7 Key Takeaways for Employers as Illinois Passes Groundbreaking Restrictive Covenant Agreement Law

Insights
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Illinois Governor J.B. Pritzker recently signed a new law into effect that amends the Illinois Freedom to Work Act (IFWA) and creates greater obstacles for employers when it comes to the enforceability of restrictive covenants such as non-competition and non-solicitation agreements. The new law, signed on August 13 and taking effect on January 1, 2022, will invariably impact any Illinois employer that either deploys such agreements already or contemplates implementing such agreements in the future. Because the new law only applies to agreements that are entered into on after January 1, 2022, *now* is the time for employers to review and revise their restrictive covenant agreements. Additionally, it is essential to begin planning for the transition to the new legal standards in 2022 and beyond. What are the seven key takeaways employers need to know?

7 Key Takeaways from Illinois's New Law

Before the enactment of the new law, the validity of restrictive covenant agreements was largely governed by Illinois common law. The amended IFWA now contains a number of provisions that dramatically alter the legal standards relating to the enforceability of employee non-competition and non-solicitation covenants in the State of Illinois. Some of the new law's key provisions include:

1. The law codifies certain judicial rulings relating to the **adequacy of consideration** in support of enforcement of non-competition and non-solicitation covenants. Under the new law, a restrictive covenant is supported by "adequate consideration" if (1) the employee has worked for the employer for at least two years after signing a restrictive covenant agreement, or (2) the employer has provided the employee with "professional or financial benefits" that may constitute independent consideration for entering into a restrictive covenant agreement. The law does not define precisely what amount of "professional or financial" benefits shall constitute adequate consideration.
2. A **covenant not to compete** is not valid or enforceable unless the employee's actual or expected annualized **rate of earnings exceeds $75,000 per year**, subject to additional increases in subsequent years.
3. A **covenant not to solicit** is not 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.

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4. Employers are required to provide employees with **at least 14 days to review a restrictive covenant agreement** and decide whether to sign, although the employee has the option of signing the agreement before the 14-day period has ended. Employers must also advise employees that they have the right to consult with an attorney before entering into a restrictive covenant agreement.
5. An employee can recover **attorneys' fees and costs** from an employer if the employee is the prevailing party in a civil action or arbitration filed by an employer to enforce non-competition or non-solicitation covenants.
6. Non-competition and non-solicitation covenants are not enforceable against an employee who has lost their job due to **COVID-19** or to "circumstances that are similar to the COVID-19 pandemic" unless enforcement of the restrictive covenant agreement includes the receipt of compensation equivalent to the employee's base salary at the time of termination for the period of enforcement, minus any compensation earned through subsequent employment.
7. The new law provides the Illinois Attorney General with **broad authority to investigate employer conduct** when there is "reasonable cause" to believe that an employer is engaged in a pattern or practice prohibited by the IFWA. The Illinois Attorney General is permitted to seek compensatory damages and equitable remedies against employers, including monetary penalties of $5,000 per violation or $10,000 for each repeat violation within a five-year period.

What Should Illinois Employers Do?

Significantly, the legal standards set forth in the new law do not apply to restrictive covenant agreements that are entered into prior to the effective date of the legislation, or January 1, 2022. 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 preexisting – 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 January 1, 2022. Further, you should begin planning for the changes that will become effective on January 1, 2022. Employers who fail to do so will find they have practical and legal issues enforcing their future agreements.

We will monitor these developments and provide updates as warranted, so make sure that you are subscribed to Fisher Phillips' Insights to get the most up-to-date information direct to your inbox. If you have further questions, contact your Fisher Phillips attorney, the authors of this Insight, or any attorney in our Chicago office.

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