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News & Types: Employment, Labor & Benefits Update

Illinois Imposes New Restrictions on Employers Utilizing Non-Competition and Non-Solicitation Agreements

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By: Naureen Amjad

Practices: Employment, Labor & Benefits

Co-Author: Reika Nakayama (Summer Associate)

EXECUTIVE SUMMARY

The Illinois General Assembly recently passed amendments to the Illinois Freedom to Work Act ("IFWA") which seek to significantly restrict Illinois employers in how they utilize non-competition and non-solicitation agreements with their employees. While Illinois appears to recognize the importance of such agreements, it also seeks to strike a balance between restricting high-earning employees from unfairly competing and placing a restraint upon trade. The amendments are anticipated to be signed by Governor J.B. Pritzker in the near future. They would take effect on January 1, 2022, applying to any employee non-competition and non-solicitation agreements entered into on or after that date but not prior. Should Governor Pritzker exercise his power to issue an amendatory veto recommending changes to the bill, an updated article will follow.

The IFWA currently requires employers to demonstrate a legitimate business interest to support enforcement of an employee non-competition or non-solicitation agreement. More specifically, the IFWA currently prohibits employers from entering into non-competition agreements with low-wage employees who earn $13 per hour, or an hourly rate equal to the applicable federal, state or local minimum wage, whichever is greater. Non-competition agreements typically prohibit an employee from performing work for another employer that is similar to the employee's current work, during a specified time period and within a certain geographic area. The IFWA currently does not regulate non-solicitation agreements, which are agreements that generally prohibit an employee from soliciting an employer's employees, clients, customers, vendors, suppliers or prospective clients or customers with whom the employer has near permanent relationships.

Once they take effect, the IFWA amendments will significantly change the landscape of non-competition and non-solicitation agreements for Illinois employers. Indeed, Illinois employers would be prohibited from entering into non-competition agreements with employees earning less than $75,000 annually, which would increase by $5,000 every five years until 2037. Illinois employers would also be prohibited from entering into non-solicitation agreements with employees earning less than $45,000 annually, which would increase by $2,500

every five years until 2037. The above compensation thresholds are based upon an employee's annualized rate of earnings, which includes salary, bonuses, commissions, tips, or any other taxable compensation reflected or expected to be reflected on the employee's Form W-2, as well as elective deferrals, such as employee contributions to 401(k) and 403(b) plans, flexible spending accounts, health savings accounts and commuter benefits. Non-competition and non-solicitation agreements must also be supported by adequate consideration, which under the IFWA amendments shall mean: (i) the employee worked for the employer for at least two years after entering into the agreement; or (ii) the employer otherwise provided adequate consideration to support the agreement, which could include a period of employment, plus certain professional or financial benefits or solely professional or financial benefits that were sufficient standing alone. Notably, the IFWA amendments place no restrictions on confidentiality and invention clauses, which permits employers to require even employees who fall below the earning thresholds above to enter into enforceable confidentiality and assignment of invention agreements.

Under the IFWA amendments, Illinois employers will need to: (i) provide an employee with at least 14 calendar days to review the non-competition or non-solicitation agreement (and in the case of a new hire, at least 14 calendar days prior to starting work), which review period the employee may choose to waive; and (ii) advise the employee in writing to consult with an attorney prior to entering into the agreement.

Employers with locations or employees in Illinois are advised to review their form non-competition and non-solicitation covenants well prior to January 1, 2022 to ensure compliance with the IFWA amendments. This not only includes reviewing stand-alone non-competition and non-solicitation agreements, but also offer letters, employment agreements and any other such agreements containing non-competition and non-solicitation clauses. Failure to comply with the IFWA amendments can result in investigations and enforcement actions by the Illinois Attorney General if it has reasonable cause to believe an employer has engaged in a pattern or practice of using agreements in violation of the IFWA amendments. In such cases, an employer could face civil penalties of up to $5,000 per violation or $10,000 for repeated violations within a five-year period, along with monetary damages and equitable relief. The IFWA amendments also entitle prevailing employees in an enforcement action over such agreements to recover all reasonable attorney's fees and costs from their employers.