CLIENT ALERTS & INSIGHTS

Significant Changes to Illinois Restrictive Covenants Law - What Employers Need to Know

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At the end of the legislative session, the Illinois legislature amended the "Illinois Freedom to Work Act" in a manner that dramatically alters the landscape of Illinois Restrictive Covenant Law. Perhaps by design, there was very little fanfare, media coverage, or debate before the amendments were passed, but employers and restrictive covenant lawyers are now analyzing the amendments and making plans to insure compliance with the amendments when they take effect on January 1, 2022.

What has changed from a legal perspective?

For two hundred years, Illinois restrictive covenant law was largely a creature of legal opinions from trial judges, appellate judges and, to a lesser extent, Supreme Court Justices. Although this case law is still important when assessing whether a restrictive covenant is reasonable and enforceable, the amendments place certain parameters and guidelines that all employers must now consider when drafting, reviewing and enforcing restrictive covenants. Three parameters/guidelines found in the amendments are:

1. Non-competition agreements/provisions are only enforceable against individuals making more than $75,000 per year. (The $75,000 threshold increases to $80,000 in 2027 and automatically increases by $5,000 every five years thereafter through 2037).
2. Non-solicitation agreements/provisions are only enforceable against individuals making more than $45,000 per year. (The $45,000 threshold increases to $47,500 in 2027 and automatically increases by $2,500 every five years thereafter through 2037).
3. Restrictive covenants are only enforceable if the individual receives "adequate consideration" at the time s/he signs the covenant or after the individual has worked for the company for two years.

Requiring "adequate consideration" at the start of employment resolves an eight year split among Illinois state and Federal courts over whether a restrictive covenant agreement with reasonable restrictions, but no consideration for those restrictions, is immediately enforceable at the start of employment. Not surprisingly, the most common and easily identifiable "adequate consideration" under the amendments is "financial benefits" (i.e. money). Yet, "professional benefits" can also constitute adequate consideration. Unfortunately, the amendments do not define or provide examples of "professional benefits," but one can reasonably assume that professional benefits could include extra vacation time, extra personal days, or specific/customized training. The amendments also do not specify the amount of the "benefit." Instead, the amendments only state that the benefit must be "adequate."

What are some of the changes that companies may need to make to their agreements and how they make offers to new hires?

Initially, it should be pointed out that the amendments only apply to restrictive covenant agreements entered into after January 1, 2022. Put another way, the amendments are not retroactive and, as such, companies do not automatically need to go back and rewrite or re-negotiate their existing agreements. Going forward, however, companies with restrictive covenant agreements governed by Illinois law will need to familiarize themselves with the new compensation thresholds and consideration requirements. Just as important, companies will also need to **a) advise the potential hire, in writing, to consult with an attorney before signing the agreement** and **b) provide the individual with 14 days to consider the agreement**. Compliance with these new requirements is essential because the amendments now allow former employees to recover their attorneys' fees if a company is unsuccessful in seeking to enforce a covenant not to compete or a covenant not to solicit.

How we can help?

Members of Benesch's **Trade Secrets, Restrictive Covenants and Unfair Competition Group** are adeptly skilled at writing agreements that comply with restrictive covenant laws and provide a company with the maximum amount of protection. Members also study, follow and, in some cases, contribute to the drafting of these laws. Accordingly, Benesch lawyers can help you revise your agreements to comply with Illinois' new restrictive covenant requirements, work with you to identify "consideration" that an Illinois court would deem "adequate," and develop and evaluate different strategies for compliance that are consistent with your company's goals and resources.

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