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JULY 19, 2023 – ALERTS

The Future of Restrictive Covenants in Illinois



Third in a series of alerts about recent changes in Illinois employment law

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With federal regulations becoming stricter and the potential near erasure of non-competes under state laws such as that of New York, it is important to take a renewed look at legal requirements surrounding restrictive covenants and their enforceability. In effect in January 2023, the new Illinois restrictive covenants law took effect, which allows employees to compete and work for competitors after leaving their current employer. The Illinois Freedom of Information Act (IFIA) also provides an unclear provision regarding requirements for

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standards and restrictions applying specifically to non-solicitation covenants.

As background, the Illinois Freedom to Work Act of 2017 initially prohibited employers from entering into non-compete agreements with low-wage employees. “Low wage employees” were defined as employees whose earnings did not exceed the greater of the hourly rate equal to the minimum wage required by the applicable federal, state, or local minimum wage law or \$13 per hour.

The new restrictions do away with the low-wage-employee requirement and invalidate and make unenforceable covenants not to compete unless the employee’s actual or expected annualized rate of earnings exceeds \$75,000 per year as of January 1, 2022, with the salary threshold increasing every five years by \$5,000 until the threshold reaches \$90,000 on January 1, 2037. With the COVID-19 illness lingering, it is important to remember that special rules apply for situations like the pandemic. A covenant not to compete is void and illegal for any employee terminated, furloughed or laid off as the result of business circumstances or governmental orders related to the COVID-19 pandemic, or under circumstances similar to the COVID-19 pandemic, *unless* enforcement of the covenant not to compete includes compensation equivalent to the employee's base salary at the time of termination for the period of enforcement minus any compensation earned through subsequent employment during the period of the covenant’s enforcement.

The amendments also render non-compete or non-solicit agreements void unless:

1. The employee receives adequate consideration
2. The agreement is in writing
3. The restriction is necessary for the employer to protect a legitimate business interest
4. The agreement is not unduly restrictive
5. The agreement is not unconscionable

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ILLINOIS EMPLOYMENT LAW: A YEAR IN REVIEW



- Chapter 1: [A Year in Review for Illinois Employers: Obligations You May Have Missed](#)
- Chapter 2: [Illinois Employers Must Act to Comply With New Equitable Employment Laws](#)
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The amendments also place restrictions for the first time on covenants not to solicit the employer's employees or clients, prospective clients, vendors, or other business relationships. A covenant not to solicit is not valid or enforceable unless the employee's actual or expected annualized rate of earnings exceeds \$45,000 per year as of January 1, 2022. The salary threshold amount will increase by \$2,500 every five years until it reaches \$52,000 on January 1, 2037.

Further, both types of restrictive covenant provisions are now illegal and void unless (1) the employer advises the employee in writing to consult with an attorney before entering into the covenant and (2) the employer provides the employee with a copy of the covenant at least 14 calendar days before the commencement of the employee's employment or the employer provides the employee with at least 14 calendar days to review the covenant.

In addition to expanding protections beyond low-wage employees, the bill clarified that a "covenant not to compete" does not include:

1. a covenant not to solicit
2. a confidentiality agreement or covenant
3. a covenant or agreement prohibiting use or disclosure of trade secrets or inventions
4. invention assignment agreements or covenants
5. a covenant or agreement entered into by a person purchasing or selling the goodwill of a business or otherwise acquiring or disposing of an ownership interest
6. clauses or an agreement between an employer and an employee requiring advance notice of termination of employment, which notice must be provided to the employee by the employer and the employee
7. agreements between an employer and an employee regarding employment or compensation of the employee

Remedies

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In addition to any remedies available under any agreement between an employer and an employee or under any other statute, in a civil action or arbitration filed by an employer (including, but not limited to, a complaint or counterclaim), if an employee prevails on a claim to enforce a covenant not to compete or a covenant not to solicit, the employee will recover from the employer all costs and all reasonable attorney fees regarding such claim to enforce a covenant not to compete or a covenant not to solicit, and the court or arbitrator may award appropriate relief.

Recommended Next Steps

Employers must review any current employment agreement templates and revise those agreements to comply with the amendments. Further, employers must review any agreements provided to employees since January 1, 2022, to determine if any agreement is considered void and unenforceable.

Next Up: The Illinois Supreme Court, BIPA Clarifications and What Employers Need to Know

Read the Previous Installments:

[A Year in Review for Illinois Employers: Obligations You May Have Missed](#)

[Illinois Employers Must Act to Comply With New Equitable Employment Laws](#)

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