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Employment Litigation

Illinois Takes Steps to Limit Employer Use of Restrictive Covenants

The Bottom Line

- The Act impacts restrictive covenants entered into on or after January 1, 2022.
- The Act is sweeping in scope, and alters the landscape for restrictive covenants in Illinois.
- Employers should carefully review their non-compete and non-solicit agreements to ensure that they comply with the provisions of the new law.

Illinois recently passed Public Act 102-0358 (the Act), which addresses the enforceability of non-compete and employee and customer non-solicit agreements entered into on or after January 1, 2022. While the Act codifies certain pre-existing case law regarding the enforceability of these agreements, it may also significantly change the landscape for restrictive covenants in Illinois.

Compensation Thresholds

The Act imposes *per-se* bans on non-compete and non-solicit agreements for employees making below certain annualized compensation thresholds.

Employers are prohibited from entering into:

- Non-compete agreements with employees making under $75,000 per year; and
- Non-solicit agreements with employees making less than $45,000 per year.

These threshold amounts are scheduled to increase at five-year intervals until 2037 (with the non-competition threshold increasing by $5,000 and the non-solicitation threshold increasing by $2,500 every five years).

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Required Elements for Enforceability

A non-compete or non-solicit covenant is unenforceable under the Act unless the:

1. Employee receives adequate consideration;
2. Covenant is ancillary to a valid employee relationship;
3. Covenant is no greater than is required for the protection of a legitimate business interest of the employee;
4. Covenant does not impose undue hardship on the employee; and
5. Covenant is not injurious to the public.

Under the Act, for a restrictive covenant to be enforceable, the employee must have worked for the employer for at least two years following execution of the agreement or received some other form of consideration consisting of "a period of employment plus additional professional or financial benefits or merely professional or financial benefits adequate by themselves."

In addition to meeting the substantive requirements for enforceability, employers must advise employees to consult with an attorney before entering into a non-compete or non-solicit agreement. Moreover, these agreements must be provided to prospective employees at least 14 days prior to the commencement of employment, and similarly give current employees at least 14 days to review the agreement, although the employee may choose to execute the agreement before the applicable 14 day period expires.

Reformation

Some employers have relied on courts to "blue pencil" or otherwise reform unenforceable non-compete or non-solicit agreements. The Act cautions that "extensive judicial reformation" may be against public policy. However, it does permit a court to exercise its discretion to "reform or sever provisions of a covenant not to compete or a covenant not to solicit rather than hold such a covenant unenforceable." Courts are to consider "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 such modifications in their agreement."

Enforcement

Both public and private enforcement mechanisms are included. The Illinois Attorney General is authorized to bring suit against any employer that the Attorney General has "reasonable cause" to believe is engaged in conduct prohibited by the Act. A suit by the Attorney General may seek a number of remedies against the employer, including monetary relief, restitution and equitable relief (including a preliminary or permanent injunction). In addition, the Attorney General may seek a civil penalty of up to $5,000 for each violation or $10,000 for each repeat violation within a 5-year period.

Moreover, and critically for employers that wish to enforce their post-employment restrictions, the Act mandates that where an employer sues to enforce a non-compete or non-solicit agreement, an employee prevailing in the dispute will recover costs and reasonable attorney fees from the employer.

Additional Prohibitions

Employers are now prohibited from entering into non-compete or non-solicit agreements with employees who were terminated or furloughed due to circumstances or orders related to the COVID-19 pandemic or similar circumstances, unless the period of enforcement of the non-compete includes compensation to the employee equivalent to the employee's base salary at the time of termination (less compensation earned from other employment during such period).

While the Act applies to non-compete and non-solicit agreements, it explicitly carves out from its purview the following:

- A confidentiality agreement or covenant;
- A covenant or agreement prohibiting use or disclosure of trade secrets or inventions;
- Invention assignment agreements or covenants;
- 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;
- Clauses or an agreement between an employer and an employee requiring advance notice of termination of employment, during which notice period the employee remains employed by the employer and receives compensation; or
- Agreements by which the employee agrees not to reapply for employment to the same employer after termination of the employee. Accordingly, those provisions and agreements will remain subject to existing Illinois law.

For More Information

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