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August 11, 2021 - Monthly Minute Memo No. 2021-3: *Illinois Legislature Passes Bill Banning Non-Compete and Non-Solicitation Agreements For Certain Employees*

On May 31, 2021, the Illinois General Assembly passed Senate Bill 672, amending the Illinois Freedom to Work Act prohibiting non-compete and non-solicitation agreements for employees earning below a certain salary. This amendment codifies various Illinois court decisions. As of the date of this Memo, the bill is still awaiting Governor Pritzker's signature. Governor Pritzker has until August 28, 2021, to either veto or approve the bill and sign it into law. If the Governor does not sign the bill, pursuant to the Illinois Constitution, the bill will become law as written with an effective date of January 1, 2022. Non-compete and non-solicit agreements entered into prior to January 1, 2022, will not be impacted by this new law.

Senate Bill 672 covers only non-compete and non-solicitation (both employee and customer) agreements. Confidentiality agreements, trade-secret agreements, invention-assignment agreements, certain agreements entered in connection with the acquisition or disposition of an ownership interest in a business, agreements between an employer and an employee requiring advance notice of termination of employment, where an employee remains employed and receives compensation (commonly referred to as garden leave provisions), and no-reapplication clauses are specifically excluded from coverage under Senate Bill 672.

As a threshold requirement, the law prohibits employers from entering into non-compete agreements with employees making less than $75,000 a year (inclusive of salary, bonuses, commissions, or any other form of taxable compensation). Every five years, the salary requirement is increased by $5,000 as follows: January 1, 2027, to $80,000; January 1, 2032, to $85,000; and January 1, 2037, to $90,000. The bill also prohibits employers from entering into agreements barring the solicitation of employees and customers with employees making less than $45,000 a year, and this requirement also increases every five years as follows: January 1, 2027, to $47,500; January 1, 2032, to $50,000; and January 1, 2037, to $52,500.

Also, if an employer furloughs, lays off, or terminates an employee due to business circumstances or governmental orders related to COVID-19, the employer may not enter into a non-compete and/or non-solicitation agreement with that employee. However, for non-compete agreements only, an employer may enter into and enforce an agreement by paying the employee's base salary from the date of termination through the period of enforcement, minus compensation earned through subsequent employment during the enforcement period.

In addition, this law prohibits non-compete agreements for those individuals covered by a collective bargaining agreement under the Illinois Public Labor Relations Act or the Illinois Educational Labor Relations Act and for certain individuals employed in the construction industry. However, this prohibition does not apply to construction employees who primarily perform management, engineering or architectural, design, or sales functions for the employer or who are shareholders, partners, or owners in any capacity of the company/employer.

Under this law, in addition to the threshold compensation requirement, in order for non-compete and non-solicitation agreements to be enforceable, employers must ensure the following requirements are met: (1) employee received adequate consideration (which is defined as at least 2 years of employment after signing the agreement, a period of employment plus additional professional or financial benefits, or merely professional or financial benefits adequate by themselves); (2) the agreement is ancillary to a valid employment relationship; (3) the agreement is no greater than what is required for the protection of a legitimate business interest of the employer; (4) the agreement does not impose undue hardship on the employee; and (5) the agreement is not injurious to the public.

To determine the legitimate business interest of the employer, the following factors may be considered: (1) the employee's exposure to the employer's customer relationships; (2) the near permanence of customer relationships; (3) the employee's acquisition, use or knowledge of confidential information through employment; and (4) the time, place and scope of activity restrictions. The importance of any factor will depend on the specific facts and circumstances of the individual case.

Furthermore, in addition to the above requirements, employers must also provide an employee a copy of the non-complete and/or non-solicitation agreement 14 days before the start of employment or provide at least 14 calendar days to review the agreement. The employee may voluntarily elect to sign the agreement before the 14 days expire. The employer must also inform employees in writing that they should consult an attorney before signing the agreement. If an employer is found to have violated the Act, there are various penalties that could be assessed, including reasonable attorney's fees and costs.

This law allows a court, at its discretion, to implement the "blue pencil" doctrine to reform or sever provisions of a non-compete and non-solicitation agreement rather than hold such agreement unenforceable. The factors a court may consider to "blue-pencil" the agreement include the fairness of the restraints as originally written, whether the original restriction reflects a good-faith effort to protect a legitimate business interest of the employer, the extent of the court's reformation of the agreement in question, and whether there is a clause in the agreement allowing such modifications.