LEGAL UPDATES

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Illinois Enacts SB 0672, Strengthening Restrictive Covenant Limits

Services

Labor & Employment

Non-Competes & Restrictive Covenants

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Key points

The amendment to Senate Bill (SB) 0672 bans noncompetes for employees earning $75,000 per year or less and bans customer and coworker nonsolicits for employees earning $45,000 per year or less.

The bill requires that individuals be permitted at least 14 days to review the agreement and decide whether to sign. The bill also requires that individuals be advised in writing to consult with an attorney before signing.

The bill also attempts to clarify the law about what constitutes adequate consideration and what qualifies as a legitimate business interest sufficient to warrant a restrictive covenant.

On May 24, 2021, the Illinois legislature unanimously passed SB 0672, which amends the Illinois Freedom to Work Act (IFWA).

If, as expected, Governor JB Pritzker signs the bill into law, it should result in fewer traditional noncompete agreements, and potentially less litigation over noncompetes, but a greater likelihood of enforceability when a noncompete dispute actually ends up in court.

IFWA amendments relating to noncompetes and nonsolicitations

The IFWA previously imposed an absolute prohibition on the use of restrictive covenants with low-wage workers – those making less than $13/hour. Effective January 1, 2022, SB 0672 amends the IFWA by expanding the scope

of the Act and its absolute prohibitions to apply to all employees, rather than only low-wage employees.

Under the amendments to the law, employers are not permitted to enter noncompete agreements with any employee whose earnings are below $75,000 per year. The earnings threshold for this requirement rises over a 15-year period, moving to $80,000 per year in 2027, $85,000 in 2032 and $90,000 in 2037.

Similarly, employers cannot enter into customer and coworker nonsolicitation agreements for any employee whose earnings are below $45,000 per year. This threshold also increases on a similar timetable as those for the noncompete ($47,500 in 2027, $50,000 in 2032 and $52,500 in 2037).

SB 0672 requires that individuals be permitted at least 14 days to review the agreement and decide whether to sign, although an employee is free to sign in less than 14 days should they elect to do so. The bill also requires that individuals be advised in writing to consult with an attorney before signing.

Clarifications to existing law

Under current law, for noncompete or nonsolicitation agreements to be legally enforceable, the following conditions must be present: (1) adequate consideration; (2) a valid employer-employee relationship; (3) the agreement is no broader than required to protect legitimate business interests; (4) the agreement does not impose an undue hardship on the employee; and (5) the agreement is not injurious to the public.

SB 0672 provides some clarification as to what constitutes "adequate consideration" sufficient to support a restrictive covenant. Specifically, the bill provides that:

> "Adequate consideration" means (1) the employee worked for the employer for at least 2 years after the employee signed an agreement containing a covenant not to compete or a covenant not to solicit or (2) the employer otherwise provided consideration adequate to support an agreement to not compete or to not solicit, which consideration can consist of a period of employment plus additional professional or financial benefits or merely professional or financial benefits adequate by themselves.

This provision provides a clear two-year employment safe harbor to establish adequate consideration. However, it also clarifies that less than two years of employment may be sufficient if coupled with additional professional or financial benefits or merely "professional or financial benefits adequate by themselves."

While the courts will be left with the task of fleshing out the meaning of these terms, such professional or financial benefits are anticipated to include consideration such as a raise, a promotion, training,

professional exposure and marketing, incentive compensation such as stock options or restricted stock, bonuses, separation pay or other employee benefits.

SB 0672 also codifies the current common law holding that a legitimate business interest sufficient to warrant a post-employment restrictive covenant is determined by "the totality of the facts and circumstances of the individual case shall be considered," and that "[e]ach situation must be determined on its own particular facts." Furthermore, the bill reiterates that: "Reasonableness is gauged not just by some, but by all of the circumstances."

The bill also clarifies Illinois blue-pencil laws related to restrictive covenants. SB 0672 states that while a court "may refrain from wholly rewriting contracts … [i]n some circumstances, a court may, in its discretion, choose to reform or sever provisions of a covenant not to compete or a covenant not to solicit rather than hold such covenant unenforceable." Factors that may be considered when deciding whether such reformation is appropriate:

The fairness of the restraints as originally written;

Whether the original restriction reflects a good-faith effort to protect a legitimate business interest of the employer;

The extent of such reformation; and

Whether the parties included a clause authorizing such modifications in their agreement.

Lastly, SB 0672 authorizes an employee to recover attorney's fees, as well as other appropriate relief, if an employee prevails on a claim filed by an employer seeking to enforce a noncompete or nonsolicit agreement.

Key exceptions in the amended bill

SB 0672 contains several critical exceptions.

First, it expressly carves out confidentiality, trade secret and invention assignment agreements from the definition of a covered noncompete.

Second, the bill also expressly exempts garden leave clauses — i.e., clauses or agreements requiring advance notice of termination of employment, during which notice period the employee remains employed by the employer and receives compensation — from the definition of a covered noncompete.

Third, SB 0672 expressly exempts agreements entered into in connection with the acquisition or

disposition of an ownership interest in a business. As a result, noncompetes in purchase or sale agreements, or even agreements by which an employee acquires any ownership interest in a business, are not covered.

Fourth, the bill exempts "no reapplication" clauses in separation agreements.

Finally, although the protections in the bill apply to "no moonlighting" provisions in employment agreements, they do not apply to no moonlighting policies in employee handbooks.

COVID-19-related terminations

The bill also contains an express exception for employees who lose their jobs because of the COVID-19 pandemic or under circumstances that are similar to the COVID-19 pandemic.

Namely, in that situation, the employer is barred from entering into a restrictive covenant with such persons unless enforcement of the covenant not to compete includes compensation equivalent to the employee's base salary at the time of termination for the period of enforcement minus compensation earned though subsequent employment during the period of enforcement.

State attorney general enforcement

In recent years, the Illinois Attorney General's Office has played an active and highly publicized role in policing certain situations involving form noncompete agreements that low-wage employees were compelled to sign. The bill codifies the state attorney general's power to protect the public in this area. Specifically, when the attorney general has "reasonable cause to believe that any person or entity is engaged in a pattern and practice prohibited" by the law, it may initiate or intervene in litigation.

Likewise, the bill also authorizes the attorney general to initiate an investigation of potential violations, and in an action brought under the bill, the attorney general may, but is not required to, request a civil penalty payable to the state, but the court has discretion whether to award any such penalty.

What this means to you

The impacts of the amendments to SB 0672 are significant. While the bill does not apply retroactively, in advance of the January 1, 2022, statutory effective date, Illinois employers should take several steps now:

First, employers should consider updating their existing agreements and having new ones executed before the law goes into effect on January 1, 2022.

Second, for all form agreements to be executed on or after January 1, 2022, employers must revise their agreements and comply with due process provisions of the law – i.e., the 14-day review period and written advice to seek counsel from an attorney before signing.

Third, given the salary thresholds and consideration requirements, employers should use this as an opportunity to reassess which employees truly warrant post-employment noncompetition and/or nonsolicitation restrictions.

Fourth, employers need to reassess the consideration provided to employees in exchange for signing. Is it adequate? Should the employer change its practices with respect to promotions, bonuses, training, or participation in severance plans or stock option plans in order to ensure that it is providing adequate consideration?

Finally, all employers should consider moving to garden leave agreements rather than traditional noncompetes.

Contact us

For guidance on compliance issues related to SB 0672, contact Anne Mayette, Tom O'Day or your Husch Blackwell attorney.

Husch Blackwell Summer Associate Aleksandra Gasich contributed to this article.