

# Illinois Imposes Substantial New Limitations on Employee Non-Compete and Non-Solicit Agreements

Labor & Employment Workforce Watch

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On August 16, 2021, Illinois Governor J.B. Pritzker signed [amendments to the Illinois Freedom to Work Act](#) (the “Act”) that will be effective on January 1, 2022 and will limit Illinois employers’ use of non-compete and non-solicit agreements with their Illinois-based employees after that date. The amendments expand the previous statutory limitations on non-compete agreements and establish limitations on non-solicit agreements.

### Expanded Limitations on Non-Compete Agreements

The amendments expand the definition of non-compete agreements to include agreements imposing adverse financial consequences on individuals engaging in competitive activities against their employer. Notably, the amendments exclude certain agreements from the definition of non-competes, including: confidentiality agreements, agreements prohibiting disclosure of trade secrets or inventions, and agreements relative to the purchase or disposal of a business ownership interest. The amendments also changed the category of workers for whom these agreements are prohibited, from those making \$13.00 per hour, or less, to those making, or who are expected to make, an annual salary of no more than \$75,000. That threshold will increase by \$5,000 every five years, until 2037.

### New Limitations on Non-Solicit Agreements

The amendments also limit agreements restricting employees from (1) soliciting current employees for potential employment, and (2) soliciting the employer’s clients for potential business.

As with non-competes, the amendments prohibit employers from establishing non-solicit agreements with individuals whose actual, or expected, annual salary is below a certain threshold. That threshold starts at \$45,000, and increases by \$2,500 every five years, until 2037.

### Requirements for an Enforceable Agreement

To establish a valid non-compete or non-solicit agreement under the amendments, all of the following must be met:

1. The employee must be given adequate consideration;

2. The covenant must be ancillary to a valid employment relationship;
3. The covenant must be limited to what is required to protect the employer's legitimate business interests;
4. The covenant cannot impose an undue hardship on the employee; and
5. The covenant cannot be injurious to the public.

Furthermore, an employer must provide the individual with notice and a deliberation period related to the agreement. Specifically, the employer must advise the individual, in writing, that they should consult an attorney before entering into the agreement. The employer must also provide the agreement to the individual at least 14 days before beginning their employment or before the agreement becomes effective. An employer complies with the Act if the individual voluntarily signs the agreement before the 14-day period expires.

### **Special Rules**

The amendments provide that if an individual is separated from their employment due to business circumstances or governmental orders related to the COVID-19 pandemic, or similar circumstances, then they, generally, cannot be subjected to a non-compete or non-solicit agreement. (The amendments do not define what constitute similar circumstances and, therefore, a determination on that point will likely require a fact-specific review.) However, if the employer compensates that individual in an amount equal to their base compensation—less any compensation earned through subsequent employment—for the duration of the enforcement of the agreement, then it is valid.

Similarly, an employer cannot enter into a non-compete or non-solicit agreement with individuals covered by a collective bargaining agreement ("CBA") if that CBA is governed by certain public-sector labor laws (e.g., municipal workers; teachers), or if the individuals work in construction. The construction workers exception does not extend to individuals primarily performing management, engineering or architectural, design, or sales functions or who are shareholders, partners, or owners of the employer in any capacity.

### **Enforcement and Remedies**

The amendments empower the Illinois Attorney General to bring a civil suit against an employer it believes is engaged in a pattern or practice violating the Act. The amendments grant the Attorney General authority to investigate before pursuing a civil action. The Attorney General can obtain various remedies through the amendments including monetary damages, injunctive relief, and civil penalties up to \$5,000 for each agreement violating the Act (or, up to \$10,000 if an employer repeatedly violated the Act within a 5-year period). Each person subjected to an agreement conflicting with the Act constitutes a violation by the employer. Furthermore, if an individual prevails in an action by an employer to enforce a non-compete or non-solicit agreement, that individual may obtain attorneys' fees and costs associated with the action.

### **Practical Impact**

Non-compete and non-solicitation agreements are useful tools for employers to protect their business interests. Employers with employees in Illinois who utilize non-compete or non-solicit agreements should carefully consider the restrictions in these amendments and how they will impact their current restrictive covenant agreements and related practices. Before January 1, 2022, employers should evaluate any changes needed to any agreements to be used after that effective date to ensure that those agreements comport with the requirements of the Act going

forward.

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