

2 Rulings Guide On Out-Of-State Worker Jurisdiction Issues

By **Robert R. Duda Jr. and Terry J. Smith** (November 4, 2020)

In two recent cases, the U.S. District Court for the Northern District of Illinois held that employers with operations in Illinois can properly bring legal actions against their former employees in Illinois for alleged misconduct, even though the employees worked remotely and never lived or worked in Illinois.

The cases are significant to Illinois employers, and employers throughout the country facing similar issues, given the increase in the number of employees working remotely from locations outside of the state and jurisdiction where the employer has its headquarters or operations.



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Where Can Remote Employees Be Sued?

The continuing COVID-19 pandemic will only increase the nationwide trend of employees working remotely from their homes. Increasingly, employees are working from other states and locales outside of the jurisdiction where their employer is located.

This begs the question: If the employee engages in misconduct, such as trade secret misappropriation, or breaches a noncompete or other restrictive covenant, where can the employer bring suit against the employee or former employee? Does the employer have to file an action in the home state where the employee resides, or can the employer bring suit in its own backyard, even if the employee lives on the other side of the country?



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In two separate recent opinions, *Tekway Inc. v. Agarwal*[1] and *Liqui-Box Corp. v. Scholle IPN Corp.*,[2] the Northern District of Illinois answered the question, permitting employers to bring lawsuits in Chicago against former employees living and working outside of Illinois and rejecting the former employees' arguments that the court lacked personal jurisdiction over the employees.

U.S. District Court Rulings

The employer in *Tekway*, headquartered in the Chicagoland area, brought suit in federal court in Chicago against a former employee for alleged violation of a noncompete agreement. The former employee sought to dismiss the lawsuit on the basis that she was not subject to personal jurisdiction in Illinois because she never lived or worked in Illinois.

Specifically, the former employee lived in New Jersey at the time she entered into the employment relationship and then almost immediately moved to Colorado, where she lived and worked remotely for the duration of her employment. There was no dispute that the former employee never set foot in Illinois either to live or work.

In the *Liqui-Box* case, the Chicago-based employer filed suit against its former employee in federal court in Chicago, alleging misappropriation of trade secrets and breach of a confidentiality agreement. The former employee, who worked remotely in various sales management positions for about 15 years, first in California before moving to Florida,

sought dismissal of the action based on lack of personal jurisdiction. The former employee never lived or had an office in Illinois but traveled to Chicago occasionally for work meetings.

Determination of Sufficient Minimum Contacts With Illinois

In both cases, the court addressed whether the former employee had the requisite minimum contacts with Illinois to establish that the court had specific or personal jurisdiction over the individual. To determine personal jurisdiction the court analyzed whether the "defendant purposefully directs its activities at the forum state and the alleged injury arises out of those activities." Importantly, the relationship between the defendant and the forum state "must arise out of contacts that the defendant himself creates with the forum."

The court in *Tekway* held personal jurisdiction does not require physical presence in the forum state. Focusing on the actions the former employee directed toward Illinois, the court stated that even though the employee never set foot in Illinois, she exhibited other conduct directed toward Illinois, including the following:

- She reached out to the employer in Illinois to raise the possibility of an employment relationship.
- She knowingly entered into an employment relationship with an employer headquartered in Illinois and reaped the benefits of working for a company based in the forum state.
- She agreed to an employment contract that contained several references to Illinois, including an Illinois choice-of-law provision, which should have given her advance notice that litigating in Illinois was a possibility.
- She regularly communicated with her employer in Illinois over the course of 15 months by phone, email and messaging applications.
- She cemented long-term ties and continuing obligations to a company in Illinois by agreeing to a noncompete.

The court also held that the employer's alleged injury — improper competition — arose from the former employee's employment relationship with an Illinois company, and it found nothing unfair about an employee litigating an employment dispute in the employer's home state.

Similarly, in *Liqui-Box*, the court found there were sufficient minimum contacts with Illinois and that the former employee could reasonably anticipate being brought into court in Illinois, despite never living or working at an office in Illinois, where the former employee:

- Signed an employee confidentiality agreement with an Illinois employer;
- Traveled to Illinois for multiple meetings at the employer's headquarters in Illinois;
- Reported to his supervisor and had frequent communications with employees who worked in Illinois; and

- Obtained the employer's confidential information, which was the basis for the underlying misappropriation claim, as a result of his employment with an Illinois-based corporation.

Finally, the court rejected the notion that a nonresident of Illinois having to litigate the case in Illinois is unduly burdensome or unreasonable.

Lessons for Employers

Illinois employers should take steps to ensure that their employees working remotely outside of the state have voluntarily directed their activities toward Illinois in order to establish the requisite minimum contacts for personal jurisdiction in Illinois. This may include, without limitation, having employees sign agreements that reference the connection between the employment and Illinois, including Illinois choice-of-law and venue provisions, and interviewing and hiring employees on-site in Illinois.

It also may include obtaining employees' agreement to perform work in Illinois as necessary or at the employer's request; encouraging employees to travel to Illinois for work meetings, conferences or sales calls; ensuring that remote employees understand and agree to report and communicate directly with supervisors and employees located in Illinois; and informing employees that the company's confidential and proprietary information is stored in and being accessed by the employee through the company's computer servers located in Illinois.

While none of these steps alone may be dispositive of the personal jurisdiction question, they are all relevant and contribute to the larger picture of establishing minimum contacts with the forum state. In addition, employers should note the following implications of these recent decisions.

Employers have a strong interest in litigating lawsuits in their home jurisdiction, where they frequently have a greater knowledge of the controlling law, easier and more ready access to witnesses and evidence, more predictability as to the outcome and cost of the litigation and where they are less likely to be viewed as an outsider corporation overreaching against a former employee.

With an increasingly fragmented workforce working from all corners of the country, it is important for employers to have the ability to control the jurisdiction and venue of lawsuits that need to be brought against former employees to protect the employer's competitive interests. This is particularly important for employers who are seeking emergency injunctive relief against an employee who may be unlawfully competing, breaching a restrictive covenant or misappropriating trade secrets. In these situations, time is of the essence and employers may benefit greatly by initiating legal actions in their home jurisdictions.

In addition to choice-of-law provisions, employers should consider using forum- or venue-selection clauses in their employment agreements. In *Liqui-Box*, the employee agreement contained a somewhat ambiguous venue-selection clause that provided for several potential proper venues including Illinois. Surprisingly, the employer did not argue for application of the venue clause, although the court noted that an employee's agreement to a venue clause could be deemed a waiver of a personal jurisdiction objection so long as the action is brought in a proper venue.

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[1] Case. No. 19-cv-6867 (N.D. Ill. Oct. 7, 2020).

[2] Case. No. 19-cv-4069 (N.D. Ill. Sept. 18, 2020).