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Illinois Freedom to Work Act: One State's Reaction to Overreaching Non-Compete Agreements

By Peter R. Bulmer

August 25, 2016

In an effort to address possible overuse of non-compete agreements by certain employers, Illinois Governor Bruce Rauner has signed into law the Illinois Freedom to Work Act. The Act prohibits private sector employers from entering into non-compete restrictions with "low-wage employees" and renders any such agreements "illegal and void." The Act applies to non-compete agreements entered into on or after the law's effective date, January 1, 2017.

Under the Act, a "low-wage employee" is any employee who earns the greater of (1) the hourly minimum wage under federal (currently, $7.25 per hour), state (currently, $8.25 per hour), or local law (currently, $10.50 per hour in Chicago) or (2) $13.00 per hour. As a practical matter, until the hourly minimum wage is increased above $13.00 per hour, the law prohibits non-compete agreements with any employee making $13.00 or less per hour.

The Act prohibits an employer from entering into an agreement that restricts the "low-wage employee" from performing:

1. any work for another employer for a specified period of time;
2. any work in a specified geographical area; or
3. work for another employer that is similar to such low-wage employee's work for the employer included as a party to the agreement.

The law comes on the heels of reports published by the Treasury Department and the White House, as well as pressure by state attorneys general, on a well-known restaurant franchisor to stop using non-compete agreements with store-level employees. For example, in June 2016, the Illinois Attorney General filed a lawsuit against the franchisor, seeking to bar it from using non-compete agreements with low-wage staff. With the Freedom to Work Act, the Illinois legislature and Governor Rauner stepped in and have functionally implemented the bar that the Attorney General is seeking to have imposed by the court.

Also in June 2016, the same franchisor reached an agreement with the New York State Attorney General in which it agreed to stop including non-compete agreements in hiring packets used for low-wage workers and that it would not support any franchisee's attempt to enforce such agreements. New York franchisees of that company also agreed to void existing agreements and to stop using them. The New York Attorney General has publicized similar agreements with other employers.

There appears to be widespread support by public officials to "do something" about the perceived overreaching by some employers to tie up workers who do not pose any realistic threat either to the employers' confidential information or to their customer base. The Freedom to Work Act is Illinois' response to that perception.

Unless an employer has workers who are making less than $13.01 per hour *and* requires them to sign non-competes, the Freedom to Work Act has no impact on its business. In addition, the Act does not affect non-disclosure or other agreements targeted at protecting confidential information.

On its face, however, the Act is unclear as to its effect on agreements with employees in which an employee promises not to *solicit* customers or employees. Arguably, the Act eliminates *complete* bars to employment of low-wage workers where their mere employment with a competitor, in and of itself,

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does not pose any real competitive threat. But what of the employee who has established a loyal following either within the employer's workforce or with its customers? Does the Act prohibit that employee's employer from restricting the employee from soliciting coworkers after he or she leaves to join the employee at a competitor? Does the Act prohibit the employer from restricting the employee from soliciting former customers with whom he or she had established relationships? One reading of the prohibitions may be that the Act does not restrict specific, tailored, and limited restrictions that otherwise would be enforceable under Illinois law; but another possible reading of those prohibitions may be that there can be no restrictions on the work performed by the low-wage worker at a competitor. Time, and the Illinois courts, will tell.

Please contact Jackson Lewis with any questions about the Act and how employers can address specific organizational needs effectively.

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