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NEW ILLINOIS LAW IMPACTS ENFORCEMENT OF NON-COMPETE AND NON-SOLICITATION AGREEMENTS

Illinois recently enacted a new law that amends the Illinois Freedom to Work Act, *820 ILCS 90/1 et seq.*, and impacts an employer's use and enforcement of non-compete and non-solicitation agreements. The new law will take effect on January 1, 2022. It will not apply retroactively, meaning it only applies to new non-compete and non-solicitation agreements signed after the January 1, 2022 effective date.

The new Illinois law is part of a growing trend of states passing new restrictions and limitations on an employer's ability to enforce non-compete and non-solicitation agreements. Illinois employers should become familiar with the new enforcement requirements for non-compete and non-solicitation agreements and take steps now to ensure they are in compliance with the new Illinois law in the coming year.

Minimum Compensation Requirements. Most significantly, the new law prohibits employers from entering into a non-compete agreement with any employee unless the employee's actual or expected annual earnings are more than $75,000. Similarly, employers may only enter into customer or employee non-solicitation agreements if the employee's actual or expected annual earnings are more than $45,000. "Earnings" includes salary, bonuses, commissions or any other form of taxable compensation. These thresholds increase incrementally every five years. The impact of the new minimum compensation requirements will be to restrict the use of non-compete and non-solicitation agreements with less senior and lower compensated employees.

Advance Notice Requirements. Under the new law, employers must provide the employee with a copy of the non-compete or non-solicitation agreement at least 14 calendar days before the employee begins working or with at least 14 calendar days to review the agreement. The employee may voluntarily choose to sign the agreement before the expiration of the 14 days. In addition, the employer must advise the employee in writing to consult with an attorney before signing the agreement. Failure to comply with any of these notice requirements will result in the agreement being void and unenforceable.

Fees and Costs to Prevailing Employees. The new law provides that if an employer seeks to enforce a non-compete or non-solicitation agreement and the employee prevails in a civil action or arbitration that was filed by the employer, the prevailing employee shall recover from the employer all reasonable attorney's fees and costs regarding such claim. This is a one-way fee-shifting provision and only provides that a prevailing employee may recover fees and costs. However, this is in addition to any remedies that the parties may agree to in the underlying non-compete or non-solicitation agreement, so employers may seek to contractually provide for recovery of their attorney's fees and costs as a prevailing party.

Application of New Restrictions. The new law applies to "covenants not to compete" entered into after January 1, 2022, that restrict an employee's conduct and work based on a specified period of time, geographic area or in performing similar work for another employer, or that imposes adverse financial consequences if the employee engages in competitive activities.

It also applies to "covenants not to solicit" entered into after January 1, 2022, which restrict an employee from soliciting an employer's employees for other employment and/or restrict an employee from soliciting for the purposes of selling products or services of any kind, or from interfering with the employer's relationships with, the employer's clients, vendors, suppliers, or other business relationships. The new law expressly does not cover the following types of agreements: (i) confidentiality agreements, (ii) agreements prohibiting the use or disclosure of trade secrets, (iii) invention assignment agreements, (iv) agreements entered into in the context of the sale of a business, (v) "garden leave" agreements where the employee agrees to provide advance notice of departure and receives compensation during the notice period, and (vi) agreements by employees not to reapply for employment with the same employer following termination.

COVID-19 Enforcement. Under the new law, an employer may not enter into and enforce a non-compete or non-solicitation agreement against an employee who is separated from employment due to COVID-19 related business circumstances or circumstances that are similar to the COVID-19 pandemic, unless enforcement of the agreement 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.

Government Enforcement. Procedures in the new law permit the Illinois Attorney General to initiate or intervene in litigation and initiate investigations into potential violations by employers. The available relief includes monetary damages to the State of Illinois, restitution, equitable relief, including TRO's and injunctive relief, and a civil penalty not to exceed $5,000 for each violation or $10,000 for repeat violations.

Codification of Illinois Case Law. The new law codifies several important rules that have developed in the Illinois case law on the enforcement of non-compete and non-solicitation agreements. First, the law codifies the five-factor test used by Illinois courts to determine enforceability of a non-compete or non-solicitation agreement. Such an agreement is not enforceable unless: (i) the employee receives adequate consideration, (ii) the agreement is ancillary to a valid employment relationship, (iii) the agreement is no greater than is required for the protection of a legitimate business interest of the employer, (iv) the agreement does not impose undue hardship on the employee, and (v) the agreement is not injurious to the public. With respect to the question of what constitutes "adequate consideration," the new law defines the term to mean at least two (2) years of continued employment following execution of the agreement or some period of continued employment plus additional professional or financial benefits or merely professional or financial benefits adequate by themselves.

Second, the law codifies the Illinois Supreme Court's stated rule in Reliable Fire Equipment Co. v. Arredondo, that the legitimate business interest necessary to support a non-compete or non-solicitation agreement is determined by looking at "the totality of the facts and circumstances of the individual case." The law identifies the following non-exhaustive factors to be considered: (i) the employee's exposure to the employer's customer relationships or other employees, (ii) the near-permanence of customer relationships, (iii) the employee's acquisition, use or knowledge of confidential information through the employee's employment, and (iv) the scope of the time, place and activity restrictions. Finally, the law emphasizes that all of the circumstances of the individual case need to be considered and "[t]he same identical contract and restraint may be reasonable and valid under one set of circumstances and unreasonable and invalid under another set of circumstances." *820 ILCS 90/7.*

Reformation of Overbroad Agreements. Illinois courts have long permitted judicial reformation or "blue-penciling" of overbroad non-compete and non-solicitation agreements. Illinois courts have the discretion to reform and then enforce certain provisions of such agreements that are deemed overbroad with respect to time, geography or scope of the restrictions. Frequently, however, it is difficult to predict whether and when Illinois courts will exercise such power and reform such overbroad agreements. The new law expressly permits judicial reformation but states that "[e]xtensive judicial reformation of a covenant not to compete or a covenant not to solicit may be against the public policy of this State and a court may refrain from wholly rewriting contracts." *820 ILCS 90/35(a)*. The new law then states that a court may, in its discretion, reform or sever provisions from an agreement rather than hold the entire agreement unenforceable. It identifies a list of factors that a court may consider, including: (i) the fairness of the restraints as originally written, (ii) whether the original restriction reflects a good-faith effort to protect the employer's legitimate business interest, (iii) the extent of such reformation, and (iv) whether the parties included a reformation clause in the agreement authorizing such modification. These are among the factors that courts currently use to decide whether to reform overbroad agreements. It remains to be seen whether this portion of the new law has any impact on the frequency and circumstances under which Illinois courts will reform overbroad non-compete and non-solicitation agreements. Employers should avoid such egregiously overbroad restrictions that essentially require the agreement to be rewritten, and they should always include a provision authorizing judicial reformation in the agreement.

Implications for Employers

- On January 1, 2022, employers need to avoid entering into non-compete and non-solicitation agreements with any employees making less than $75,000 and $45,000, respectively. When such agreements are entered into, employers need to provide the required statement advising the employee to consult with an attorney before signing and give employees 14 calendar days to review the agreement before signing although that consideration period can be contractually waived.

- Employers should review the terms of their existing non-compete and non-solicitation agreements, as well as their implementation procedures, and ensure that they are in compliance for agreements implemented after January 1, 2022. This may include adding provisions identifying the consideration provided to the employee, permitting a court to reform overbroad restrictions, providing for prevailing party attorney's fees for the employer since those fees and costs are now available to prevailing employees in the new law and the required notice to the employee to consult with an attorney and period for consideration.

- Importantly, confidentiality agreements are not impacted by the new law, and employers should remember that the use of confidentiality and non-disclosure agreements, as well as state and federal trade secrets laws, are a key and essential tool in protecting confidential information and customer relationships.

- The new law resolves the dispute in Illinois state and federal court decisions and provides clarification that if the only consideration provided for the non-compete or non-solicitation agreement is continued employment, then the employee must remain employed for at least two (2) years after executing the agreement. However, the new law does not provide any guidance on how much

financial or professional benefits, whether separately or paired with some length of continued employment less than two (2) years, constitutes adequate consideration to support a non-compete or non-solicitation agreement.

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