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Alerts

Frequently Asked Questions About the Illinois Freedom to Work Act

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Insights for Employers

Multiple bills to modify and limit the use of non-solicitation clauses and restrictive covenants have been proposed in the Illinois Legislature over the past several years. Until recently, those measures have not generated sufficient support for passage. However, over the recent Memorial Day holiday, the Illinois Legislature passed a significant amendment to the Illinois Freedom to Work Act (House Bill 789 or the Bill), which is a reform package of non-compete and non-solicitation law.

The Bill is expected to be signed by Governor J. B. Pritzker. Therefore, employers utilizing restrictive covenants with their executives and other employees must be aware of changes that will be effective on January 1, 2022. Not only do the changes cover long-sought-after initiatives from employee advocates, but they also memorialize in the law certain judicial decisions, including some which have come under criticism by the federal courts.

The new law covers:

- Establishing what is sufficient consideration for restrictive covenants
- Procedural and review rights for employees confronted with a restrictive covenant
- Compensation thresholds which must be satisfied before covenants may be enforceable
- Completely exempted categories of employees
- New criteria for judicial interpretation of the restrictive covenants
- Intervention authority for the State Attorney General.

Frequently Asked Questions

Q: What is the current status of the Bill?
A: The Bill was passed unanimously by the Illinois Senate and House of Representatives over Memorial Day Weekend and is expected to be signed by the governor.

Q: Are there financial limitations imposed upon the use of restrictive covenants?
A: Yes, the Bill prohibits the use of non-compete agreements for employees who are earning $75,000 or less annually. The earnings amount increases to $80,000 on January 1, 2027, $85,000 on January 1, 2032, and $90,000 on

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Q: Are there different financial restrictions on the use of non-solicitation provisions?
A; Yes, the Bill prohibits the use of non-solicitation agreements concerning customers and co-workers for employees who are earning $45,000 or less annually. The earnings amount increases to $47,500 on January 1, 2027, $50,000 on January 1, 2032, and $52,500 on January 1, 2037.

Q: Did the Bill address issues concerning what would be sufficient consideration for a restrictive covenant in Illinois?
A: Yes, the Bill provides that adequate consideration for a restrictive covenant exists either where the employee has worked for the employer for at least two years after the employee signed either a non-compete or non-solicitation agreement or where the employer otherwise provided consideration adequate to support a non-compete or non-solicitation agreement. The Bill clarifies that the "otherwise provided consideration" can consist of a period of employment in addition to professional or financial benefits, or professional or financial benefits if they are adequate by themselves.

While the Bill does not provide further clarity, with time, Illinois courts likely will need to determine what constitutes additional professional and financial benefits, what balance must be struck between the period of employment and additional professional and financial benefits, and what amount of these benefits, on their own, will be adequate consideration. These benefits will likely include raises, promotions, training, employee benefits, and incentive-based compensation, such as stock options and bonuses.

Q: When does the Bill go into effect, if signed?
A. If signed, the Bill's provisions will apply to non-competes and non-solicitations entered into after January 1, 2022.

Q: Does the Bill provide review rights for employees?
A: Yes, the Bill requires employers to provide individuals with at least 14 days to review an agreement containing a restrictive covenant prior to signing it, although individuals can sign the agreement sooner. In addition, the Bill requires that employers advise individuals in writing to consult with an attorney prior to signing an agreement.

Q: Does the Bill limit the use of restrictive covenants in certain industries?
A: Yes, the Bill prohibits the use of non-compete and non-solicitation agreements for construction tradespeople and public employees.

Q: How does the Bill fit with the Illinois Supreme Court's decision in *Reliable Fire*?
The Bill codifies the common law restrictive covenant standard set forth by the Illinois Supreme Court in *Reliable Fire Equip. Co. v. Arredondo*. The Bill provides that a restrictive covenant is only enforceable when: (1) the employee receives adequate consideration; (2) the covenant is ancillary to a valid employment relationship; (3) the covenant is no greater than what is required to protect a legitimate business interest of the employer; (4) the covenant does not impose an undue hardship on the employee; and (5) the covenant is not injurious to the public.

The Bill also codifies the *Reliable Fire* holding that whether an employer's legitimate business interest exists is determined by the totality of the circumstances under the facts and circumstances of each particular case. In addition to the three factors mentioned in *Reliable Fire*—the near-permanence of customer relationships, employee's acquisition of confidential information, and time/place restrictions—the Bill provides additional factors for courts to consider when determining whether an employer's legitimate business interest exists, including the employee's exposure to employer's customer relationships, the employee's use and knowledge of confidential information, and the scope of the activity restrictions in the restrictive covenant.

Q: Does the Bill address what is known as "blue-penciling" provisions?
A: Yes, while the Bill discourages courts from completely rewriting a restrictive covenant agreement, the Bill provides that, depending on the circumstances, courts have the discretion to rewrite non-compete and non-solicitation agreements to either reform those agreements to be enforceable or to sever certain provisions in an agreement so that the rest of the agreement is enforceable.

The Bill further provides factors for courts to consider when reforming a restrictive covenant agreement, such as fairness of the restrictions, whether the restrictions are a good-faith effort to protect the legitimate business interest of the employer, and whether the parties intended for such modifications of the agreement to occur.

Q: What other exceptions are contained in the Bill?
A: There are a number of exceptions outlined in the Bill. The Bill explicitly excludes confidentiality, trade secret, and invention assignment agreements from the statutory definition of non-compete. Garden leave clauses, defined below, are also exempted from the statutory definition of non-compete.

Further, the Bill's provisions do not apply to agreements that are entered into in connection with either an acquisition or sale of an ownership interest in a business. Nor do the Bill's provisions apply to "no reapplication" clauses in employment separation agreements. A "no reapplication" clause exists where an employee agrees not to reapply for employment with the same employer following a separation between the employee and that employer.

Q: What is garden leave?
A: Garden leave are agreements or clauses in agreements that require advance notice of termination of employment, and during that advanced notice period, the employer continues to employ the employee and continues to compensate the employee.

Q: Does the Bill grant rights to the Attorney General to intervene in disputes over a restrictive covenant?
A: Yes, the Illinois Attorney General may initiate or intervene in litigation where the Attorney General has reasonable cause to believe that any person or business entity is engaging in a pattern or practice that is prohibited by the law. Prior to initiating a lawsuit on behalf of the State of Illinois, the Attorney General may conduct an investigation into any alleged unlawful activity.

The Bill gives the Attorney General the ability to seek a variety of remedies. The Attorney General may seek equitable relief such as an injunction, as well as monetary damages. In addition, the Attorney General may also request that a court impose a civil penalty of $5,000 for a violation of the statute or $10,000 for repeat violations within a five-year period.

Q: Are there any other unique provisions included in the bill?
A: Yes, where an employee is terminated or furloughed because of the COVID-19 pandemic or under circumstances similar to the COVID-19 pandemic, the employer is prohibited from entering into any restrictive covenants with such an employee. However, an employer may enter into a restrictive covenant with such an employee where the agreement provides compensation equivalent to the employee's base salary for the period of the agreement minus compensation earned by the employee in subsequent employment during the period of the agreement.

As indicated above, the law takes effect on January 1, 2022. The pending Bill does not provide for retroactivity and will not apply to restrictive covenants in existence on or prior to December 31, 2021. However, employers should modify their existing restrictive covenant arrangements and prepare for these significant changes that will go into effect with the new year.

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