Illinois Act Bring Changes to Non-Competes in 2022

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As 2021 draws to a close, the use of noncompete agreements under Illinois law is about to change in significant ways. Specifically, on January 1, 2022, key provisions of the Illinois Freedom to Work Act[1] will go into effect, limiting who may agree to restrictive covenants regarding solicitation and competition, providing new COVID-specific restrictions, codifying common-law standards, and imposing considerable penalties for non-compliance.

KEY CHANGES

On August 13, 2021, Illinois Governor J.B. Pritzker signed into law key amendments to the Illinois Freedom to Work Act, following a recent trend of states pushing back on restrictive covenants in employment agreements. The following is an overview of key changes set to go into effect in the new year:

Employees Subject to Noncompete and Nonsolicit Covenants: The prior version of the Act provided that workers being paid less than $13/hour or the hourly minimum wage (whichever was greater) could not be bound by a noncompete covenant. The amended Act now provides that employers may not enter into a noncompete covenant with an employee unless their earnings exceed $75,000 per year. Notably, that minimum is set to increase by $5,000 in 2027, 2032, and 2037 (at which time earnings must exceed $90,000). Similarly, the Act now prohibits nonsolicit covenants for employees earning less than $45,000 per year, with that minimum likewise increasing in 2032 and 2037.

COVID Provisions: The amendments also added new language to the Act barring employers from entering into noncompete or nonsolicit covenants with any employee terminated, furloughed, or laid off as a result of the COVID-19 pandemic. The prohibition will not apply, however, if the employer pays compensation equivalent to the employee's base salary at the time of

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termination for the period of enforcement (minus compensation earned through subsequent employment during the period of enforcement).[2]

Codification of Case Law: The amended Act also now codifies prevailing Illinois case law regarding the enforceability of restrictive covenants. Specifically, the Act provides that noncompete or nonsolicit covenants will only stand where: (1) the employee receives adequate consideration, (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, (4) the covenant does not impose undue hardship on the employee, and (5) the covenant is not injurious to the public.

Employers should further note that the law defines "adequate consideration" as meaning the employee worked for the employer for at least 2 years after the employee signed the agreement, or the employer otherwise provided employment *plus* additional professional or financial benefits (or professional or financial benefits that are adequate by themselves). Put differently, mere employment (if less than 2 years) cannot be expected to support an Illinois noncompete or nonsolicit covenant under the amended Act.

Noncompliance: The amendments further impose strict new penalties for failure to comply with the Act. To start, attorney's fees and costs now must be paid to any employee prevailing on a claim to enforce a covenant not to compete or a covenant not to solicit, in addition to any other remedies available.[3] Additionally, any employer engaging in a pattern or practice prohibited by the Act may be investigated by the Illinois Attorney General, who is also empowered to initiate or intervene in a civil action.[4] Employers subject to AG prosecution face civil penalties of $5,000 for each violation, or $10,000 for each repeat violation within a five-year period.[5]

Notice Provisions: Among other changes, the Act further requires employers to advise (in writing) that employees consult with an attorney prior to entering into restrictive covenants, and requires that employees be provided at least 14 days to review the underlying covenants before signing.

TAKEAWAYS

In light of the foregoing, employers seeking to enter into noncompete or nonsolicit covenants under Illinois law would do well to ensure that—prior to January 1, 2022—their agreements comply with the amended provisions of the Illinois Right to Work Act. Failure to do so could expose companies to costly penalties or litigation risk.

Butzel Long continues to track, analyze, and advise on a variety of issues regarding trade secret and non-compete litigation.

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[1] 820 ILCS 90/1 *et seq.*

[2] *Id.* at /10(c).

[3] *Id.* at /25.

[4] *Id.* at /30(a)-(b).

[5] *Id.* at (d)(1).