Proposed Illinois Law Signals Potential Change On The Horizon For Employers Relying On Restrictive Covenant Agreements

Insights
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Recent legislative developments in the State of Illinois underscore the need for employers to review and revise their restrictive covenant agreements with their employees to maximize potential enforceability. Specifically, a bill has emerged in the state legislature that would significantly restrict employer use and enforcement of restrictive covenant agreements. What do Illinois employers need to know about this potentially game-changing development?

Current State Of Illinois Law

As is the case in many states, Illinois law governing the enforceability of restrictive covenant agreements – which include covenants not to compete and not to solicit customers and employees – in the employment context has developed largely through judge-made, common law decisions. Under current law, and to briefly summarize, Illinois courts will enforce restrictive covenant agreements against a former employee where necessary to protect an employer's legally protectable interests, based upon a holistic analysis of the facts in each case under a reasonableness standard.

While the fact-intensive nature of court decisions in this area of the law has, at times, made it difficult for employers to predict the enforceability of a restrictive covenant agreement in any specific instance, the Illinois legislature has not codified the relevant legal standards governing enforceability. Nor have state lawmakers otherwise tilted the scale of enforceability toward either the employee or the employer.

Changes Could Be On The Horizon

That may be changing, as the Illinois State Legislature recently has entered the fray. On January 8, 2021, lawmakers introduced a bill (H.B. 789) that would codify key aspects of Illinois law governing enforcement of restrictive covenant agreements. More specifically, H.B. 789 contains several provisions that would potentially restrict employer use and enforcement of these agreements.

Some of the key provisions in H.B. 789 include:

- A covenant not to compete would not be valid or enforceable unless the employee's actual or expected annualized rate of earnings exceeds $75,000 per year, subject to additional increases in

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- A covenant not to solicit would not be valid or enforceable unless the employee's actual or expected annualized rate of earnings exceeds $45,000 per year, subject to additional increases in subsequent years.
- An employer would have to provide the employee with a copy of the restrictive covenant agreement at least 14 days prior to the commencement of employment, advise the employee in writing that they should have legal counsel review the agreement, and further provide the employee with at least 14 calendar days to review the agreement prior to signing.
- A covenant not to compete would be unenforceable against any employee who is terminated or furloughed as the result of business circumstances or governmental orders related to the COVID-19 pandemic, or under circumstances that are similar to the COVID-19 pandemic.
- In addition to any remedies provided in the relevant restrictive covenant agreement, an employee who prevails on a civil claim to enforce a covenant not to compete or a covenant not to solicit "shall" recover from the employer all costs and reasonable attorneys' fees.
- Covenants not to compete and not to solicit would be illegal and void unless (1) the employee receives adequate consideration, (2) the agreement is ancillary to a valid employment relationship, (3) the covenant is no greater than necessary for the protection of the legitimate interests of the employer, (4) the covenant does not impose undue hardship on the employee, and (5) the covenant is not injurious to the public.

Among other things, the bill would provide that, to support a legally binding restrictive covenant, an employer must (1) offer the employee independent consideration at the time of entering into the agreement (such as a monetary payment to which the employee would not otherwise be entitled), or (2) the employee must work for the employer for at least two years after signing the agreement.

The Big Question: Will It Become Law?

Viewed in the context of national developments, the passage of H.B. 789, or some modified version thereof, is not far-fetched. The proposal comes in the wake of broader federal and state-based efforts to rethink the enforceability of restrictive covenants in the employment context. For example, legislative enactments in the states of Washington, Rhode Island, and Oregon, among others, have in many ways restricted employers' ability to enter into binding restrictive covenant agreements with their employees. Time will tell if the bill ultimately becomes law, or if it is passed in a modified form.

What Should Illinois Employers Do?

While the proposed legislation would clarify some of the legal standards relating to the enforceability and potential reformation of overly broad covenants, H.B. 789 would undoubtedly present challenges to employers who rely upon restrictive covenant agreements to protect their legal interests. Significantly, however, the legal standards set forth in current version of H.B. 789

legal interests. Significantly, however, the legal standards set forth in current version of H.B. 767 would not apply to restrictive covenant agreements that are entered into prior to the effective date of the legislation. In other words, employers who have entered into legally enforceable agreements with their employees under the current state of the common law would be able to rely upon and enforce these agreements under the pre-existing, and less restrictive, legal standards.

Accordingly, we recommend that you consider reviewing your existing restrictive covenant agreements to maximize the potential for enforcement in advance of any legislative changes that may only apply prospectively. If you have not done so yet, you should consider implementing some form of these agreements in the near future.

At a minimum, you should continue to track these legislative developments, and seek advice of employment counsel, to be sure you are not caught flat-footed in advance of significant changes in the law. We'll continue to monitor developments in this area, so make sure you are subscribed to Fisher Phillips' Alert System to get the most up-to-date information. If you have any questions about how this decision may impact your business, please contact your Fisher Phillips attorney or any attorney in our Chicago office.

This Legal Alert provides an overview of a specific proposed state law. It is not intended to be, and should not be construed as, legal advice for any particular situation.

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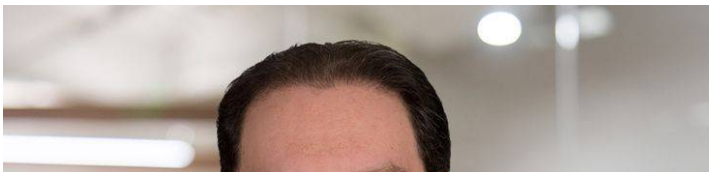

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