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Insights

Significant Changes to Illinois Law Affect Employers' Restrictive Covenant Agreements

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As of January 1, 2022, Illinois employers must abide by significant new amendments to the Illinois Freedom to Work Act (the "Act"). Specifically, these amendments pertain to non-competition and non-solicitation agreements between employers and their employees that are entered into after January 1, 2022. The expanded law now prohibits employers from entering into non-competition and non-solicitation agreements for workers earning under a certain amount, adds a disclosure requirement, and allows the Illinois Attorney General to enforce such requirements. Employers not in compliance could be hit with civil penalties.

1. The New Wage Limits

First, the amendments prohibit employers from entering into non-competition agreements with employees who earn less than $75,000 annually. As defined by the Act, "earnings" includes salary, bonuses, commissions, "or any other form of taxable compensation." The $75,000 threshold will also increase by $5,000 every five years through 2037, at which point the threshold will be $90,000.

Employers are also prohibited from entering into non-solicitation agreements with employees who earn less than $45,000 per year. Non-solicitation agreements are those that typically restrict employees and former employees from either soliciting for hire other employees or seeking to obtain business from clients, vendors, suppliers, and other business relationships, other than on behalf of the employer. The compensation threshold will increase by $2,500 every five years until 2037, at which point the threshold will be $55,000.

2. Adequate Consideration

The Act also requires the employer to provide adequate consideration in order to enter into a non-competition or non-solicitation agreement. Typically, continued employment provides adequate consideration, but the Act specifically defines what employers must provide. "Adequate consideration" under the Act, means (1) the employee worked for the employer for at least 2 years after the employee signed the non-competition or non-solicitation agreement or (2) the employer provides consideration that is adequate to support a non-competition or non-solicitation agreement, including a period of employment plus additional professional or financial benefits or simply professional or financial benefits that are by themselves adequate.[1] Accordingly, continued employment, alone, is not adequate consideration under the amendments to the Act.

3. Disclosure Requirements

Additionally, the Act requires employers to advise employees in writing to consult with counsel prior to signing a non-competition or non-solicitation agreement and must allow the employee at least 14 calendar days to review a copy of the agreement. Employees can choose to waive these rights and sign without the advice of counsel or before the end of the 14-calendar day deadline.

4. COVID-19 Provision

Under the Act, employers are prohibited from entering into non-competition and non-solicitation agreements with any employee whom an employer terminates, furloughs, or lays off as a result of business circumstances or governmental order related to the COVID-19 pandemic or other circumstances that are similar to the COVID-19 pandemic. There is an exception to this prohibition if the employer includes compensation equivalent to the employee's base salary at the time of termination for the period of enforcement minus compensation earned through subsequent employment during the period of enforcement.

5. Illinois Attorney General Can Investigate and Initiate Action

Finally, under the amendments to the Act, the Illinois Attorney General can investigate any employer it believes "is engaged in a pattern or practice prohibited" by the Act and can initiate corresponding civil against such employer. The Attorney General can also request the court impose a civil penalty of up to $5,000 per violation or up to $10,000 for each repeat violation within a five-year period. Further, in any action in which the employee is the prevailing party, he or she is entitled to all costs and reasonable attorneys' fees from the employer.

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Illinois employers will need to consider these new requirements when entering into non-competition or non-solicitation covenants going forward. Should you have any questions about the Act or want to ensure your agreements are compliant, please contact **Elizabeth M. Roberson** or another member of our **Employment Law Practice**.

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[1] 820 ILCS 90/5.