Cooley

Illinois Legislature Passes Significant Changes to Noncompete Law

June 22, 2021

The Illinois legislature recently passed amendments to the **Illinois Freedom to Work Act (IFWA)** which, if signed into law, will significantly change Illinois law on employee noncompete and nonsolicit agreements. The amendments, which are expected to be signed into law, would go into effect on January 1, 2022, but wouldn't apply retroactively or impact existing noncompete and nonsolicit agreements.

Current IFWA

Currently, the IFWA prohibits noncompete agreements between an employer and low-wage employees who earn the greater of an hourly rate equal to the applicable federal, state or local minimum wage, or $13 per hour. Because federal and Illinois minimum wage is currently less than $13 per hour, the law prohibits noncompete agreements with employees making less than $13 per hour in most cases. (The minimum wage in Chicago is currently higher than $13 per hour, so noncompete agreements with employees earning a higher wage rate are prohibited in Chicago.) The restrictions imposed under the current IFWA are also limited to noncompete agreements only and not, for example, agreements restricting the solicitation of employer customers or employees.

Amended IFWA

The amendments to the IFWA would significantly reform the current statute. Among other changes, the amended IFWA would add requirements for enforceable noncompete and nonsolicit agreements with employees, and the amendments would prohibit these agreements with employees at much higher compensation levels than the current statute. We've summarized the key provisions of the IFWA amendments below.

Types of agreements covered

The amended IFWA would apply to noncompete and nonsolicit agreements.

Noncompete agreements are:

- Agreements that restrict the employee from performing (a) any work for another employer for a specified period of time, (b) any work in a specified geographical area or (c) work for another employer that is similar to the employee's work for the employer.
- Forfeiture-for-competition agreements, which impose adverse financial consequences on former employees engaging in competitive activities after the termination of their employment. Forfeiture-for-competition provisions are often contained in incentive compensation plans, instead of employment agreements or restrictive covenants agreements with employees. Employers should ensure that these types of forfeiture provisions contained in any compensation plans are reviewed for compliance with the amended IFWA.

Notably, "garden leave" provisions (those requiring advance notice of termination of employment, during which the employee remains employed by the employer and receives compensation) and covenants or agreements entered into in connection with the

sale of a business are not subject to the prohibitions and requirements of the amended IFWA.

Nonsolicit agreements are:

- Agreements that restrict the employee from soliciting the employer's employees for employment.
- Agreements that restrict the 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.

Noncompetes and nonsolicits prohibited with employees under certain compensation levels

Noncompete agreements would be prohibited for employees making less than $75,000 per year. This threshold would increase by $5,000 every five years until 2037 (i.e., $80,000 per year beginning January 1, 2027, $85,000 per year beginning January 1, 2032, and $90,000 per year beginning January 1, 2037).

Nonsolicit agreements would be prohibited for employees making less than $45,000 per year, which would increase by $2,500 every five years until 2037 (i.e., $47,500 per year beginning January 1, 2027, $50,000 per year beginning January 1, 2032, and $52,500 per year beginning January 1, 2037).

The compensation levels are based on an employee's annualized rate of earnings, which includes salary, bonuses, commissions, or any other form of taxable compensation, reflected or expected to be reflected as wages, tips and other compensation on the employee's W-2, plus any elective deferrals not reflected as wages, tips and other compensation on the employee's W-2, such as employee contributions to a 401(k) plan, a 403(b) plan, a flexible spending account, a health savings account or commuter benefit-related deductions.

Noncompete and nonsolicit agreements prohibited upon certain employee separations

An employer cannot enter into a noncompete or nonsolicit agreement with any employee who the employer terminates, furloughs or lays off as the result of business circumstances or governmental orders related to the COVID-19 pandemic or "under circumstances that are similar to the COVID-19 pandemic," unless the noncompete provides the employee compensation equal to the employee's base salary at the time of termination for duration of the covenant, less compensation earned through subsequent employment. (The amendments passed by the Illinois legislature are unclear on whether the exception to the prohibition applies also to a nonsolicit agreement.)

Consideration to support noncompetes and nonsolicits

Noncompete and nonsolicit obligations must be supported by adequate consideration. Under the amended IFWA, adequate consideration for a noncompete or nonsolicit will mean either:

- The employee worked for the employer for at least two years after the employee signed an agreement containing a noncompete or nonsolicit agreement
- The employer otherwise provided consideration adequate to support a noncompete or nonsolicit, which can include of a period of employment, plus additional professional or financial benefits, or merely professional or financial benefits adequate by themselves

This means at-will employment or continued at-will employment alone would be insufficient consideration to support noncompete or nonsolicit agreement, if the employment lasts for less than two years. This consideration requirement will be familiar to Illinois

employers, as it would largely codify recent Illinois case law addressing consideration for noncompete agreements. In *Fifield v. Premier Dealer Services, Inc.*, an Illinois Court of Appeals found that, without other consideration, two years of employment is required for a noncompete agreement to be deemed supported by adequate consideration. The amended IFWA would, however, expressly extend this consideration requirement to employee nonsolicit agreements, too.

Ensuring employees are informed

Employers would have to take both of the following steps to ensure an employee is informed about the noncompete and nonsolicit obligations:

- Advise the employee in writing to consult with an attorney before entering into the noncompete and nonsolicit obligations
- Provide the employee with a copy of the covenants at least 14 calendar days before the beginning of employment or provide at least 14 calendar days to review the covenants (but the employee can voluntarily elect to sign before the expiration of the 14-day period)

Responsibility for costs and fees in enforcement actions

If an employee prevails on a claim to enforce a noncompete or nonsolicit, the employee is entitled to recover from the employer all costs and all reasonable attorney's fees for the claim.

Liability for a pattern or practice of noncompliance

The Illinois Attorney General would be able to bring an action against an employer if it can show a pattern or practice of noncompliance of the amended IFWA by the employer. A successful action can expose an employer to a civil penalty of up to $5,000 for each violation or $10,000 for each repeat violation within a five-year period, in addition to monetary damages, equitable relief and other appropriate relief.

Courts can reform noncompetes and nonsolicits

The amended IFWA would allow courts to reform or sever provisions of a noncompete or nonsolicit instead of finding the covenant unenforceable. This provision highlights the importance of including a clause authorizing these types modifications in noncompete and nonsolicit agreements.

We will continue to monitor the progress of the amendments to the IFWA. If you have any questions about these requirements, please reach out to a member of the Cooley employment team.

Key Contacts

Ann Bevitt London	abevitt@cooley.com +44 (0) 20 7556 4264
Wendy Brenner Palo Alto	brennerwj@cooley.com +1 650 843 5371
Leslie Cancel San Francisco	lcancel@cooley.com +1 415 693 2175
Helenanne Connolly Reston	hconnolly@cooley.com +1 703 456 8685
Joshua Mates San Francisco	jmates@cooley.com +1 415 693 2084
Gerard O'Shea New York	goshea@cooley.com +1 212 479 6704
Summer Wynn San Diego	swynn@cooley.com +1 858 550 6030
Karun Ahuja Chicago	kahuja@cooley.com +1 312 881 6621