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Client Alert: New Illinois Non-Compete Law Effective January 1, 2022

By: James L. Komie | August 18, 2021

Illinois has a new statute regulating the use of non-compete and non-solicit covenants with employees.

Effective date: The law applies only to agreements signed on or after January 1, 2022.

Bright-line Rules Regarding Covered Employees: The law creates the following bright-line rules:

- Employees making less than \$75,000 cannot be required to sign a covenant not to compete.
- Employees making less than \$45,000 cannot be required to sign a covenant not to compete OR a covenant not to solicit.
- Certain employees in construction and public employees covered by a collective bargaining agreement cannot be required to sign a covenant not to compete.

Procedural Protections for Employees: The law creates requirements for the process of having employees sign covenants. An employer that does not comply with the following cannot enforce the covenant:

- The employer must advise the employee in writing to consult with an attorney.
- The employer must either (a) provide a copy of the covenant to the employee 14 calendar days before his or her first day or (b) give the employee 14 days to decide whether to sign.
- Employees can waive the 14-day period and sign before the period has ended.
- An employee who prevails in a suit by an employer to enforce a covenant will be entitled to have his or her attorneys' fees paid by the employer.
- A separation agreement with an employee laid off due to the COVID-19 or future pandemic cannot include a non-compete or non-solicit unless the agreement continues the employee's base salary during the restriction (less compensation earned by the employee through other employment).

Clarifying & Standardizing Illinois Law: The law does not make significant substantive changes to Illinois case law on non-competes and non-solicits, but tries to clarify and standardize certain rules:

- Illinois courts have disagreed about what length of "continued employment" will provide adequate consideration to enforce a covenant. The new law specifies that two years will suffice. Alternatively, the employer may provide consideration in the form of "additional



professional or financial benefits” or a combination of continued employment and such benefits.

- The law codifies Illinois case law regarding the scope of covenants, including that the covenant can be “no greater than is required for protection of a legitimate business interest of the employer.”
- The law also continues the rule that courts can modify—but not rewrite—an overly broad covenant or delete unreasonable clauses and enforce the remaining provisions, particularly if the agreement specifies that it may be modified by a court.

Certain Agreements Excluded: The new law does not apply to non-competes entered into by a person acquiring or selling an ownership interest in a company. The new law also does not apply to confidentiality/non-disclosure provisions, invention assignment agreements, or garden-leave provisions.

Action Items for Employers: Employers need to prepare for these changes—in particular, the requirements that employees be given 14 days to review a covenant and be advised in writing to consult with an attorney, as well as the ban on using non-competes with employees making under \$75,000 and non-solicits with employees making under \$45,000.

For more information, please contact your Howard & Howard attorney.

