



NEW ILLINOIS LAW LIMITS ENFORCEABILITY OF NON-COMPETES & NON-SOLICITS

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The Illinois General Assembly recently passed, and Governor Pritzker is expected to sign, an amendment to the Illinois Freedom to Work Act (the “Act”) which voids certain non-competition and non-solicitation agreements for middle-class workers and codifies Illinois common law for all other such agreements (collectively, “restrictive covenants”). The Act also requires employees be provided with 14 days to review and must be advised to consult an attorney before entering such an agreement. It also authorizes the employee to recover its attorneys’ fees and costs if it prevails on a lawsuit brought by its employer to enforce the agreement. Finally, the Act allows a Court to “blue-pencil” or revise an agreement, rather than reject it entirely, in order to protect a legitimate business interest.

New Limitations on Restrictive Covenants

Effective January 1, 2022, “[n]o employer shall enter into a covenant not to compete with any employee unless the employee’s actual or expected annualized rate of earnings exceeds \$75,000 per year,” and “[n]o employer shall enter into a covenant not to solicit with any employee unless the employee’s actual or expected annualized rate of earnings exceeds \$45,000 per year.” These salary thresholds will increase slightly every five years through 2037.

A “covenant not to compete” means an agreement that restricts: (1) any work for another employer for a specified period of time; (2) any work in a specified geographical area; or (3) work for another employer that is similar to the employee’s work for the former employer. A “covenant not to solicit” means an agreement that: “(1) restricts the employee from soliciting for employment the employer’s employees; or (2) restricts the employee from soliciting, for the purpose of selling products or services of any kind to, or from interfering with the employer’s relationships with, the

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employer's clients, prospective clients, vendors, prospective vendors, suppliers, prospective suppliers, or other business relationships.”

Notably, a “covenant not to compete” expressly does not include a confidentiality agreement, an agreement prohibiting the use or disclosure of trade secrets or inventions, invention assignment agreements, and agreements entered into by a person purchasing or selling the goodwill of a business or otherwise acquiring or disposing of an ownership interest. These agreements will continue to play an important role in the protection of employers’ proprietary information.

Codification of Existing Illinois Common Law

While the Act now holds certain agreements void and unenforceable, it codifies Illinois common law for all other such agreements by writing the holdings of recent appellate court decisions into the statute books. The Act requires that to enforce a restrictive covenant, it must be supported by “adequate consideration” which it defines as two years of employment or “a period of employment plus additional professional or financial benefits...” The restrictive covenant must also be ancillary to a valid employment relationship, must not impose an undue hardship on the employee, and must not be injurious to the public.

The Act also requires that the restrictive covenant be no greater than is required for the protection of a legitimate business interest, which is defined in the Act to require the Court’s consideration of the totality of the facts and circumstances. Factors to be considered include:

- The employee’s exposure to the employer’s customer relationships or other employees;
- The near-permanence of customer relationships,
- The employee’s acquisition, use, or knowledge of confidential information through the employee’s employment; and
- The time, place and scope of the restrictions.

New Mandatory Requirements for Restrictive Covenants

New statutory requirements void the restrictive covenants unless:

- The employer advises the employee in writing to consult with an attorney before entering into the covenant; and
- The employer provides the employee at least 14 calendar days to review the covenant before being required to sign.

If an employee prevails on a claim to enforce a restrictive covenant filed by the employer, the employee shall recover from the employer its attorneys’ fees and costs. Finally, the Act authorizes a court to reform or sever provisions of a restrictive covenant, rather than hold it entirely unenforceable.

The Act does not apply to any agreements entered into before January 1, 2022. It is, nonetheless, important to ensure that existing agreements generally conform with the Act as the stated public policy of Illinois and as codification of existing precedential case law. Going forward, such agreements must



conform with the Act in order to be enforceable in Court.