction is "too general," as it fails to specifically identify a particular contract provision for which the failure to timely perform is intended by the parties to result in a material breach.

In order to avoid contract construction that results in an ineffective TE provision, Adams proposes language that clarifies exact time constraints and ties those constraints to particular provisions. A good example is the Drop-Dead Date, which is commonly included in M&A transactions. For example: "Time is of the essence with regard to the Drop-Dead Date," with the Drop-Dead Date being a specified date by which a transaction agreement will terminate if the transaction is not closed and a party elects to terminate the agreement. [5]

When thoughtfully drafted, a TE clause can be a simple, yet powerful, provision. When tied to specific provisions, a TE gains gravity, becoming less of a boilerplate addition and more of a meaningful tool to support a successful transaction. ◆

Endnotes

1. "Time of the Essence in Commercial Contracts," *Practical Law Practice Note* 6-519-5141.
2. *Id.*
3. *Soliz v. Jimenez*, 222 Or App 251, 259, 193 P3d 34 (2008); *Alk v. Lanini*, 61 Or App 158, 161, 656 P2d 367 (1982).
4. Stephen L. Sepinuck, "Gotcha!: Caught in the Explicitness Trap," 8 *Transactional Law*. 1, 1–2 (2018).
5. Lori D. Johnson, "Say the Magic Word: A Rhetorical Analysis of Contract Drafting Choices," 65 *Syracuse Law Review*. 451, 470 (2015).

Loans and Grants for Businesses

The following is a non-exhaustive list of governmental loans and grants available to businesses. Details of the programs, including eligibility requirements and application processes, can be found on the cited websites.

7(a) Small Business Loan

7(a) loans are the most basic of the Small Business Administration's (SBA) business loan programs. The loan program is designed to assist for-profit businesses that are not able to get financing from other resources.
https://www.sba.gov/funding-programs/loans/7a-loans

Economic Injury Disaster Loan and Targeted EIDL Advances

The Economic Injury Disaster Loan (EIDL) program can provide up to $2 million of financial assistance (actual loan amounts are based on amount of economic injury) to small businesses or private, non-profit organizations that suffer substantial economic injury as a result of the declared disaster, regardless of whether the applicant sustained physical damage.
https://www.sba.gov/funding-programs/loans/covid-19-relief-options/eidl/covid-19-eidl

EIDL applicants may also be eligible to receive up to $15,000 in funding from SBA that does not need to be repaid. These "advances" are similar to grants, but without the typical requirements that come with a U.S. government grant.

To receive an advance, an applicant must first apply for a COVID-19 EIDL. The applicant need not accept the loan or be approved for the loan to receive an advance. After the application is submitted, SBA will invite the applicant via email to apply for one of the advance programs if the business is located in a low-income area.
https://www.sba.gov/funding-programs/loans/covid-19-relief-options/eidl/targeted-eidl-advance-supplemental-targeted-advance

Certified Development Company 504 Loan Program

The CDC/504 loan program provides growing businesses with long-term, fixed-rate financing for major fixed assets. For example, a 504 loan can be used for the purchase or construction of: existing buildings or land, new facilities, or long-term machinery or equipment.

It can also be used for the improvement or modernization of land, streets, utilities, parking lots, landscaping, and existing facilities.
https://www.govloans.gov/loans/certified-development-company-(cdc)-(504)-loan-program/

Indian Loan Guaranty, Insurance, and Interest Subsidy Program

The purpose of the program is to help Indian-owned businesses obtain commercially-reasonable financing from private sources.
https://www.govloans.gov/loans/indian-loan-guaranty-insurance-and-interest-subsidy-program/

Paycheck Protection Program

The Paycheck Protection Program (PPP) ended on May 31, 2021. Existing borrowers may be eligible for PPP loan forgiveness.
https://www.sba.gov/funding-programs/loans/covid-19-relief-options/paycheck-protection-program/ppp-loan-forgiveness

Portland Small Business Repair Grants

The Local Small Business Repair Grants provide one-time emergency funds using existing tax increment funding (TIF) resources and funding allocated by Portland City Council to provide up to $10,000 to local small businesses needing immediate repairs. Grants are available to Portland businesses that have sustained physical damage—such as broken windows or doors, graffiti, or sign damage – since March 8, 2020.
https://prosperportland.us/portfolio-items/local-small-business-repair-reopening-grant/

Portland Bureau of Transportation (PBOT) Healthy Businesses Permit Program

PBOT's Healthy Businesses program allows local businesses to use street space to safely serve their customers. These temporary outdoor spaces have allowed businesses to create space for social distancing and accommodate customers who prefer to shop and dine outdoors. PBOT requires permittees to follow specific design requirements and permit conditions. Program permit fees are waived through June 30, 2022.
https://www.portland.gov/transportation/safestreetspdx/hb-requirements-conditions

Job Postings

Buckley Law

Shareholder – Business

Buckley Law is looking for shareholder-level attorneys to join our firm, particularly as senior partners begin transitions of their practices over the next two-to-five years. With a collegial group of partners in place, strong support staff, and talented associates, this is a great opportunity for entrepreneurial, business-oriented, and client-focused attorneys to manage and cultivate already successful books of business.

The ideal attorney (shareholder) will have at least 10 years of any of the following: estate planning, business, real estate, or tax experience and superior client management skills, client service focus, and track record of providing value to clients.

Shareholder – Real Estate

Buckley Law is looking to add to our Real Estate Transaction/Litigation group and looking for a shareholder-level real estate attorney who can manage a team, clients, and a book of business, and be a part of our continued growth.

The ideal attorney (shareholder) will have 8+ years as a practicing attorney, with experience in real estate transactions and litigation and an ability to manage a larger volume of cases.

Our employees have voted Buckley Law as one of the top workplaces in Oregon and a best company to work for in Oregon. Please send a resume to resumes@buckley-law.com with a cover letter and your targeted compensation range. Find out more about this position and Buckley Law on our careers page: https://www.buckley-law.com/our-firm/careers/

Sussman Shank LLP

Trust and Estate Tax Attorney

We have an immediate opening in our business practice group for a motivated tax lawyer who focuses on taxable estate planning, trust and estate administration, closely-held business succession planning, and related transactions. The position requires strong academic credentials and excellent written and oral communication skills.

An ideal candidate has completed an LLM program in tax (or has comparable tax experience), has experience working directly with high-net-worth clients, and has the capacity for, and shows dedication to, business and practice development.

- Competitive benefits and compensation.
- Ranked one of the 100 Best Companies to Work For in Oregon
- Ranked as one of the Oregon's 100 Best Green Companies to Work For
- Recognized as one of Portland's Most Admired Companies.
- Equal Opportunity Employer committed to diversity and inclusion.

Please address cover letters and resumes to our Chief Operating Officer, Steven T. Seguin at sseguin@sussmanshank.com

Tonkon Torp LLP

Environmental and natural resources attorney

The qualified candidate will have at least two years' legal experience and experience assisting clients with environmental regulatory compliance, including advising, permitting, and working with administrative agencies, such as the Clean Water Act, RCRA, Superfund, the Clean Air Act, the Endangered Species Act, and their state equivalents. Experience in environmental and resource acquisition support for M&A and real estate transactions, as well as a technical or scientific background, would also be an advantage.

We offer:

- Competitive salary and benefits commensurate with local, large firms
- A unique culture that values collaboration in everything we do
- A diverse and inclusive workplace and opportunities to give back to the communities in which we live and work
- Varied career paths supported by professional development programs and resources
- Opportunities for pro bono activities

Submit a short cover letter and resume to Recruiting@tonkon.com.

Oregon State Bar Business Law Section

The mission of the Oregon State Bar Business Law Section is to provide excellent service to the diverse group of business law practitioners throughout the State of Oregon by providing regular, timely, and useful information about the practice of business law, promoting good business lawyering and professionalism, fostering communication and networking among our members, advocating improvement of business law, and supporting Oregon's business infrastructure and business community.