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PENDING ILLINOIS BILL WILL FURTHER LIMIT THE USE OF RESTRICTIVE COVENANTS IN ILLINOIS

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The Illinois General Assembly recently passed Senate Bill 672 ("SB 672") to amend the Illinois Freedom to Work Act ("IFWA"). The amendments will further limit and clarify when a restrictive covenant can be enforced against an Illinois employee. After recent passage of SB 672 in both Houses of the Illinois Legislature, Governor Pritzker received the Bill on June 29, 2021, and is expected to sign this new legislation into law in the near future. The Bill only applies to restrictive covenants entered after January 1, 2022.

Currently, under the IFWA, a covenant not to compete between an employer and employee is illegal and void if the employee's earnings do not exceed either the applicable minimum wage or $13.00 per hour, whichever is greater. SB 672 will increase the IFWA income threshold and expand the scope of restrictive covenants that are subject to the IFWA.

Expanding the Compensation Threshold

SB 672 will amend the compensation threshold in the IFWA and effectively bar any "covenant not to compete" between an employer and employee unless that employee's earnings exceed $75,000 per year. This income threshold will increase to $80,000 per year by January 2027, to $85,000 per year by January 2032, and $90,000 per year by January 2037.

SB 672 will also ban covenants not to compete for employees furloughed or terminated due to business circumstances or governmental orders related to the COVID-19 pandemic, or under circumstances similar to the COVID-19 pandemic, unless enforcement of the covenant not to compete includes compensation equivalent to the employee's base salary at the time of termination for the period of enforcement.

Covenants Not to Solicit Will Also Be Included

The proposed IWFA amendments also include a separate ban on covenants not to solicit for employees earning below a certain income threshold. SB 672 defines a "covenant not to solicit" as an agreement between an employer and employee that restricts an employee from soliciting for employment the employer's employees or restricts an employee from soliciting for the purpose of selling products or services of any kind to, or from interfering with the employer's relationships with, the employer's clients, prospective clients, vendors, prospective vendors, suppliers, prospective suppliers, or other business relationships.
The amendments would ban any "covenant not to solicit" between an employer and employee unless that employee's earnings exceed $45,000 per year. This income threshold will increase to $47,500 per year by January 2027, to $50,000 per year by January 2032, and $52,500 per year by January 2037.

Defining Adequate Consideration

In 2013, the Illinois Appellate Court for the First District issued the decision *Eric Fifield and Enterprise Financial Group, Inc. v. Premier Dealer Services, Inc.*, requiring employers to provide employees with "at least two years or more of continued employment" as consideration for signing a restrictive covenant if at-will employment is the sole consideration offered in exchange for the agreement. Since *Fifeld* was decided, several other Illinois Appellate Courts and federal courts asked to interpret Illinois law have refused to apply the two-year consideration rule. The new law will effectively end the split in the Courts by codifying the *Fifield* two-year rule.

Additional Provisions

Additional provisions in SB 672 include:

- Employers are required to advise employees in writing to consult with an attorney before entering into the covenant.
- Employers must provide a copy of the covenant to the employee at least 14 calendar days before commencement of the employee's employment or provide the employee at least 14 calendar days to review the covenant before signing.
- Allowing prevailing employees to recover costs and reasonable attorney's fees in civil actions filed by employers to enforce restrictive covenants.
- Granting the Illinois Attorney General's Office the right to initiate investigations and initiate or intervene in any civil action to compel compliance whenever the Attorney General has reasonable cause to believe that any employer has engaged in a pattern and practice prohibited by the amendments. In addition, the Attorney General will have subpoena power to investigate potential violations and may seek a court order imposing civil penalties not to exceed $5,000 for each violation or $10,000 for each repeat violation within a five-year period.
- Codifying the "blue pencil" doctrine for otherwise permissible restrictive covenants, which allows a court to revise a restrictive covenant based on factors that include fairness of the restraints as originally written, whether the original agreement reflects a good-faith effort to protect a legitimate business interest, the extent of the reformation, and whether the parties included a clause authorizing modification of the agreement.

Status and Implementation of SB 672

It is expected that following Governor Pritzker's forthcoming signature of Senate Bill 672 the new law its requirements will take effect on January 1, 2022.

For more details about and assistance navigating and implementing the current requirements of the IFWA and to prepare for implementing the requirements of Senate Bill 672, please contact the Williams, Bax & Saltzman, P.C. Labor and Employment Law Group (saltzman@wbs-law.com or spellman@wbs-law.com).

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