Restricting the Restrictions: New Illinois Legislation Would Limit Employer Use of Non-Competition and Similar Restrictive Covenants

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The Illinois General Assembly recently passed Senate Bill 672 ("SB 672" or the "Bill"), which codifies Illinois common law standards for enforceability for covenants not to compete or solicit and imposes several additional statutory limitations on employers’ ability to enter into and enforce post-employment restrictive covenants. The Bill, which is expected to be signed into law by the end of the year, follows a nationwide trend among Democratic state legislatures enacting laws designed to limit the use or utility of various restrictive covenants in the employment setting.

Under SB 672, a covenant not to compete or solicit is void and unenforceable, subject to judicial reformation, unless: (1) the employee receives adequate consideration; (2) the covenant is ancillary to a valid employment relationship; (3) the covenant is no greater than is required for the protection of a legitimate business interest of the employer; (4) the covenant does not impose undue hardship on the employee; and (5) the covenant is not injurious to the public. The Bill codifies
the holding of *Fifield v. Premier Dealer Services*, 2013 IL App (1st) 120327, by defining “adequate consideration” as (a) two years of continuous employment after signing the agreement; or (b) alternative consideration, such as “a period of employment plus additional professional or financial benefits or merely professional or financial benefits adequate by themselves.” This is noteworthy as some courts applying Illinois law have declined to apply *Fifield’s* holding taking the position that it does not correctly state Illinois law. Following SB 672’s enactment, it is likely that *Fifield* will be followed by courts across the board, even when interpreting restrictive covenants entered into before the Bill’s effective date.

Likewise, the Bill incorporates the holding of *Reliable Fire Equipment Co. v. Arredondo*, 965 N.E.2d 393 (Ill. 2011), by adopting its “totality of the facts and circumstances” standard for determining an employer’s legitimate business interest. The Bill further provides a non-exclusive list of factors to be considered by courts when determining the employer’s legitimate business interest: (1) the employee’s exposure to the employer’s customer relationships or other employees; (2) the near-permanence of customer relationships; (3) the employee’s acquisition, use, or knowledge of confidential information through the employee’s employment; (4) the time restrictions; (5) the place restrictions, and (6) the scope of the activity restrictions.

SB 692 also codifies the Illinois common law rule permitting courts to reform otherwise unenforceable noncompete and nonsolicitation agreements. Under the law, Illinois courts will be able to use their discretion to “blue pencil” or rewrite or sever provisions of an overly broad and otherwise unenforceable covenant, rather than striking it as unenforceable as a whole. Pursuant to the Bill, courts will consider the following factors when deciding when and how to blue pencil otherwise unenforceable covenants: (1) the fairness of the restraints as originally written, (2) whether the original restriction reflects a “good-faith effort” to protect a legitimate business interest of the employer, (3) the extent of the contemplated reformation, and (4) whether the parties included a clause authorizing modifications in their agreement.

**Seven Limitations on Post-Employment Restrictive Covenants**

In addition to setting forth the judicial standards for their enforceability, SB 672 imposes these seven limitations on post-employment restrictive covenants:

1. SB 672 replaces the “low-wage” definition in the Illinois’ Freedom to Work Act, which prohibited “covenants not to compete” for “low-wage employees” earning up to $13.00 per hour or minimum wage (whichever is greater), with an annualized earnings requirement that makes void any non-competition covenants for employees earning $75,000 per year or less. [1]

2. It introduces a threshold for non-solicitation covenants, requiring that the employee earn at least $45,000 per year (inclusive of all forms of taxable compensation) to be enforceable. [2]

3. It requires employers to provide employees with at least fourteen calendar days to review noncompete and nonsolicitation agreements and to advise them, in writing, of their right to consult with an attorney prior to signing the
agreement.

4. It provides prevailing employees in noncompete and nonsolicit litigation with a statutory right to attorney’s fees and costs.

5. It authorizes the Illinois Attorney General to initiate or intervene in restrictive covenant litigation and to conduct investigations of employer conduct that violates the Bill’s prohibitions. [3]

6. Employers are prohibited from enforcing restrictive covenants against employees who are separated due to COVID-19 or “circumstances that are similar to the COVID-19 pandemic 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 through subsequent employment during the period of enforcement.”

7. It voids covenants not to compete entered into with an individual covered by a collective bargaining agreement under the Illinois Public Labor Relations Act or the Illinois Educational Labor Relations Act, as well as individuals employed in construction.

While SB 672 applies to post-employment covenants not to compete or solicit, it does not apply to other restrictive covenants such as confidentiality agreements, invention assignment agreements, “garden leave” agreements, or no rehire agreements. Also excluded are restrictive covenants entered into by an owner acquiring or disposing of an ownership interest in a business. [4]

If signed into law as expected, SB 672 will go into effect January 1, 2022 and will apply to agreements entered into on or after that date. The Bill is not retroactive and will not apply to agreements entered into before January 1, 2022. Prior to the Bill’s effective date, Illinois employers should evaluate whether to enter into new covenants not to compete or solicit with their employees, and should review and revise their existing form agreements for compliance.

Moving forward, some Illinois employers may soon have to deal with the reality that employees who have access to confidential information and trade secrets no longer are subject to noncompete agreements. To protect against the misuse of confidential and proprietary information and trade secrets by these employees, employers should consider utilizing more robust confidentiality agreements, drafting appropriate employer policies, conducting employee training on data privacy and security, and taking additional physical and computer security measures to protect their information.

[1] The statutory minimum salary threshold increases by $5,000 increments every five years, through 2037.

[2] This minimum salary threshold increases as well, in $2,500 increments, every five years through 2037.

[3] In its enforcement actions, the Attorney General is permitted to seek
compensatory or equitable remedies, or seek civil penalties of $5,000 per violation or $10,000 for each repeat violation within a five-year period.

[4] The application of this exclusion is limited to owners of a business that is acquired or sold. Employers should not treat all restrictive covenants executed as a result of an acquisition or sale as excluded under SB 672.

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