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Illinois Gets More Restrictive on Restrictive Covenants



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Employers seeking to impose restrictive covenants upon employees will face substantial new hurdles beginning January 1, 2022. Previously, the Illinois Freedom to Work Act barred employers from requiring “low wage” workers earning \$13.00 per hour or less to sign a covenant not to compete or covenant not to solicit agreement. The original Act was inspired by cases like the one brought by the Illinois Attorney General against Jimmy John’s, which prohibited employees from working for any sandwich maker within 2 miles of any Jimmy John’s for two years.

The legislature passed an amendment to the Act in June 2021 (expected to be signed by Illinois Gov. J.B. Pritzker) that greatly expands the scope of its original, laudatory intent to protect vulnerable workers without bargaining power.

Under the amendment, an employer cannot enter into a covenant not to compete unless the employee earns more than \$75,000 per year. For a non-solicitation agreement, which covers actual or prospective customers and other business relationships (like vendors), the threshold is over \$45,000 per year. These amounts will increase by \$5,000 and \$2,500, respectively, every 5 years over the next 15 years. “Earnings” include compensation reported on the employee’s IRS Form W-2 (e.g., wages, commissions, bonuses) plus elective deferrals not included (e.g., contributions to 401(k) plan, flexible spending account, commuter benefits). Excluded from these agreements altogether are construction workers and employees covered by a collective bargaining agreement under the Illinois Public Labor Relations Act or the Illinois Educational Labor Relations Act.

The amendment also codifies Illinois precedent breaking from the majority rule that hiring or continuing to employ an employee is adequate consideration to support restrictive covenants. Instead, adequate consideration requires either two or more years of employment from the date of signing, or some other adequate form of consideration, which “can consist of a period of employment plus additional professional or financial benefits or merely professional or financial benefits adequate by themselves.” We should expect litigation over the unsettled question of what will be considered adequate consideration.

Once these preliminary requirements are met, a restrictive covenant will be enforced if deemed reasonable based on the totality of the facts and circumstances test derived from the Illinois Supreme Court’s ruling in *Reliable Fire Equipment Company v. Arrendondo*. Such factors used to conduct that analysis are rooted in traditional notions of an employer’s legitimate business interests, like an employee’s exposure to customers and confidential information, the near-permanence of the employer’s customer relationships, and the breadth of time and geographic restrictions. In addition, the agreement cannot impose undue hardship on the employee or be injurious to the public. Before signing, employers must advise employees in writing to consult with an attorney and provide 14 days to review the agreement.

In short, the world of restrictive covenants remains as fact-specific and uncertain as ever, with added impediments imposed upon the employer. And it must be noted that employers who lose an enforcement action in court or arbitration shall pay the employee’s attorney’s fees. If you are an employer who utilizes these agreements for other than highly valued employees, it is time to take a close look at their enforceability and continued practicality in light of the attendant costs.

If you have questions regarding the amendment, please contact any of the attorneys in our [Human Resources and Employment Law Practice](#).