

Employment Law Practice Bulletin – Illinois

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CHANGES TO NON-COMPETITION AND NON-SOLICITATION AGREEMENTS COMING TO ILLINOIS JANUARY 1, 2022

On August 13, 2021, Illinois Governor JB Pritzker signed into law several amendments to the Illinois Freedom to Work Act (“Act”). The amendments limit when employers may use non-competition and non-solicitation agreements with their employees. The changes become effective January 1, 2022 and apply to all such agreements entered after that date. Although the changes do not apply retroactively, employers should review and, if necessary, update their employment agreements and procedures to ensure enforceability and compliance going forward.

Below is a non-exhaustive summary of some of the changes to the Act. Any employer who uses (or is considering using) non-competition and non-solicitation agreements should consult an attorney to review the employer’s particular needs and circumstances. Under the Act’s amendments, agreements that violate the Act not only are unenforceable but also may lead to monetary and other penalties against the employer.

What are Restrictive Covenants?

In the employment context, restrictive covenants are contractual provisions that prevent employees (especially departing employees) from engaging in certain prohibited activities, usually for a specified time. These activities may include preventing an employee from competing against the company, from soliciting a company’s customers or employees, from using a company’s confidential information for the employee’s own purposes, and the like. Many employers use restrictive covenants to protect important business assets like intellectual property and customer relationships. This article addresses non-competition and non-solicitation agreements, which are two types of restrictive covenants.

New Income Thresholds for Restrictive Covenants

Prior to the new amendments, the Act prohibited employers from requiring “low-wage employees” to enter non-competition agreements. The Act defined “low-wage employees” as those earning less than either: (1) the applicable federal, state, or local hourly minimum wage; or (2) \$13.00 per hour, whichever was greater. Under the amendments, instead of prohibiting non-competition agreements for “low-wage employees”, the Act now prohibits non-competition agreements for employees who earn (or are expected to earn) \$75,000 or less annually.

The amendments also change the income threshold for employee and customer non-solicitation agreements. Beginning January 1, 2022, employers may not require their employees who earn (or who are expected to earn) \$45,000 or less to enter employee and customer non-solicitation agreements.

The income thresholds increase periodically over time. For example, by January 1, 2037, the income threshold for non-competition agreements increases to \$90,000 annually.

Other Enforceability Considerations

It is not sufficient that an employee earns above the applicable income threshold for a non-competition or non-solicitation agreement to be enforceable. In addition to the income requirements, the covenant also must be properly tailored to protect an employer's legitimate business interest. Whether a non-competition or non-solicitation agreement is tailored to protect an employer's legitimate business interest involves a complex analysis of several factors.

Further, non-competition and non-solicitation agreements must be supported by adequate consideration to be enforceable. In Illinois, courts (and now the Act) define "adequate consideration" to mean the employee worked for the employer for at least two years after signing the agreement, or that the employer provided other or additional consideration adequate to support the agreement (e.g., adequate professional or financial benefits). The agreement also must be ancillary to a valid employment relationship, must not impose any undue hardship on the employee, and cannot be injurious to the public.

Review Period and Penalties for Noncompliance

Besides the income thresholds and other enforceability requirements, there are some other important changes to the Act that employers should familiarize themselves with. For example, the Act's amendments now require that employers advise their employees to seek legal counsel and provide their employees with at least 14 days to review the agreements before signing. If an employer does not provide this review period, then the agreement is "illegal and void".

Further, employers who violate the Act not only risk having their agreements be unenforceable, but also risk having to pay an employee's attorney's fees if the employee prevails in a legal proceeding. The amended Act also empowers the Illinois Attorney General to investigate and act against employers who violate the Act. Employers who violate the Act may have to pay monetary damages and civil penalties and may face other consequences. Thus, the Act now includes stiff penalties for employers who violate its provisions.

Final Thoughts

Although restrictive covenants can be a valuable tool for employers to protect their business assets, they can be difficult to enforce in Illinois. Given the new amendments to the Act, any Illinois employer who uses non-competition or non-solicitation agreements should consult an attorney to ensure that its agreements and policies will remain enforceable after the amendments become

effective. Likewise, any Illinois employer considering using such agreements in the future should consult an attorney for help to create an enforceable agreement and policy in Illinois.

For more information about this article, or employment or business law in general, please contact Albee Law PC at (312) 279-0115 or info@albeelaw.com.