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ALERTS

Pending Illinois Legislation Will Restrict Employers' Use Of Non-Compete, Non-Solicit Agreements

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Highlights

Senate Bill 672, when signed by the governor, will amend the Illinois Freedom to Work Act, which governs non-compete and non-solicit agreements

Under the new law, Illinois employers that use non-compete and non-solicit agreements will be subject to new restrictions and requirements

Illinois employers should consider promptly reviewing their existing agreements and related practices to ensure they will comply with the new requirements

On May 31, 2021, the Illinois legislature unanimously passed Senate Bill 672, which is expected to be signed into law by Gov. JB Pritzker. Once signed, SB 672 will be effective Jan. 1, 2022, amending the Illinois Freedom to Work Act and making numerous significant changes that affect non-compete and non-solicit agreements for Illinois employees.

Employers should consider promptly reviewing their existing form

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agreements and related practices in light of the pending law to ensure they will remain legally enforceable once the new law goes into effect.

Key Provisions of the Law

SB 672 is a bi-partisan effort by the Illinois legislature to strike a balance between employee and employer interests, although employers may well view the law as pro-employee.

The law's key provisions include:

• Effective date – The law applies to restrictive covenant agreements entered into after Jan. 1, 2022. Because the law has no retroactive application, it will not impact any agreement entered into prior to that date.

• Increased annual earnings thresholds – The law will increase the current earnings thresholds and prohibit non-compete agreements for employees who earn $75,000 per year or less, and also prohibit non-solicit agreements for employees who earn $45,000 per year or less. These thresholds will increase in future years to account for inflation. The law defines "earnings" to include all forms of taxable compensation that are reflected on an employee's Form W-2, including salary, bonuses, and commissions.

• COVID-19-related terminations – The law prohibits enforcing agreements against employees who lose their jobs because of the COVID-19 pandemic "or under circumstances that are similar to the pandemic", unless the employee receives compensation equivalent to his or her base salary for the full restrictive period, minus any compensation received during that period from new employment. The law does not provide any guidance regarding what circumstances would be "similar to the pandemic."

• Attorney's fees – The law authorizes employees to recover attorney's fees if they prevail in a claim brought by an employer seeking to enforce an agreement

• Attorney General enforcement – The law empowers the Illinois Attorney General to investigate potential violations of the law and initiate litigation, in which a court may impose civil penalties on an offending employer

• Review period – The law requires that employees be given at least 14 days to review an agreement and decide whether to sign it; the agreement is void unless the employer advises the employee in writing that the employee has a right to consult with an attorney before signing an agreement. Employees are free to sign an agreement before the end of the 14-day period, so long as they do so voluntarily.

• Sufficient consideration – The law codifies existing case law under which Illinois courts have ruled that, unless an employee receives some professional or financial benefit in exchange for signing an agreement (e.g., a cash payment or additional vacation time), the employee must work for the employer for at least two years after signing an agreement for it to be enforceable

• Legitimate business interest – The law provides that when assessing whether an employer has a legitimate business interest sufficient to warrant a post-employment restrictive covenant, courts must consider the

totality of the facts and circumstances, with each situation being assessed on a case-by-case basis

• Judicial reform of overly broad restrictions – The law provides that a court may exercise its discretion and choose to reform or eliminate provisions of an agreement that are overly broad, rather than invalidating an agreement

Key Exceptions to the Law

The law contains a number of significant exceptions, including:

• Confidentiality and trade secret agreements – The law does not apply to confidentiality, trade secret, and invention assignment agreements. These types of agreements will continue to be governed by existing laws and principles.

• Sales of business – The law does not apply to agreements that are entered into in connection with the acquisition or disposition of an ownership interest in a business

• Garden leave provisions – The law does not apply to "garden leave" clauses that require an employee to provide advance notice of termination of employment, with the employee remaining employed and compensated during the notice period

• No reapplication clauses – The law does not apply to "no reapplication" clauses that are commonly included in separation agreements and prohibit the separating employees from reapplying for employment in the future

Employer Takeaways

When assessing the impact of the new law, employers should consider potential changes to ensure their agreements and practices will remain enforceable and viable; minimally, agreements entered into after Jan. 1, 2022 will need to include new language regarding the 14-day review period and right to consult with an attorney. Although the law does not impact agreements that are currently in effect, there may be circumstances in which an employer wishes to enter into a new, modified agreement.

For more information, please contact the Barnes & Thornburg attorney with whom you work or Timo Rehbock at 313-214-4592 or timo.rehbock@btlaw.com.

may have concerning your situation.