

JUNE 4, 2021



Illinois Legislature passes non-compete reform

By Lisa C. Sullivan and Richard H. Tilghman

Illinois employers and employees alike need to be cognizant of changes that will impact the enforceability of employee non-compete agreements entered into after 2021.

Legislation unanimously passed by the Illinois General Assembly over Memorial Day weekend, and anticipated to be signed into law by Governor Pritzker, will take effect for employee covenants not to compete or covenants not to solicit customers or employees entered into as of January 1, 2022. Existing non-compete agreements will not be impacted.

Among the key aspects of the new legislation are the following:

- Bans covenants not to compete for employees making less than \$75,000 per year in earnings (including any commissions or bonuses). That threshold will increase over time (by \$5,000 every five years) until the threshold becomes \$90,000 in January 2037.
- Bans customer non-solicitation agreements and employee non-solicitation agreements for employees making less than \$45,000 per year in earnings. This threshold will increase in \$2,500 increments every five years until it becomes \$52,500 in January 2037.
- Mandates the recovery of attorneys' fees and costs by an employee who prevails in a lawsuit brought by the employer seeking to enforce a covenant not to compete or covenant not to solicit.
- Makes covenants not to compete or not to solicit void and illegal unless the employer both (a) provides employees 14 days to review an agreement containing a covenant not to compete or not to solicit and (b) advises the employee in writing to discuss the agreement with an attorney.
- Clarifies that the determination of whether an employer has a legitimate business interest that may justify use of a covenant not to compete or covenant not to solicit is judged by the "totality of the facts and circumstances."
- Codifies the "two-year rule" followed by certain Illinois state courts, which requires either (a) two years of employment or (b) alternative "adequate" consideration to make a non-compete or non-solicitation agreement enforceable.

- Permits courts, in some circumstances and in the court’s discretion, to reform or sever provisions of a non-compete or non-solicitation agreement rather than hold them unenforceable, while noting that “extensive” reformations may be against Illinois public policy.
- Bans enforcement of covenants not to compete for employees who are terminated or furloughed as a result of COVID-19 or “circumstances that are similar to the COVID-19 pandemic” unless certain compensation is provided.
- Bans non-compete agreements for certain, specified union employees who are bound by collective bargaining agreements.
- Permits the Illinois Attorney General to investigate potential violations of the law.

The legislation clarifies that the following are *not* considered to be “covenants not to compete”:

- a confidentiality clause;
- a clause protecting a company’s trade secrets or inventions;
- a non-compete agreement entered into in connection with the acquisition or sale of an ownership interest in a business; and
- a clause requiring advance notice of termination during which the employee remains employed and receives compensation.

While existing non-compete agreements will not be impacted by this legislation, employers should nevertheless review their existing non-compete and non-solicit agreements to ensure they provide adequate protection. To prepare for the effective date of the legislation, employers should create new “template” agreements that comply with the law for eligible future employees.

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