

Trade Secrets and Restrictive Covenants Labor and Employment

Illinois Seeks to Expand Restrictions on Non-Competes

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On May 31, 2021, the Illinois Senate and House of Representatives unanimously passed [Senate Bill 672](#) amending the existing Illinois Freedom to Work Act, 820 ILCS 90, and significantly expanding its scope. The current Illinois Freedom to Work Act prohibits employers from entering into covenants not to compete with “low-wage employees,” defined as employees whose earnings are less than the greater of \$13 per hour or any applicable federal, state, or local minimum wage. As we describe below, the new bill makes some significant additions to the Act, many of which apply to all agreements, regardless of employee pay.

New and Revised Restrictions on Non-Solicitation and Non-Competition Agreements

The new bill increases that low-wage employee threshold significantly, prohibiting non-competition agreements for employees paid \$75,000 or less on an annual basis. That threshold increases to \$80,000 annually on January 1, 2027, to \$85,000 annually on January 1, 2032, and finally to \$90,000 annually on January 1, 2037.

In addition to raising that threshold, the bill modifies the definition of the prohibited non-competition agreements, broadening them to include agreements that by their “terms impose[] adverse financial consequences on the former employee” for “engag[ing] in competitive activities after termination of the employee’s employment with the employer.” A definition of “competitive activities” is notably absent, though the bill does list certain categories of agreements that expressly are not prohibited, such as those prohibiting use or disclosure of trade secrets or inventions, agreements requiring advance notice of termination of employment, or agreements by which the employee agrees not to reapply for employment at the same employer.

The bill also adds an express prohibition on non-solicitation agreements, which is absent from the current Act. That prohibition applies to any agreement that

(1) restricts the employee from soliciting for employment the employer's employees or (2) restricts the employee from soliciting, for the purpose of selling products or services of any kind to, or from interfering with the employer’s relationships with, the employer’s clients, prospective clients, vendors, prospective vendors, suppliers, prospective suppliers, or other business relationships

where the employee earns \$45,000 annually or less. Similar to the periodic increases to the earnings threshold applicable to non-competition agreements, the bill provides that the non-solicitation agreement prohibition threshold increases by \$2,500 every five years, to a maximum of \$52,500 on January 1, 2037.

COVID-19-Specific Restrictions

The new bill also adds a prohibition on entering into non-competition or non-solicitation agreements with employees terminated due to the “business circumstances or governmental orders related to the COVID-19 pandemic or under circumstances that are similar to the COVID-19 pandemic,” regardless of pay,

unless the employer agrees to pay the terminated employee their base annual salary at the time of termination less any compensation earned through new employment.

Disclosure Requirements

Also new in the bill is a requirement for employers to inform employees in writing to consult with counsel before entering into any non-competition or non-solicitation agreement, and for employers to provide the employee at least 14 days to review the agreement. Any agreement executed without satisfying this requirement is deemed illegal and void.

Fee Shifting

The bill adds mandatory fee shifting to employees who prevail in a civil action or arbitration brought by an employer—whether in a complaint or in a counterclaim—to enforce a non-competition or non-solicitation agreement.

Attorney General Enforcement

A public enforcement provision empowers the Attorney General to take action against employers engaged in any “pattern and practice prohibited by [the] Act,” including through investigative demands, and may obtain compensatory or equitable remedies, or seek civil penalties of \$5,000 per violation or \$10,000 for each repeat violation within a five-year period.

Reformation

Under the bill, courts expressly have the power to reform (i.e., “blue-pencil”) agreements.

Definitions

The bill codifies the legitimate business interest requirement that the Illinois Supreme Court articulated in *Reliable Fire Equipment Co. v. Arredondo*, 2011 IL 111871, stating that, “[i]n determining the legitimate business interest of the employer, the totality of the facts and circumstances of the individual case shall be considered.” The bill also codifies the definition of the “adequate consideration” required for non-competition and non-solicitation agreements set forth in *Fifield v. Premier Dealer Services*, 2013 IL App (1st) 120327, defining it as either two years of employment or “a period of employment plus additional professional or financial benefits or merely professional or financial benefits adequate by themselves.”

Key Takeaways

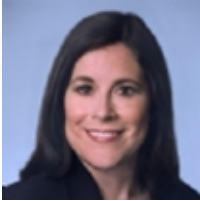
The new bill, which Governor Pritzker is expected to sign into law, would become effective on January 1, 2022 and goes far beyond the narrow scope of the original Freedom to Work Act. While its restrictions and prohibitions are not retroactive, all employers—not just employers of “low-wage” workers—should carefully review the bill with experienced counsel and begin work on any necessary business practice changes sooner rather than later. Many of the bill’s new requirements, such as the disclosure requirements and the fee-shifting provision, are applicable to all non-competition and non-solicitation agreements, regardless of employee compensation level. Moreover, employers should expect this trend of passing legislation governing non-competition and non-solicitation agreements to continue, and thus should consult experienced counsel to determine whether any additional action is warranted.

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