The Times They Keep A-Changing: The New Illinois Restrictions on the Use of Non-Compete and Non-Solicit Agreements

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The state-by-state non-compete reform movement keeps rolling – this time in the state of Illinois. Effective January 1, 2022, the Illinois Freedom to Work Act has dramatically changed the landscape for employers in that state who desire to use non-compete agreements with their employees. In a marked departure from most other states enacting reform measures, this new law also adds restrictions on the use of non-solicit agreements.

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As a quick refresher, non-compete agreements prohibit an employee from working for a competitor for some limited period of time after departing employment. Non-solicit agreements more narrowly restrict an employee from soliciting the employer's customers or clients post-termination.

Non-solicit agreements have typically been less the target of legislative reform than non-compete agreements. No doubt this has been the case due to the fact that the employer was seeking to protect existing customer relationships (typically referred to as "goodwill") which it had invested time, effort and expense in creating. As a result, reform efforts have more often focused on non-competes where there is far less of an identifiable investment appropriate to protect. As a prime example of this legislative differentiation, the Massachusetts Noncompetition Agreements Act which took effect in 2018 (the "Massachusetts Act"), expressly excludes non-solicitation agreements from the reach of the

enacted reforms.

Not so in Illinois. Painting with a very broad brush, the **Illinois Freedom to Work Act (IFWA)** imposes the following restrictions on the use of either:

- Continued employment will not be sufficient consideration for such agreements unless the employment continues for at least two years after signing or the employee is provided undefined "additional professional or financial benefits;"
- An employee terminated or furloughed due to the business impacts of COVID "or under circumstances that are similar to the COVID-19 pandemic" must be provided compensation equal to the employee's final base salary for the entire time period that the restriction is in place (with an offset if the employee has found subsequent employment);
- Non-compete and non-solicit agreements may not be used with employees earning less than certain annual income thresholds ($75,000 for non-competes; $45,000 for non-solicits; with automatic income threshold increases in 2027, 2032, and 2037);
- Covenants not to compete with construction workers, shareholders of the employer; or employees subject to certain collective bargaining agreements are illegal and void;
- Agreements that do not expressly advise the employee to consult with an attorney are illegal and void;
- Agreements which do not provide a 14 calendar day review period are similarly illegal and void;
- Attorney's fees must be awarded to employees who successfully defeat an employer's enforcement attempt; and
- The attorney general is empowered to prosecute employers who "engage in a pattern and practice" prohibited by IFWA with fines beginning at $5,000 and escalating with each subsequent violation.

It is interesting to compare the provisions in the IFWA to what is and is not provided in the **Massachusetts Act**:

- *Coverage*. Non-solicit agreements are not affected and remain enforceable to the same extent as they were prior to enactment of the

Massachusetts Act;

- *Consideration*. Continued employment regardless of how long it continues will not be sufficient consideration for such agreements – "fair and reasonable consideration" (undefined in the statute) must be given to a current employee asked to sign such an agreement and the consideration being provided must be spelled out in the agreement;
- *Laid Off Employees*. A non-compete agreement becomes void if an employee is terminated without cause or "laid off" regardless of what precipitated the lay-off;
- *Garden Leave*. In perhaps the most common misperception, "garden leave" of 50% of an employee's base salary is *an option* an employer *may* provide in consideration for a non-compete agreement, but it is not mandated – although it is anticipated that Massachusetts courts will likely be less receptive to non-competes that do not include a "garden leave" provision;
- *Off-Limits Employees*. Non-compete agreements may not be used with non-exempt employees, student interns or young employees (under age 19) regardless of income level;
- *Mandatory Notice of Right to Counsel*. The employee must be expressly advised of his or her right to consult with an attorney before signing (one court sitting in Massachusetts held an agreement unenforceable where this language was absent);
- *Mandatory Review Period*. The employee must be provided a 10 business day review period before signing;
- *Attorney's Fees and Fines*. There are no provisions imposing mandatory attorney's fees or potential civil administrative penalties under the Massachusetts Act.

As the non-compete reform movement continues to spread across the country, the widely-varying approaches taken from state-to-state defy any general description. Where there has been activity, some states have enacted very limited restrictions (such as New Hampshire whose legislation is limited to a ban on non-competes with low wage employees) (see 2019 blog post – *The Summer of Non-Compete Reform: Three Other New England States Get In On The Act*). A few (such as the District of Columbia in particular) (see January 2022 blog post – *The District of Columbia's Aggressive Ban on Non-Compete Agreements*)

have joined California in banning non-compete agreements outright. As the comparison between the Massachusetts Act and the IFWA reflects, other states have taken very different and creative approaches tailored to address specific areas of concern of each state's legislature. Given this spectrum, the only general takeaway is that employers, particularly those with operations in numerous states, must be knowledgeable about the crazy quilt of laws that have emerged and take the steps necessary to carefully comply.