

ILLINOIS LEGISLATURE ENACTS LAW REGULATING RESTRICTIVE COVENANTS

Aug 23, 2021 | Michael Brohman

On August 13, 2021, Governor Pritzker signed a new law regulating restrictive covenants in employment agreements involving Illinois employees, to be effective January 1, 2022. The impacted restrictive covenants are (i) covenants not-to-compete (e.g., provisions that restrict a current or former employee from engaging in post-employment competitive activities); and (ii) non-solicitation provisions (e.g., provisions that prohibit an employee from hiring the employer’s employees or which restrict the employee from soliciting the employer’s current or prospective patients or clients, referral sources or other individuals with whom the employer has or has attempted to establish business relationships during the employee’s employment).

Prior to the enactment of this new law, the validity of restrictive covenant provisions was strictly decided by courts without any legislative guidance. The new law adopts many of the court-established principles, but importantly adds a number of new guidelines for employers to follow if they wish to enforce restrictive covenants.

The following chart identifies the changes enacted by the new law:

<i>Prior to January 1, 2022</i>	<i>As of January 1, 2022</i>
Covenants not-to-compete are not limited by amount of an employee’s compensation	Covenants not-to-compete will not be enforced against employees earning the following compensation (which includes bonuses and all sources of taxable income from employment): Year 2022-\$75,000 or less Year 2027-\$80,000 or less Year 2032-\$85,000 or less Year 2037-\$90,000 or less
Non-solicitation provisions are not limited by the amount of the employee’s compensation	Non-solicitation provisions will not be enforced against employees earning the following compensation (which includes bonuses and all sources of taxable income from employment): Year 2022-\$45,000 or less Year 2027-\$47,500 or less Year 2032-\$50,000 or less Year 2037-\$52,500 or less
Covenants not-to-compete and non-solicitation restrictions are not limited by COVID-19	Covenants not-to-compete and non-solicitation provisions will not be enforced against employees, who have been terminated due to COVID-19 or to “circumstances that are similar to the COVID-19 pandemic” unless enforcement of the covenant not to compete includes (i) compensation equivalent to the employee’s base salary at the time of termination for the period of enforcement; minus (ii) compensation earned through subsequent employment during the period of enforcement
Covenants not-to-compete and non-solicitation provisions are possibly enforceable against employees covered by a collective	Covenants not-to-compete or non-solicitation provisions will not be enforced against employees covered by a collective bargaining





<p>bargaining agreement</p>	<p>agreement under the (i) Illinois Public Labor Relations Act; or (ii) Illinois Educational Labor Relations Act. Also, these restrictions will not be enforced against persons employed in construction (other than construction employees who primarily perform management, engineering or architectural, design, or sales functions for the employer or who are shareholders, partners, or owners of the employer)</p>
<p>No mandatory review period</p>	<p>Employers must give employees 14 days to review covenants not-to-compete and non-solicitation provisions, although employees can voluntarily waive the 14-day review period</p>
<p>No obligation to inform employees of right to seek legal counsel</p>	<p>Employers must inform employees of their right to seek the advice of legal counsel related to the restrictive covenants</p>
<p>No specific oversight of covenants not-to-compete and non-solicitation provisions by Illinois Attorney General</p>	<p>The Illinois Attorney General's office is to oversee covenants not-to-compete and non-solicitation provisions and to take action against employers who violate the new law.</p> <p>The Attorney General is permitted to seek compensatory or equitable remedies against employers, or to seek civil penalties of \$5,000 per violation or \$10,000 for each repeat violation within a five-year period.</p>
<p>No employee statutory right to obtain attorney's fees in the event an employer brings a lawsuit to enforce a covenant not-to-compete or non-solicitation provision</p>	<p>An employee can recover attorney's fees and costs from employer if the employee is the prevailing party in a lawsuit to enforce a covenant not-to-compete or non-solicitation provisions</p>
<p>Many Illinois courts have required employers to show that, aside from continued employment, "adequate consideration" was provided for covenants not-to-compete and non-solicitation provisions as a requirement for the enforcement of those provisions</p>	<p>The new law formally adopts the holding in judicial decisions which requires "adequate consideration" to support enforcement of covenants not-to-compete and non-solicitation provisions</p> <p>An employer can demonstrate "adequate consideration" with evidence that:</p> <ul style="list-style-type: none"> - the employee has worked for the employer for at least two years after the employee signed the covenant not-to-compete or non-solicitation provisions; - the employer otherwise provided consideration adequate to support a covenant not-to-compete or non-solicitation provision, which consideration can consist of a period of employment plus additional professional or financial benefits; or - the employer otherwise provided additional professional or financial benefits to the employee





<p>Most courts used a “totality of the circumstances” approach to determine whether to enforce covenants not-to-compete and non-solicitation provisions</p>	<p>The new law requires courts to use a “totality of the circumstances” analysis to determine whether to enforce a covenant not-to-compete or non-solicitation provisions, and to consider factors such as:</p> <ul style="list-style-type: none"> - the employee’s exposure to the employer’s clients or patients; - the near permanence of the employer’s relationship with its clients or patients; - the employee’s use or acquisition of the employer’s confidential information; - the length of the time restrictions involved in the provisions; - the extent of any geographical restrictions in the provisions; and - the scope of activities being restricted
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The new law does not impact the following situations:

- Covenants not-to-compete and non-solicitation provisions entered into by parties before January 1, 2022. It is our current understanding that any covenants not-to-compete or non-solicitation provisions that were in agreements entered into prior to January 1, 2022 will not be subject to the new law, even if the term of such agreements continue beyond January 1, 2022;
- Covenants not-to-compete or non-solicitation provisions arising out of the sale of a business, the sale of an ownership interest in a business, or the sale of the “goodwill” of a business;
- Confidentiality agreements or provisions, or to provisions pertaining to the disclosure, sale or assignment of trade secrets or inventions;
- Restrictive covenants preventing competition and solicitation during notice periods in agreements that require advance notice of termination of employment, and the employee remains employed and receives compensation during such notice period; and
- Provisions barring an employee from re-applying for employment after termination.

The new law leaves many unanswered questions, including: What type and amount of “professional or financial benefits” are adequate consideration for enforcement of restrictive covenants? Will restrictive covenants entered into prior to January 1, 2022 be exempt from the new law if they are renewed or modified after January 1, 2022? Does the new law apply to a restrictive covenant in an employment agreement signed in 2021 for employment commencing in 2022? Will employers be able to enforce agreement provisions that allow them to recover their fees and costs from employees if employers prevail in restrictive covenant litigation?

These new legal requirements will impact your business and will make the availability and enforcement of restrictive covenants in Illinois more difficult. Now is the time to consider what needs to be included in employment agreements to be entered into after January 1, 2022, and how agreements currently in-effect may be impacted. Protect your business interests and contact us now to have our attorneys help you navigate the challenges presented by this new law.



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