Blog Post

Illinois Imposes New Limits on Non-Competes Effective January 1

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Illinois employers will be far more restricted in their ability to bind employees to non-competition and non-solicitation agreements as result of an amendment to the Illinois law governing such agreements. The law amends the Illinois Freedom to Work Act effective January 1, 2022, and imposes some initial hurdles and eligibility conditions on agreements executed after that date. It provides more clarity and potentially less litigation over non-competition and non-solicitation agreements, as well as a greater likelihood of enforcement for agreements that comply with the law.

We provide a summary of the amendments below:

Salary Prohibitions

Currently, Illinois law prohibits employers from entering into non-compete agreements with employees who earn $13.00 per hour or less. The new law prohibits non-compete agreements for employees earning $75,000 per year or less. The law likewise prohibits customer and co-worker non-solicit agreements for employees earning $45,000 per year or less. These salary thresholds increase over time (through 2037) to account for inflation.

Industry Prohibitions

The amendment prohibits non-compete agreements for individuals working in construction, except those

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who primarily perform management, engineering, architectural, design or sales functions or those who are shareholders, partners, or owners of a company in the construction industry. It also prohibits non-compete agreements for individuals covered by a collective bargaining agreement under the Illinois Public Labor Relations Act or the Illinois Educational Labor Relations Act.

Required Conditions for Signature

The amendment requires that employees be given at least 14 calendar days to review the agreement. The employees may, however, sign in fewer than 14 days if they wish. The law also requires that employees be advised in writing to consult with counsel before signing the agreement. If an employer does not comply with these conditions, the agreement will be deemed illegal and void.

Conditions for Enforcement:

The amendment provides that non-compete and non-solicit agreements are illegal and void unless: (1) the employee receives adequate consideration (explained below); (2) the covenant is ancillary to a valid employment relationship; (3) the covenant is no greater than is required for the protection of a legitimate business interest of the employer (discussed below); (4) the covenant does not impose undue hardship on the employee; and (5) the covenant is not injurious to the public.

Consideration

Consideration has been a key issue for Illinois employers. Illinois case law provides that at-will employment alone is not sufficient consideration to support a non-compete agreement, but two years of employment is sufficient. Case law recognizes that other consideration could also be sufficient. The new law defines “adequate consideration” to mean: (1) two years of employment after the employee signs the non-compete or non-solicit; or (2) other “consideration adequate to support an agreement to

not compete or to not solicit, which consideration can consist of a period of employment plus additional professional or financial benefits or merely professional or financial benefits adequate by themselves." The meaning of "professional or financial benefits" will undoubtedly be the subject of litigation in the future, but it seems likely that such benefits could include a raise, a bonus, an award of stock options or phantom equity, a promotion, as well as other professional benefits, such as training and education.

Legitimate business interest

The new law codifies the requirement articulated by Illinois case law that a restrictive covenant must be supported by a legitimate business interest. Such interests would typically include protection of the employer's trade secrets or customer relationships. The law provides that when determining whether a legitimate business interest exists sufficient to support a post-employment restrictive covenant, "the totality of the facts and circumstances of the individual case shall be considered" and "each situation must be determined on its own particular facts." Relevant factors 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, and the time, place, and scope of restrictions.

Blue Penciling

The law cautions against wholly rewriting contracts but states that courts have discretion to choose to reform or sever provisions of restrictive covenants rather than holding them unenforceable. Relevant factors in determining whether reformation is appropriate include the fairness of the restraints as originally written, whether the original restriction reflects a good-faith effort to protect a legitimate business interest of the employer, the extent of such reformation, and whether the parties included a clause authorizing reformation in the agreement.

Attorneys' Fees

In addition to the remedies available under the agreement or by statute, the new law provides for an employee to recover his or her reasonable attorneys' fees if the employee prevails in a claim filed by an employer seeking to enforce a non-compete or non-solicit agreement.

Exceptions

The law does not apply to certain kinds of agreements, including:

- confidentiality agreements;
- agreements prohibiting the use or disclosure of trade secrets;
- invention assignment agreements;
- garden leave clauses (agreements that require a specific period of advance notice of termination, during which time the employee remains employed and continues be compensated);
- restrictive covenants entered into as part of a business acquisition or sale, including acquiring or disposing of an ownership interest in a business; and
- agreements where an employee agrees not to reapply for employment to the same employer after termination.

The law also restricts an employer's ability to enter into restrictive covenants with employees who are terminated, laid off, or furloughed due to the COVID-19 pandemic or similar circumstances. It provides that restrictive covenants with such employees are prohibited unless enforcement includes compensation equivalent to the employee's base salary at termination for the period of the enforcement (minus compensation the employee earns through subsequent employment).

Enforcement

The law permits the Illinois Attorney General's office to file or intervene in litigation where the attorney general has "reasonable cause to believe that any person or entity is engaged in a pattern and practice prohibited by law." The attorney general is also empowered to investigate potential violations and to request a civil penalty in litigation.

Recommendations

Illinois employers should consider taking a few steps before the law takes effect next month. First, employers should review their current agreements and as appropriate, enter into new agreements before next month. Second, for all agreements executed on or after January 1, 2022, Illinois employers must revise the agreements to comply with the law. Third, employers should consider moving to garden leave agreements, which are carved out of the bill.

For assistance with Illinois non-compete agreements or other workplace issues, contact your Akerman attorney.

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