Amendments to the Illinois Freedom to Work Act Add Substantive Requirements and Limitations for Non-Compete and Non-Solicitation Agreements

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Non-compete and non-solicitation agreements ("restrictive covenants") can be a helpful tool for protecting a business, as they allow employers to restrict their employees' ability to seek employment with competitors and/or poach other employees, solicit clients for the sale of competitive products or services, and use protectible confidential and proprietary information they learned during their employment. However, an employer's ability to enter into and enforce restrictive covenants is not without limits. On May 31, 2021, the Illinois General Assembly passed a bill (SB 0672) to amend the Illinois Freedom to Work Act that will impose greater limits and requirements for restrictive covenants. The new provisions include:

- the requirement that employers advise employees in writing to consult with an attorney and provide at least 14 calendar days to review a non-compete and non-solicitation agreement prior to signing;
- the limitation of the use of non-compete clauses to only employees who earn at least $75,000 per year (applicable only to restrictive covenants entered into after January 1, 2022);
- the limitation of the use of non-solicitation clauses to only employees who earn at least $45,000 per year (applicable only to restrictive covenants entered into after January 1, 2022);
- a prohibition against restrictive covenants between employers and employees covered by a collective bargaining agreement under the

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Illinois Public Labor Relations Act or Illinois Educational Labor Relations Act and most non-management or non-administrative workers employed in the construction industry (applicable only to restrictive covenants entered into after January 1, 2022);

- voiding non-compete agreements (but not non-solicitation agreements) for employees furloughed or discharged due to business circumstances, governmental orders related to COVID-19, or similar circumstances, unless the employee is paid a base salary from the date of discharge through the period of enforcement, minus any income earned through subsequent employment (this is often called "garden leave");
- a codification of the *Fifield* rule (from the case *Eric Fifield and Enterprise Financial Group, Inc. v. Premier Dealer Services, Inc.*, 373 Ill. Dec. 379, 993 N.E. 2d 938 (Ill. App. Ct. 2013)), which requires employers to provide employees with "at least two years or more of continued employment" before employment alone could be considered adequate consideration for a restrictive covenant. The new provision requires employers to provide adequate consideration for restrictive covenants in the form of either "professional or financial benefits adequate by themselves" or "at least two years" of employment after signing the agreement.
- a codification of the "blue pencil" doctrine, which allows a court to revise a restrictive covenant to conform to the law, in its discretion; and
- allowing employees who prevail in civil actions filed by employers to enforce restrictive covenants to recover reasonable attorneys' fees and costs.

These amendments will take effect on January 1, 2022. In the meantime, Illinois employers should review their non-compete and non-solicitation agreements and consider revising these agreements to comply with the new legal requirements for any agreements to entered into before January 1, 2022. Employers may also desire to review whether they want to obtain such restrictions from key employees now, before the new amendments take place. Please contact your Laner Muchin servicing attorney with any questions regarding your non-compete and non-solicitation agreements.